2019 IL App (1st) 171161-U

No. 1-17-1161

Order filed June 27, 2019

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 16 CR 4653
	)	
ALLEN ROGERS,	)	Honorable
	)	Mauricio Araujo,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE REYES delivered the judgment of the court.
Justices Gordon and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's 11-year sentence is affirmed where the trial court properly imposed a three-year enhancement based on the presence of fentanyl in the heroin that defendant was charged with possessing.

¶ 2 Following a bench trial, defendant Allen Rogers was convicted of possession of a controlled substance (heroin) with intent to deliver in violation of section 401(d) of the Illinois Controlled Substances Act (Act) (720 ILCS 570/401(d) (West Supp. 2015)). The trial court sentenced defendant to 11 years' imprisonment, which included a 3-year enhancement based on

the presence of fentanyl in the heroin. On appeal, defendant argues that he was not charged with possession of fentanyl, and therefore, the trial court misapprehended the applicable sentencing range. We affirm.

¶ 3 Defendant was charged by information with one count of possession with intent to deliver less than one gram of heroin within 1000 feet of a school in violation of sections 401(d) and 407(b)(2) of the Act (720 ILCS 570/401(d) (West Supp. 2015); 720 ILCS 570/407(b)(2) (West 2016)). Prior to trial, the State amended the charging instrument to remove the allegation that the offense occurred within 1000 feet of a school. As amended, the information alleged that defendant knowingly possessed and intended to deliver "less than 1 gram of a substance containing a certain controlled substance, to wit: heroin, or an analog thereof, *** in violation of" section 401(d) of the Act.

¶ 4 In a pretrial motion for discovery, defendant requested "[a]ny reports or statement of experts made in connection with the particular case, including the results of *** scientific tests, experiments and comparisons ***." The State responded that it would tender any "[r]eports of experts and examination results" to the defense upon receipt. The discovery is not included in the record, but there is no indication that defendant challenged the State's disclosures prior to trial.

¶ 5 At trial, Chicago police sergeant Cory Petracco testified that on February 6, 2016, at approximately 8:50 p.m., he and Officer Chernik[1] set up narcotics surveillance in a vacant building on the 3900 block of West Monroe Street. Petracco observed defendant, whom he identified in court, and another man in the alley behind the yard of the building. The other man unlocked and opened a gate in the fence between the yard and the alley. Defendant entered the

[1] Officer Chernik's first name does not appear in the transcript of proceedings.

yard, and the man locked the gate and walked out of view. Defendant stuck his hand into the front of his pants, made "a motion as if he was moving items," and placed something under a piece of siding on the ground. Then, defendant shouted "[y]o" several times, which Petracco testified was a signal for soliciting narcotic sales. A man approached the fence and spoke to defendant, who appeared to retrieve an item from underneath the siding. Between a space in the gate, the man gave defendant money, and defendant appeared to give the man an item. Defendant conducted similar transactions with two other individuals who approached the yard separately. Petracco and Chernik exited the building, and Chernik detained defendant. Petracco lifted the siding and found "a clear sandwich bag containing three clear capsules each containing a white powder substance." Later, at the police station, the officers recovered $87 from defendant and Petracco inventoried the items found under the siding.

¶ 6 Nancy McDonagh, a forensic scientist for the Illinois State Police, testified that she received the inventoried bag of suspect narcotics. She determined that the powder in one of the capsules weighed 0.287 grams and contained heroin and fentanyl.

¶ 7 During closing arguments, defense counsel argued the State failed to prove beyond a reasonable doubt that defendant possessed the items found under the siding. Specifically, counsel asserted that Petracco never clearly observed the narcotics in defendant's hand, and that there was no "constant surveillance" while defendant allegedly sold the drugs. The State argued that defendant had immediate, exclusive control over the capsules, since he was alone in the locked yard with them. The State also noted that the capsules containing heroin and fentanyl were the only items found by the officers under the siding, and that defendant retrieved multiple objects from that location prior to his arrest.

