2019 IL App (2d) 170162-U
No. 2-17-0162
Order filed May 7, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ADAM R. GORNOWICH, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 15-CF-375 Honorable James C. Hallock, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Burke and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in considering in aggravation that defendant received compensation for his theft, as the only compensation consisted of the proceeds implicit in the theft; as we could not say that the court's consideration of this factor did not produce a greater sentence, we remanded for resentencing.

¶ 2 Defendant, Adam R. Gornowich, pleaded guilty to theft of more than $100,000 (720 ILCS 5/16-1(a)(1), (b)(6) (West 2016)) and was sentenced to eight years' imprisonment. He appeals, contending that the trial court considered in aggravation that defendant received compensation in the form of proceeds, a factor implicit in every theft. We reverse in part and remand for resentencing.

¶ 3 The factual basis for the plea showed that defendant worked in the purchasing department of TechPro, where he used a corporate credit card to make purchases for the business. However, he frequently used the card to make personal purchases from websites such as Amazon.com. These purchases included gift cards, flat-screen televisions, sports memorabilia, and concert and sports tickets. The total value of this merchandise was $353,694.

¶ 4 As there was no agreement on a sentence, the court conducted a sentencing hearing. There, St. Charles police detective Andrew Lamela testified that he interviewed defendant about the theft from TechPro and defendant admitted "to everything." Defendant said that, after he made an unauthorized purchase, he would generate a fake invoice to TechPro. When asked why he committed the offense, defendant responded that he wanted his friends to think that he had money and he wanted to live a lifestyle like his employer, Barry Bourdage. Defendant also felt that he was not being paid enough. With defendant's cooperation, police recovered more than 180 items, including some that he had given to family and friends as gifts.

¶ 5 Bourdage testified that defendant admitted using a specific Amazon account to make unauthorized personal purchases and gave Bourdage the user name and password. Bourdage used this information to create a spreadsheet that he printed and gave to police. The total value of the items purchased was $353,694.39.

¶ 6 Defendant's mother, Sue Lloyd, testified that defendant grew up in the rural community of Harbor Beach, Michigan. He never had a relationship with his biological father. Sue married Robin Lloyd when defendant was about nine years old, and Robin adopted him. When Robin was injured in a construction accident, defendant helped out the family by doing chores around the neighborhood.

¶ 7 When defendant was 15, Sue had a daughter prematurely and was out of work for six months. Defendant went to work at Robin's place of employment and contributed his earnings to the family to help out with expenses. Later, defendant volunteered at charity events at the hospital where Sue worked. He also did chores for elderly neighbors. Other friends and family members described defendant as kind and family-oriented.

¶ 8 The State argued that the statutory aggravating factors of receiving compensation and deterrence applied. Defense counsel argued in mitigation that defendant had no criminal history and inflicted no physical harm. Moreover, he cooperated with the police and helped recover many items. In allocution, defendant apologized to the victim and to his family and friends, noting that they had "no idea what was going on this whole time."

¶ 9 The trial court sentenced defendant to eight years in prison. In doing so, the court "considered the factors in aggravation Nos. 2 and 7" for which the State had argued, as well as the mitigating factors suggested by the defense.

¶ 10 Defendant moved to reconsider the sentence. In denying the motion, the court acknowledged that it did consider that defendant received compensation for committing the crime. The court explained that defendant gave many of the items to family friends "to purchase the friendship, loyalty, love and companionship of these donees," and, while the court placed less weight on this factor than on deterrence, it was still appropriate to consider. Defendant timely appeals.

¶ 11 Defendant contends that the court erred by considering that defendant received compensation, because receiving compensation in the form of proceeds is an element of theft. The State contends that defendant forfeited the issue by not contemporaneously objecting. Generally, both a contemporaneous objection and a written posttrial motion are required to

preserve an issue for review. *People v. Lewis*, 234 Ill. 2d 32, 40 (2009). However, in cases such as this, defense counsel is not required to interrupt the judge and point out that he is considering incorrect factors in aggravation. *People v. Saldivar*, 113 Ill. 2d 256, 266 (1986). So long as the trial court has the chance to review the same essential claim that is later raised on appeal, the issue is not forfeited. *People v. Heider*, 231 Ill. 2d 1, 18 (2008). Given that defendant raised the identical claim in his motion to reconsider the sentence and the trial court specifically addressed it, defendant preserved the issue.

