2019 IL App (4th) 150909-U

NO. 4-15-0909

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
January 25, 2019
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
NATHANIEL L. LEMONS,	)	No. 15CF395
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Holder White and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's improper considerations in sentencing defendant were not so unduly prejudicial as to require a remand for resentencing. This court is without jurisdiction to consider the Crime Stoppers fine.

¶ 2 Defendant, Nathaniel L. Lemons, pleaded guilty to domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2014)) and he was placed on probation. After defendant violated a term of his probation, the trial court revoked his probation and sentenced him to six years' incarceration. Defendant appeals, arguing (1) the trial court erred in considering prior incidents of uncharged criminal conduct attributed to him in police reports and orders of protection, which were not presented through witness testimony subject to cross-examination, and (2) the court improperly imposed a Crime Stoppers fine. We affirm the court's judgment.

¶ 3 I. BACKGROUND

¶ 4 In March 2015, the State charged defendant with one count of domestic battery with a prior conviction for a violation of an order of protection (720 ILCS 5/12-3.2(a)(1) (West 2014)) after defendant bit his girlfriend, Tasheba Palmer, and caused her bodily harm.

¶ 5 In May 2015, the State filed a motion to present evidence of prior incidents of domestic violence against the same victim. The State attached the following to its motion: (1) Palmer's March 2005 petition for an order of protection describing defendant pushing, choking, biting, and hitting her; (2) a March 2005 emergency order of protection against defendant; (3) a March 2005 plenary order of protection against defendant; (4) a 2007 police report describing an incident in which defendant struck Palmer "with a closed fist multiple times"; (5) a 2011 police report indicating that defendant broke multiple windows in Palmer's car; (6) a 2012 police report indicating that defendant stabbed Palmer in the stomach with a knife; and (7) a 2012 police report that described an incident in which defendant pushed Palmer, bit her, and broke windows in her home.

¶ 6 On May 5, 2015, defendant pleaded guilty to committing domestic battery against Palmer. The State withdrew its motion to present evidence and agreed to a sentence of 24 months' probation. The trial court subsequently sentenced defendant to probation.

¶ 7 A few months later, defendant violated a term of his probation by testing positive for cannabis. In August 2015, the trial court revoked his probation.

¶ 8 On October 7, 2015, the trial court held a sentencing hearing. The State presented the testimony of Sergeant David I. Griffet IV. Sergeant Griffet testified that, on August 4, 2015, he was dispatched to a Circle K gas station where officers were attempting to serve an arrest warrant on defendant. Defendant was reportedly armed with a handgun. When officers

approached defendant at the gas station, defendant fled on foot. Sergeant Griffet testified that defendant "had his hands around his waistband" as he ran away. Defendant was later apprehended and a handgun was located in the front yard of a nearby residence. According to Sergeant Griffet, the owner of the residence stated that she had not seen a handgun in her yard when she mowed the lawn the day before. Sergeant Griffet relayed the owner's statement that "the only person she knew that [had] been in her yard as of late" was "[t]he young man" that she saw "r[u]n through her yard ***."

¶ 9 The presentence investigation report (PSI) showed defendant had a criminal history consisting of convictions for battery in 2004 and 2005, a violation of an order of protection with respect to Palmer in 2007, obstruction of justice in 2008, criminal trespass in 2010, criminal damage to Palmer's property in 2014, and defendant's sentence of probation for domestic battery with a violation of an order of protection in the instant case.

¶ 10 The State recommended the maximum prison sentence of six years. 730 ILCS 5/5-4.5-45(a) (West 2014). In support of its recommendation, the State emphasized defendant's violation of the terms of his probation by testing positive for cannabis, the testimony of Sergeant Griffet regarding defendant's recent arrest, defendant's "constant string of criminal offenses dating back to 2004," and his failure to complete probation on five occasions.

¶ 11 Defense counsel requested a community-based sentence. Defense counsel noted defendant's plea of guilty in this case, his young age, lack of education, challenges with substance abuse, and his completion of the Partner Abuse Intervention Program assessment.

¶ 12 Defendant then made a statement in allocution.

¶ 13 The trial court sentenced defendant to six years in prison, stating, in pertinent part,

as follows:

> "Well, I've considered the report prepared by Court Services. I've considered the comments of counsel. I've considered the comments of the defendant. I've considered the evidence presented in aggravation, and the evidence presented in mitigation. I've considered the statutory factors in aggravation, as well as the statutory factors in mitigation. There aren't any statutory mitigating factors that apply to this defendant, to this type of an offense.
>
> If one scours this record one might find some non-statutory mitigation. [Defendant] [is] only 25 years of age. That's a non-statutory mitigating factor. He initially pled guilty to the charge, that's a non-statutory mitigating factor. Beyond that there's absolutely no mitigation in this record. The two obvious statutory factors in aggravation [include] *** the prior criminal history. He has the two batteries as a juvenile *** in [2004] and [2005]. The second adjudication sent him to the Department of Juvenile Justice. He's got [an] order of protection violation, obstructing conviction, criminal trespass, [and] criminal damage as his prior criminal history. So he does have a prior criminal history.
>
> And the other *** statutory factor in aggravation is the deterrent factor. The court has to fashion a sentence that will not only deter this defendant, but other individuals similarly situated from committing this type of an offense, and domestic battery is a deterrable offense.
>
> When the court looks at the circumstances surrounding the offense *** the court has to make a determination that a community-based sentence is appropriate

*** as the first alternative. So when I look to the history, character[,] and condition of the defendant[,] we have a young man, no education, never been employed. He has three children by three different women. [He] [is] [t]otally unable to pay support for those children that he's brought into this world.