¶ 8 The trial court found defendant guilty of possession of a controlled substance with intent to deliver. The assistant state's attorney asked whether the trial court "found [defendant] guilty with the heroin and fentanyl," and the court stated, "Yes. As charged."

¶ 9 At the sentencing hearing, the parties corrected the presentencing investigation report (PSI), which reflected 40 convictions for offenses including trespass, retail theft, and armed robbery between 1991 and 2015. The PSI stated that defendant grew up in two foster care homes, and that both his parents had alcohol and mental health problems. Defendant was diagnosed with depression and bipolar disease in 1996, received various medications, and reported struggling with anxiety. Defendant dropped out of high school when he went to prison at age 17 and reported a desire to obtain a GED, but stated "it is too hard to function with mental health medication." According to defendant, he never held a full-time job due to his disability, though he had "done odd jobs through temp services." Defendant also reported that he was not currently involved with a gang, but "was a Gangster Disciple from age 15 to 33." He began using alcohol and marijuana at age 15, and used heroin from age 15 to 43. Defense counsel clarified that defendant had attended Cook County Jail's mental health treatment center "for the past couple of months" at the time of the hearing.

¶ 10 Over defense counsel's objection, the State called Chicago police officer Daniel Dowling to testify in aggravation. Dowling testified that he arrested defendant in October 2009 for an armed robbery in which the victim reported that defendant followed him toward a bus, grabbed his arm, pointed a gun at him, and took his wallet. While defendant was in custody, another victim implicated him in an earlier incident. According to that victim, she attempted to load shopping bags into her vehicle when defendant took her money and car while armed with a

handgun. Defendant was convicted in both cases. In allocution, defendant requested mercy, stated that he was receiving mental health treatment and was "thinking different now," and added that he was "ready to go home and be a father to [his] one-year-old child."

¶ 11 The State argued that defendant "has 20 misdemeanors and 35 bond forfeitures," and that "his violent felonies just continue and continue and continue for 19 years." Additionally, the State asserted that possession of fentanyl is "a particularly dangerous drug crime," and that fentanyl "has made a resurgence and has been responsible for many deaths." The State requested a sentence of at least 12 years, including a three-year fentanyl enhancement, "to keep the citizens of Chicago safe."

¶ 12 Defense counsel argued that Dowling did not have personal knowledge of the armed robberies that he described. She also argued that while defendant had a history of violent crimes, they were "crimes of someone struggling with mental health and aggression issues." Counsel explained that defendant's trespass offenses were related to his periods of homelessness, and added that defendant understood he had not been there for his child and felt guilty for not setting a good example. Counsel then stated "[t]he minimum in this case is steep," and "[h]e knows that the minimum is nine and that that's a long time." She concluded that "nine years is plenty sufficient," and requested the minimum sentence. Defendant lastly stated that he wanted to further his drug treatment, and that he is on "different meds" that are "working better now."

¶ 13 The trial court sentenced defendant as a Class X offender to 11 years' imprisonment. The court stated that "defendant was charged and found guilty of possession of a controlled substance with intent to deliver, and that substance was fentanyl-laced." Thus, according to the court, "[t]he minimum is nine no [m]atter what happens here today." The trial court noted that defendant

received compensation for the instant offense. The court further noted that fentanyl was dangerous, but added this factor was not significantly aggravating because no evidence showed defendant knew the heroin contained fentanyl. Also, while defendant had a history of criminal activity, his background of trespassing was indicative of "people who have nowhere to lay their head," and his conduct did not cause or threaten serious physical harm. Moreover, defendant's "criminal conduct was a result of circumstances unlikely to reoccur," and defendant stated he is taking steps to change his "path" and not commit another crime. The court also observed that imprisonment would entail excessive hardship on defendant's one-year-old child.

