2019 IL App (4th) 160579-U

NO. 4-16-0579

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

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
JOSEPH H. BOOTH,	)	No. 16CF53
Defendant-Appellant.	)	
	)	Honorable
	)	Jeffrey S. Geisler,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices DeArmond and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant forfeited the sentencing issues raised on appeal by failing to raise them with the trial court and his forfeiture may not be excused under the plain-error doctrine.

¶ 2 Defendant, Joseph H. Booth, was convicted of two counts of criminal sexual assault (720 ILCS 5/11-1.20(a)(2) (West 2014)) based on a theory of accountability, and the trial court sentenced him to two, consecutive eight-year prison terms. Defendant appeals, arguing the court abused its discretion when imposing his sentences and that the sentences imposed were excessive. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In January 2016, the State charged defendant with two counts of criminal sexual assault. *Id.* It alleged that defendant or another for whom he was legally accountable placed his

penis in the vagina and mouth of the victim, N.S, while knowing that N.S. was unable to give knowing consent.

¶ 5 In May 2016, defendant's jury trial was conducted. Evidence showed defendant and N.S. were friends. On December 25, 2015, N.S. invited defendant and his girlfriend, Justene Eckhardt, to her home. Defendant contacted another person, Devon Chenoweth, and also invited him to N.S.'s residence. Everyone in the group except Eckhardt consumed alcohol and N.S. became intoxicated. N.S. testified she could not remember everything that happened the night of the alleged offenses. The next morning, she woke up wearing no clothing and noticed pain in her vagina, jaw, throat, and legs. She also discovered "a really bad rug burn on [her] backside." N.S. did not remember having sex with anyone or agreeing to have sex with anyone.

¶ 6 On December 27, 2015, N.S. discovered that defendant used her cell phone to record Chenoweth engaging in acts of sexual penetration with her while she was "passed out." N.S. testified that defendant's voice could be heard on the recordings and that he was "directing" Chenoweth regarding "what to do." She further stated she did not consent to any of the acts shown in the recordings nor did she remember any of the acts occurring. The recordings were played for the jury.

¶ 7 At trial, defendant presented the defense that N.S. consented to engage in sexual activity with Chenoweth on the night of the alleged offenses. Defendant testified on his own behalf and acknowledged making the recordings on N.S.'s cell phone. On cross-examination, he also acknowledged that the recordings captured him crudely directing Chenoweth on what to do to N.S. Defendant admitted that after being shown the recordings by the police he agreed that N.S. looked "incapacitated," "too drunk to consent," that it appeared she did not have "full use of her motor skills," and that the sexual activity depicted "looked nonconsensual." Defendant also

testified that he told the police that he felt bad about what had occurred, that it was wrong, and that he felt like a "scumbag." The jury found defendant guilty on both criminal-sexual-assault counts.

¶ 8 In June 2016, defendant filed a motion for a new trial. In July 2016, the trial court denied defendant's motion and proceeded with his sentencing. The court considered defendant's presentence investigation (PSI) report, showing defendant was 25 years old and, at the time of the offenses at issue, was on probation for the felony offense of burglary. Defendant's criminal record also included misdemeanor convictions for battery, "No Sales Tax License," retail theft, and driving on a suspended license.

¶ 9 The PSI report showed that "at an early age" defendant became a ward of the Illinois Department of Children and Family Services due to his parents' substance abuse and " 'arguments.' " The report stated defendant "was placed in many different group homes throughout his childhood" and had no contact with his biological family from ages 7 to 14. Defendant reported that at age 14, he "educated himself on family laws, and he sought the court's approval for visitation rights with his parents." Defendant was then allowed to reunite with family members including his parents and twin brother.