¶ 12 Because receiving the proceeds of the crime is implicit in every theft, it is reasonable to conclude that the legislature considered this fact when setting the range of penalties for theft offenses. *People v. Conover*, 84 Ill. 2d 400, 404-05 (1981). Thus, "compensation" in the context of theft statutes "applies only to a defendant who receives remuneration, other than proceeds from the offense itself, to commit a crime." *Id.* at 405. In other words, the legislature intended to impose a harsher sentence on one who is paid to commit a burglary or theft than on one who commits it on his own volition. *Id.* We may affirm a sentence resulting from the consideration of an improper factor only if we conclude that the weight accorded the improper factor was so slight that it did not lead to a greater sentence. *Heider*, 231 Ill. 2d at 22-24.

¶ 13 Here, there is no question that the trial court considered that defendant received compensation, as the court explicitly said so. Moreover, although the court gave less weight to this factor than to the deterrence factor, it clearly gave it some weight. The court's explanation for considering this factor is that defendant gave some of the items to friends and family members, thereby gaining their love and friendship. *Conover*, however, limited consideration of this factor in theft cases to those who are paid to commit a crime. *Conover*, 84 Ill. 2d at 405. In *People v. Peterson*, 227 Ill. App. 3d 20, 24 (1992), we noted that *Conover* distinguished between

receiving proceeds of the crime and being paid or hired to commit the crime. Only the latter may be considered in aggravation.

¶ 14 Here, there was no evidence that anyone paid defendant to commit the crime. Indeed, defendant's statement in allocution strongly implies that no one was even aware of his scheme. Thus, regardless of how he used them, defendant received no more than the proceeds of the theft. Any successful thief will presumably spend the proceeds in some way and derive some measure of satisfaction from doing so. To equate these intangible benefits with receiving additional compensation would once again make this factor applicable in virtually every theft case.

¶ 15 Further, we cannot say that the weight the court gave this factor was so insignificant that it did not affect the sentence. Theft of between $100,000 and $500,000 is a Class 1 felony. 720 ILCS 5/16-1(b)(6) (West 2016). Despite having no criminal record, defendant received a sentence of 8 years' imprisonment, near the midpoint of the 4-to-15-year range for such a felony. See 730 ILCS 5/5-4.5-30(a) (West 2016). The sheer amount of the thefts was substantial, falling nearer to the $500,000 maximum than the minimum, but the court did not focus on the amount taken. Thus, we cannot conclude that consideration of the improper factor did not affect the sentence.

¶ 16 The State contends that the court in reality considered only the nature of the offense. In fashioning an appropriate sentence, the trial court must consider all relevant factors, including " ' "the nature and circumstances of the offense, including the nature and extent of each element of the offense as committed by the defendant." ' " *Saldivar*, 113 Ill. 2d at 268-69, quoting *People v. Hunter*, 101 Ill. App. 3d 692, 694 (1981), quoting *People v. Tolliver*, 98 Ill. App. 3d 116, 117-18 (1981)). To that end, the court may consider the degree of harm the defendant's conduct caused the victim even where some harm is implicit in the offense. But the court did not

do that here, or at least it did not say so. The court's remarks in denying defendant's motion to reconsider focus on the fact that defendant used the proceeds to attempt to buy his friends' and family members' love and affection rather than on the dollar amount of the stolen items.

¶ 17 There is little question that the sheer scope of defendant's conduct is appalling and justified a severe sentence. Although it did not expressly say so, the court might well have considered this factor, given the length of the sentence in light of defendant's lack of a criminal record. However, the record does not foreclose the impact of the improper factor.

¶ 18 The judgment of the circuit court of Kane County is reversed in part and the cause is remanded for resentencing.

¶ 19 Reversed and remanded.