¶ 14 Defendant filed a motion to reconsider sentence, arguing that because his criminal background "already factored into the fact that the minimum sentence is nine," the trial court did not need to consider his background again in raising his sentence above the minimum term. The trial court denied defendant's motion.

¶ 15 On appeal, defendant contends the trial court misinterpreted the charging instrument and, therefore, misapprehended the sentencing range in stating the minimum sentence was nine years. Because the charging instrument only alleged that he possessed heroin, and not fentanyl, he claims he was not subject to a three-year sentencing enhancement for fentanyl possession under section 401(b-1) of the Act (720 ILCS 570/401(b-1) (West Supp. 2015)). Thus, defendant argues he was only subject to the standard Class X sentencing range of 6 to 30 years (730 ILCS 5/5-4.5-25(a) (West 2016)), and his 11-year sentence resulted from the court's mistaken belief that the 3-year fentanyl enhancement applied. The State responds that no error occurred because section 401(d) of the Act (720 ILCS 570/401(d) (West Supp. 2015)), under which defendant was charged, expressly criminalizes possession with intent to deliver a controlled substance

containing fentanyl. The State further argues that defendant was found to have possessed both heroin and fentanyl beyond a reasonable doubt, and so section 401(b-1) of the Act mandated the three-year enhancement.

¶ 16 Defendant acknowledges that he forfeited this issue on appeal by failing to challenge his sentence enhancement both in a contemporaneous objection and a postsentencing motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Nonetheless, defendant argues his sentence should be vacated under the plain-error doctrine, a "narrow and limited exception to the general forfeiture rule." (Internal quotation marks omitted.) *People v. McGuire*, 2016 IL App (1st) 133410, ¶ 12. For the plain-error doctrine to apply in the sentencing context, "a defendant must first show that a clear or obvious error occurred." *Hillier*, 237 Ill. 2d at 545. The defendant must then show that "(1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *Id.* Before conducting a plain-error analysis, we must determine whether any error occurred. *Id.*

¶ 17 Under the *Eddington* standard, a "misstatement of the understanding of the minimum sentence by the trial judge necessitates a new sentencing hearing only when it appears that the mistaken belief of the judge arguably influenced the sentencing decision." (Emphasis and internal quotation marks omitted.) *People v. Quinones*, 362 Ill. App. 3d 385, 398 (2005) (citing *People v. Eddington*, 77 Ill. 2d 41, 48 (1979)). However, "even if a sentence imposed under a wrong sentencing range fits within a correct sentencing range, the sentence must be vacated due to the trial court's reliance on the wrong sentencing range in imposing the sentence." (Internal quotation marks omitted.) *People v. Owens*, 377 Ill. App. 3d 302, 305-06 (2007) (vacating a sentencing order where the trial court imposed a sentence based on the mistaken belief that

defendant was eligible for Class X sentencing). "The *Eddington* standard applies to cases in which the trial court mistakenly believed that a defendant was eligible for an extended-term sentence." *People v. Hill*, 294 Ill. App. 3d 962, 970 (1998). When determining whether the trial court's sentence was based on a mistaken belief, courts consider "whether the trial court's comments show that the court relied on the mistaken belief or used the mistaken belief as a reference point in fashioning the sentence." (Internal quotation marks omitted.) *Quinones*, 362 Ill. App. 3d at 398.

¶ 18 Section 401(d) of the Act (720 ILCS 570/401(d) (West Supp. 2015)) provides that it is unlawful for any person to possess with the intent to deliver less than one gram of certain controlled substances, including lysergic acid diethylamide, substances containing amphetamine or N-Benzylpiperazine, narcotic drugs, and "any substance containing *** fentanyl." A violation of section 401(d) is a Class 2 felony (*id.*), with a sentencing range of three to seven years (730 ILCS 5/5-4.5-35(a) (West 2016)). However, section 401(b-1) of the Act (720 ILCS 570/401(b-1) (West Supp. 2015)) states:

> "Excluding violations of this Act when the controlled substance is fentanyl, any person sentenced to a term of imprisonment with respect to violations of Section 401 ***, when the substance containing the controlled substance contains any amount of fentanyl, 3 years shall be added to the term of imprisonment imposed by the court, and the maximum sentence for the offense shall be increased by 3 years."