¶ 10 According to the PSI report, defendant dropped out of high school in the 12th grade and had not earned a general equivalency degree (GED). Defendant reported that he never had gainful employment or a steady source of income. Instead, he "had many 'odd jobs' for which he was paid cash." Further, the report showed that defendant was single but in a dating relationship with Eckhardt. The couple had a five-month-old child. Defendant also had a four-year-old child from a previous relationship. He had no contact with his older child and had not been court ordered to pay child support for either child.

¶ 11 Regarding his health, defendant reported that he suffered from Wolff-Parkinson White syndrome, a heart condition that caused him to experience a rapid heartbeat. According to defendant, he experienced sporadic symptoms and his condition was most problematic when he was under stress. Around age 13, defendant was also diagnosed with depression and bipolar disorder. He received therapy for those conditions as a child but felt it was of no benefit. Defendant did not believe that he needed mental health treatment.

¶ 12 Finally, defendant reported that he used alcohol socially and no more than once per month. However, at age 15, he began using cannabis, and after being prescribed Norco following a bike accident at age 17, defendant began using heroin and cocaine. Defendant stated he used both heroin and cocaine on a daily basis for approximately five years. He also reported that he entered treatment for his drug use, successfully completed treatment, and had been drug free for the past four years. Defendant did not believe that he needed any additional substance-abuse treatment.

¶ 13 At the sentencing hearing, the trial court also considered N.S.'s victim-impact statement and defendant's statement of allocution. In her statement, N.S. asserted that prior to the crimes at issue she trusted defendant and viewed him as a friend. She stated she had nightmares about the assault and increased anxiety issues. N.S. further asserted that she felt anxious and paranoid when she left her house and that she felt "weak and vulnerable all the time." In making his statement of allocution, defendant stated as follows:

> "Really, all I can honestly say is, you know, what [N.S.] said was true. Yeah, she trusted me. And I allowed things to get out of hand. Nothing was supposed to go down like that on Christmas.
>
> I mean, it's true that she invited me over. She invited my girlfriend over.

> And I allowed a situation to become out of hand when I should have been responsible enough to know enough is enough.
>
> If [N.S.] was here, I would honestly apologize to her. I mean, I—I never wanted to hurt a friend. You know, I don't have many to begin with, you know.
>
> And I mean, all I can say is I accept the consequences for my actions of what, you know, what happened that night and I just hope the Court will grant me a little leniency, if any. And I apologize for everything. Nothing like that was ever supposed to happen."

Neither party submitted any additional evidence.

¶ 14 In presenting arguments to the trial court, the State noted that defendant was subject to mandatory consecutive sentences and recommended that he receive two, 10-year terms of imprisonment. It argued that none of the factors in mitigation applied and that more than one statutory aggravating factor was applicable. Specifically, the State asserted that defendant's conduct caused serious harm and that he had a history of prior criminal activity. Defendant's counsel asked the court to sentence him to consecutive terms of no more than 4½ to 5 years in prison. He argued that defendant had taken responsibility for his actions and had not denied his part in the offenses while testifying at trial. Further, defense counsel pointed out that defendant's prior felony conviction was for burglary, a nonviolent offense, and his criminal history otherwise involved only misdemeanor convictions.

¶ 15 In setting forth its sentencing decision, the trial court stated it "[c]onsidered [the] factors in aggravation and mitigation" and agreed with the State that no statutory mitigating factors applied. Regarding the aggravating factors, the court noted defendant's conduct caused harm and that he had a criminal history. The court specifically pointed out that defendant was placed

on probation in October 2015 and that the offenses at issue occurred the following December. The court further stated that it had observed the recordings of the offenses "on more than one occasion." It described them as follows:

> "Using [the State's] words, it was a [*sic*] horrific. The Court has never seen a video of that nature. I don't think I will forget that for the rest of my life. [Defendant] was an active participant in this, to the point that he was instigating this."

The court found that a sentence in the minimum range was not appropriate and sentenced defendant to two, consecutive eight-year prison terms.