In looking at the records in [this case,] 15 CF 395, *** had [it] gone to trial, [the State would have] present[ed] evidence about the bad acts by this defendant *** with the same victim. *** [T]he pleadings [are] replete with violations of domestic *** orders of protection[,] [which were] filed on numerous occasions. The defendant has *** done a tremendous amount of violence to the victim in this case *** over and over again.

The court has to determine whether or not the defendant needs to be incarcerated because he's dangerous, and/or would a further sentence of probation or conditional discharge deprecate the seriousness of his conduct ***?

Well, if there was any doubt, the fact that he's running around with a weapon, with a firearm in the City of Champaign certainly does seal the deal. This young man is incredibly dangerous. And it's only a matter of time before he does something really bad to *** his victim in this case, or some other victim. It would be totally inappropriate for a community-based sentence[.] [H]e needs to be incarcerated because he's dangerous[.] [Probation] wouldn't [be] the appropriate deterrent factor."

¶ 14 In October 2015, defendant filed a motion for reconsideration, arguing his sentence was excessive. He subsequently filed a *pro se* motion stating that his public defender

did not have his "[b]est interest [at] heart" and that his "background isn't bad at all." The trial court denied his motions.

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 Defendant argues on appeal that (1) the trial court erred in considering prior incidents of uncharged criminal conduct attributed to him in police reports and orders of protection, which were not presented through witness testimony subject to cross-examination, and (2) the court improperly imposed a Crime Stoppers fine.

¶ 18 A. Sentencing

¶ 19 As stated, defendant contends the trial court erred in considering prior uncharged criminal conduct attributed to him in police reports and orders of protection that was not presented through witness testimony at the sentencing hearing. Further, defendant challenges the trial court's conclusion that he had "numerous" violations of orders of protection where the PSI reflects he was only found guilty of violating two orders of protection.

¶ 20 As an initial matter, we note defendant acknowledges on appeal that he has forfeited his claim of error because he failed to object at the sentencing hearing and he failed to raise the issue in a motion to reconsider his sentence. *People v. Smith*, 2016 IL 119659, ¶ 38, 76 N.E.3d 1251. He maintains, however, that his forfeiture may be excused under the plain error doctrine. "The initial step under either prong of the plain error doctrine is to determine whether the claim presented on review actually amounts to a 'clear or obvious error' at all." *People v. Harvey*, 2018 IL 122325, ¶ 15, ___ N.E.3d ____ (citing *People v. Staake*, 2017 IL 121755, ¶ 33, 102 N.E.3d 217). "[S]entencing errors raised for the first time on appeal are reviewable as plain

error if (1) the evidence was closely balanced or (2) the error was sufficiently grave that it deprived the defendant of a fair sentencing hearing." *People v. Ahlers*, 402 Ill. App. 3d 726, 734, 931 N.E.2d 1249, 1256 (2010).

¶ 21 Defendant maintains the court's alleged error deprived him of his right to a fair sentencing hearing. The State "concedes that clear or obvious error occurred" when the trial court considered "hearsay materials that were contained only in pretrial motions" and "was mistaken about the number of orders of protection" but denies that defendant was denied a fair sentencing hearing.

¶ 22 "The ordinary rules of evidence governing a trial are relaxed at the sentencing hearing." *People v. Williams*, 2018 IL App (4th) 150759, ¶ 17, 99 N.E.3d 590. "Moreover, 'a sentencing judge is given broad discretionary power to consider various sources and types of information so that he can make a sentencing determination within the parameters outlined by the legislature.' " *Id.* (quoting *People v. Williams*, 149 Ill. 2d 467, 490, 599 N.E.2d 913, 924 (1992)). "At the sentencing hearing, evidence is admissible if it is relevant and reliable." *Id.* " '[C]riminal conduct for which there has been no prosecution or conviction may be considered in sentencing. Such evidence, however, should be presented by witnesses who can be confronted and cross-examined, rather than by hearsay allegations in the presentence report, and the defendant should have an opportunity to rebut the testimony.' " *People v. Raney*, 2014 IL App (4th) 130551, ¶ 43, 8 N.E.3d 633 (quoting *People v. Jackson*, 149 Ill. 2d 540, 548, 599 N.E.2d 926, 930 (1992)). Reversal is only required where the error is so serious or unfairly prejudicial that defendant's right to due process is violated. *People v. Harth*, 339 Ill. App. 3d 712, 715, 791 N.E.2d 702, 705 (2003) (citing *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)).