¶ 19 Defendant previously received two convictions for a Class 2 or greater felony, and so he was subject to a Class X sentencing range of 6 to 30 years. 730 ILCS 5/5-4.5-95(b) (West 2016) (Class X sentencing based on criminal background); 730 ILCS 5/5-4.5-25(a) (West 2016) (Class

X sentencing range of 6 to 30 years). He asserts, however, that he was not subject to the three-year sentencing enhancement under section 401(b-1) of the Act (720 ILCS 570/401(b-1) (West Supp. 2015)), since he was only charged with possession of heroin and not fentanyl.

¶ 20 Although defendant maintains that he does not challenge the charging instrument on appeal, his claim that the trial court misapprehended his charge—and therefore, the applicable sentencing range—is predicated on his interpretation of the charging instrument being correct. Thus, in order to address defendant's claims on the merits, we must interpret the charging instrument. Because this issue involves a question of law, our review is *de novo*. *People v. Rowell*, 229 Ill. 2d 82, 92 (2008); *People v. Mimes*, 2014 IL App (1st) 082747-B, ¶ 26.

¶ 21 Pursuant to section 111-3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/111-3 (West 2016)), "[a] defendant has a fundamental right *** to be informed of the nature and cause of criminal accusations made against him." *Rowell*, 229 Ill. 2d at 92-93. Section 111-3(c-5) of the Code (725 ILCS 5/111-3(c-5) (West 2016)) provides:

> "Notwithstanding any other provision of law, in all cases in which the imposition of the death penalty is not a possibility, if an alleged fact (other than the fact of a prior conviction) is not an element of an offense but is sought to be used to increase the range of penalties for the offense beyond the statutory maximum that could otherwise be imposed for the offense, the alleged fact *must be included in the charging instrument or otherwise provided to the defendant through a written notification before trial*, submitted to a trier of fact as an aggravating factor, and proved beyond a reasonable doubt." (Emphasis added.)

¶ 22 Here, the charging instrument alleged that defendant knowingly possessed and intended to deliver "less than 1 gram of a substance containing a certain controlled substance, to wit: heroin, or an analog thereof, *** in violation of" section 401(d) of the Act (720 ILCS 570/401(d) (West Supp. 2015)). As noted, section 401(d) criminalizes possession of heroin, but also several other controlled substances, including substances containing fentanyl. *Id.* For the first time on appeal, defendant maintains that he was not subject to the three-year fentanyl enhancement because his charging instrument did not expressly mention fentanyl.

¶ 23 Defendant's failure to raise this issue before the trial court is significant. *People v. Davis*, 217 Ill. 2d 472, 478 (2005) ("the timing of a challenge to the indictment has been considered significant in determining whether a defendant is entitled to reversal of his conviction on that ground" (internal quotation marks omitted)). " '[W]hen the sufficiency of an indictment *** is attacked for the first time on appeal, the indictment *** is sufficient if it apprised the accused of the precise offense charged with sufficient specificity to prepare his defense and to allow him to plead a resulting conviction as a bar to future prosecutions arising from the same conduct.' " *Mimes*, 2014 IL App (1st) 082747-B, ¶ 33 (quoting *Rowell*, 229 Ill. 2d at 93). Where a defendant challenges an indictment for the first time on appeal, "the State's failure to strictly comply with section 111-3(c-5) is not dispositive," and the determinative issue becomes "whether defendant was prejudiced in the preparation of his defense." *Id.*