¶ 16 Shortly following sentencing, defendant filed a motion to reconsider his sentences. He argued only "that the Court abused its discretion in sentencing [him] to an excessive period of confinement, and not granting [him] a lesser period of incarceration." In August 2016, the trial court conducted a hearing on defendant's motion. At the hearing, defendant's counsel argued as follows:

> "Judge, you heard the arguments at [the] sentencing hearing and during the trial. Obviously, the issue here is one of Court's [*sic*] discretion, and we would suggest that the Court should review its prior finding and reduce the amount of time that you gave [defendant] for incarceration."

The trial court noted that it had presided over both defendant's trial and his sentencing hearing and stated it "did look at the factors of aggravation and mitigation." The court found it imposed appropriate sentences and denied defendant's motion.

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 On appeal, defendant challenges the trial court's imposition of two consecutive

eight-year prison terms, arguing the court abused its discretion and imposed excessive sentences. Specifically, he contends the court erred by failing to consider an applicable statutory factor in mitigation and that it "wholly ignored" mitigating evidence contained in his PSI report.

¶ 20 Initially, the State argues that defendant forfeited the sentencing issues raised on appeal because he did not raise them with the trial court. The Unified Code of Corrections (Code) provides that "[a] defendant's challenge to the correctness of a sentence or to any aspect of the sentencing hearing shall be made by a written motion filed with the circuit court clerk within 30 days following the imposition of sentence." 730 ILCS 5/5-4.5-50(d) (West 2014). To preserve a sentencing issue for appellate review, a defendant must raise the issue in a postsentencing motion. *People v. Heider*, 231 Ill. 2d 1, 15, 896 N.E.2d 239, 247 (2008).

¶ 21 Here, in his postsentencing motion, defendant generally asserted that the trial court "abused its discretion" when sentencing him and that he was sentenced "to an excessive period of confinement." He did not raise the specific claims presented on appeal regarding the court's failure to consider an applicable statutory mitigating factor or information contained in his PSI report. Additionally, at the hearing on his postsentencing motion, defendant did not raise any specific claim of error and asked only that the court review his sentences and reduce them. Accordingly, we find the issues now presented on review were never brought to the trial court's attention and have been forfeited.

¶ 22 In his reply brief, defendant maintains that his forfeiture of sentencing issues may be excused under the second prong of the plain-error doctrine. To obtain relief under the plain-error doctrine, a defendant must show that "a clear or obvious error" occurred and that either "(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." *People v. Hillier*, 237 Ill. 2d 539, 545,

931 N.E.2d 1184, 1187 (2010). "Under both prongs of the plain-error doctrine, the defendant has the burden of persuasion." *Id.* Additionally, "[t]he 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, 115 N.E.3d 172. In this instance, we find no clear or obvious error occurred, and as a result, the plain-error doctrine may not be applied to excuse defendant's forfeiture.

¶ 23 "The Illinois Constitution provides penalties are to be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." *People v. Daly*, 2014 IL App (4th) 140624, ¶ 26, 21 N.E.3d 810 (citing Ill. Const. 1970, art. I, § 11). "This constitutional mandate calls for balancing the retributive and rehabilitative purposes of punishment, and the process requires careful consideration of all factors in aggravation and mitigation." *Id.*

¶ 24 The trial court has "great discretion *** in each case to fashion an appropriate sentence within the statutory limits." *People v. Fern*, 189 Ill. 2d 48, 53, 723 N.E.2d 207, 209 (1999). "The trial court must base its sentencing determination on the particular circumstances of each case, considering such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *Id.* The sentence imposed by the trial court is entitled to great deference and will not be reversed on appeal absent an abuse of discretion. *People v. McGuire*, 2017 IL App (4th) 150695, ¶ 38, 92 N.E.3d 494. Also, "[a] sentence within statutory limits will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense." *Fern*, 189 Ill. 2d at 54.

¶ 25 Here, defendant was convicted of two Class 1 felony offenses. As a result, he was

subject to a sentencing range of 4 to 15 years in prison for each offense. 730 ILCS 5/5-4.5-30(a) (West 2014).