¶ 23 In this case, the trial court considered police reports and orders of protection that were not presented through witness testimony at the sentencing hearing. Those documents described instances in which defendant committed uncharged acts of domestic battery against his girlfriend, Palmer. Specifically, in reaching its decision, the trial court stated as follows:

> "In looking at the records in [this case,] 15 CF 395, *** had [it] gone to trial, [the State would have] present[ed] evidence about the bad acts by this defendant *** with the same victim. *** [T]he pleadings [are] replete with violations of domestic *** orders of protection[,] [which were] filed on numerous occasions. The defendant has *** done a tremendous amount of violence to the victim in this case *** over and over again.
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> The court has to determine whether or not the defendant needs to be incarcerated because he's dangerous, and/or would a further sentence of probation or conditional discharge deprecate the seriousness of his conduct ***?
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> Well, if there was any doubt, the fact that he's running around with a weapon, with a firearm in the City of Champaign certainly does seal the deal. This young man is incredibly dangerous. And it's only a matter of time before he does something really bad to *** his victim in this case, or some other victim."

As conceded by the State, it was error for the trial court to consider defendant's prior uncharged criminal conduct detailed only in the orders of protection and police reports that were attached to the State's pleadings and not presented through the testimony of a witness at the sentencing hearing. *Raney*, 2014 IL App (4th) 130551, ¶ 43 (quoting *Jackson*, 149 Ill. 2d at 548). (" '[C]riminal conduct for which there has been no prosecution or conviction may be considered

in sentencing. Such evidence, however, should be presented by witnesses ***.' ").

¶ 24 Although we find the trial court erred here, we must also consider whether the error was so unduly prejudicial as to warrant vacating defendant's sentence and remanding for another sentencing hearing. *Harth*, 339 Ill. App. 3d at 715. As stated, such action is only required where the error was unduly prejudicial to the extent that defendant's right to a fair sentencing hearing was denied. See *e.g.*, *Raney*, 2014 IL App (4th) 130551, ¶¶ 45-46, 8 N.E.3d 633 (finding the trial court erred in considering a victim impact statement regarding prior misconduct without testimony from that victim; however, the error was not so unduly prejudicial to warrant reversal).

¶ 25 Significantly, in this case, the trial court emphasized at the sentencing hearing that it considered defendant's recent gun-related offense, including his flight from officers as evidence of his disingenuousness. Further, the trial court noted defendant's prior criminal history, which occurred over the course of a decade. Specifically, the PSI reflected defendant had been convicted of battery in 2004 and 2005, a violation of an order of protection in 2007, obstruction of justice in 2008, criminal trespass in 2010, criminal damage to Palmer's property in 2014, and the violation of an order of protection in this case in 2015. In addition, defendant had been afforded opportunities to complete sentences of probation in the past, yet he failed to do so on multiple occasions. Accordingly, based on the above, we find defendant was not unduly prejudiced by the trial court's error.

¶ 26 B. The Crime Stoppers Fine

¶ 27 Defendant next argues the circuit clerk improperly imposed a $10 Crime Stoppers fine. We find we lack jurisdiction to consider this issue.

¶ 28 Generally, "[a]lthough circuit clerks can have statutory authority to impose a fee,

they lack authority to impose a fine, because the imposition of a fine is exclusively a judicial act." (Emphases omitted.) *People v. Smith*, 2014 IL App (4th) 121118, ¶ 18, 18 N.E.3d 912. However, our supreme court found in *People v. Vara*, 2018 IL 121823, ¶ 23, __ N.E. 3d __"that the appellate court lacked jurisdiction to review the clerk's recording of mandatory fines that were not included as part of the circuit court's final judgment." The court explained the underlying rationale as follows:

> "Because the circuit clerk had no authority to levy any fines against defendant, the recording of the additional fines was invalid and unenforceable. However, the fact that the clerk's action was improper does not mean that defendant can challenge the unauthorized fines through the appeal process. The appellate court is constitutionally vested with jurisdiction to review final judgments entered by circuit courts. The recording of a fine is a clerical, ministerial function and is not a judgment—void or otherwise. Therefore, the improper recording of a fine is not subject to direct review by the appellate court." *Id.*

Following the supreme court's decision in *Vara*, "[a]ny questions as to the accuracy of the data entries included in the payment status information must be resolved through the cooperation of the parties and the circuit clerk or by the circuit court in a *mandamus* proceeding." *Id.* ¶ 31.

¶ 29 Here, as stated, defendant challenges the circuit clerk's imposition of the Crime Stoppers fine. However, in light of the supreme court's decision in *Vara*, we find we lack jurisdiction to address this issue.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm the trial court's judgment. As part of our

judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2014).

¶ 32 Affirmed.