¶ 24 We find that defendant did not suffer prejudice where the charging instrument did not expressly state he possessed fentanyl. Defendant does not argue that he did not know evidence of fentanyl would be presented at trial, and the record does not suggest that he lacked notice. During discovery, defendant requested "[a]ny reports or statement of experts made in connection

with the particular case, including the results of *** scientific tests, experiments and comparisons ***." The State responded that it would tender any "[r]eports of experts and examination results" to the defense upon receipt. While the pretrial production is not provided in the record, the record does not reflect that defendant filed any objections to the State's discovery production. At trial, the defense raised no objection when McDonagh testified that the heroin at issue contained fentanyl. Defense counsel even expressly acknowledged that defendant was aware of his enhanced sentencing range at the sentencing hearing, stating that he "knows that the minimum is nine and that that's a long time."

¶ 25 Moreover, it is clear from the record that defendant was able to sufficiently prepare his defense based on the facts set forth in the charging instrument. At trial, the defense's theory primarily focused on whether defendant possessed the capsules of heroin and fentanyl at all, since Sergeant Petracco was unable to clearly see the items that defendant retrieved from under the siding and exchanged with other individuals. The fentanyl was laced into the heroin that defendant was charged with possessing, and the same expert testimony identified both heroin and fentanyl in the same capsule. Given that the evidence of heroin and fentanyl were closely intertwined, it is difficult to imagine how defendant would have prepared a different defense strategy had the charging instrument contained the word "fentanyl." Thus, the record as a whole does not reflect that defendant was misled by the charging instrument or surprised by the evidence at trial. *People v. Winford*, 383 Ill. App. 3d 1, 5-6 (2008) (finding the record did not show that defendant was misled or prejudiced by the indictment, or "surprised by the State's evidence," where the charging instrument alleged possession of cocaine, but the evidence at trial showed he possessed heroin).

¶ 26 Defendant also does not risk exposure to double jeopardy. The charging instrument contains defendant's name, and the location and nature of the offense. Moreover, as our supreme court has recognized, testimony from the first trial can be admitted in any subsequent prosecution to support a defense of double jeopardy. *People v. Rothermel*, 88 Ill. 2d 541, 548 (1982); *People v. Stephenson*, 2016 IL App (1st) 142031, ¶ 23.

¶ 27 Accordingly, we find that the State's failure to expressly mention fentanyl in the charging instrument is not fatal to the application of the three-year enhancement in this case. *Mimes*, 2014 IL App (1st) 082747-B, ¶ 33. Having reached this conclusion, we also find no merit in defendant's claim that the trial court misinterpreted the charging instrument in imposing the fentanyl enhancement. Because the trial court did not err, we need not consider defendant's claim under plain-error review. *People v. Land*, 2011 IL App (1st) 101048, ¶ 146 (declining to consider defendant's challenges on appeal under plain-error review where there was no error).

¶ 28 Defendant also argues that defense counsel was ineffective for not objecting to the trial court's alleged misapprehension of the correct sentencing range. To demonstrate the ineffective assistance of counsel, a defendant must show (1) "that counsel's performance was so seriously deficient as to fall below an objective standard of reasonableness under the prevailing professional norms," and (2) that "counsel's deficient performance must have prejudiced the defendant so as to deny him a fair trial." *People v. Klepper*, 234 Ill. 2d 337, 350 (2009). We may dispose of an ineffective assistance claim based on a lack of prejudice without addressing counsel's performance. *People v. Hale*, 2013 IL 113140, ¶ 17. As stated, the trial court properly imposed a fentanyl enhancement on defendant's sentence, even though the charging instrument did not expressly mention fentanyl. Defendant therefore could have received the enhancement

regardless of whether defense counsel objected to and corrected the court's alleged misapprehension of the charge. Accordingly, defendant has failed to show that he suffered prejudice as a result of defense counsel's failure to raise an objection, and his ineffective assistance claim must fail. *Id.* As the trial court properly imposed the enhancement, and defendant does not claim that the trial court abused its discretion by imposing an excessive sentence, his sentence is affirmed.

¶ 29 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 30 Affirmed.