¶ 26 On appeal, defendant first argues the trial court abused its discretion during sentencing because it gave no weight to a relevant statutory mitigating factor. Specifically, he points to section 5-5-3.1(a)(9) of the Code (730 ILCS 5/5-5-3.1(a)(9) (West 2014)), providing that one factor weighing in favor of minimizing a defendant's sentence of imprisonment is that "[t]he character and attitudes of the defendant indicate that he is unlikely to commit another crime." Defendant contends this factor was applicable to his case because he expressed remorse and accepted responsibility for his conduct.

¶ 27 "The trial court is in the best position to determine how the character and attitudes of the defendant reflected upon the likelihood of his committing another crime." *People v. Baker*, 241 Ill. App. 3d 495, 498, 608 N.E.2d 1251, 1253 (1993). "This is because the trial court is in a better position to make a firsthand reasoned judgment based on defendant's general moral character, credibility, social habits, and age." *Id.* at 498-99. Here, at sentencing, the State argued that no statutory mitigating factors applied to defendant's case and the trial court agreed with that argument. We find no abuse of discretion by the trial court in making that determination.

¶ 28 First, a defendant's expressions of remorse do not necessarily require a court to find that he or she is unlikely to commit further crimes. Although defendant made statements prior to trial indicating he was remorseful and apologized for his actions at sentencing, this case was not one in which defendant only admitted wrongdoing or accepted responsibility for his offenses. In fact, at trial, defendant testified on his own behalf and asserted that N.S. consented to the sexual activity at issue and suggested that she was not too intoxicated to give knowing consent to the activities captured on the recordings. The court was also not required to accept de-

fendant's expressions of remorse without question. At sentencing, defendant apologized for allowing "things to get out of hand." The trial court could have determined defendant's comments fell short of accepting full responsibility for the sexual assaults on N.S. as they seem to suggest that he had a more passive role in the commission of those crimes than the court determined was shown by the evidence. In particular, the court noted that the recordings of the offenses were "horrific" and that they showed defendant was an "active participant *** to the point that he was instigating" what occurred.

¶ 29 Second, we note the trial court was also presented with evidence of defendant's criminal history. That evidence showed defendant had several prior convictions for misdemeanor offenses and a prior felony conviction for which defendant was on probation at the time of the offenses in this case. Ultimately, the record was such that the court could have determined defendant's expressions of remorse fell far short of demonstrating his resolve to not commit another crime and that the mitigating factor in section 5-5-3.1(a)(9) of the Code was inapplicable.

¶ 30 On appeal, defendant also argues the trial court erred by failing to consider information contained in his PSI report showing his disadvantaged upbringing, mental and physical health issues, and his history of substance abuse. He maintains such evidence was relevant to show his rehabilitative potential. Defendant further argues that the court was singularly focused on aggravating evidence to the exclusion of evidence in mitigation, revealing "the court's 'punishment only' objective."

¶ 31 "A court is not required to expressly outline every factor it considers for sentencing and we presume the court considered all mitigating factors on the record in the absence of explicit evidence to the contrary." *People v. Harris*, 2015 IL App (4th) 140696, ¶ 57, 32 N.E.3d 211. Further, "[s]imply because rehabilitative and mitigating factors are present does not entitle

them to greater weight than the seriousness of the offense." *Id.* ¶ 58.

¶ 32 Here, the record reflects the trial court was aware of defendant's PSI report and that it considered the information contained within that report. Additionally, we presume that the trial court considered the evidence related to defendant's family history, mental and physical health issues, and substance-abuse history as there is no explicit evidence in the record to the contrary. Moreover, assuming that evidence weighed in defendant's favor, the trial court was not required to give it more weight than the seriousness of the offense or the evidence in aggravation.

¶ 33 In this case, the trial court sentenced defendant well within the applicable statutory sentencing range. Contrary to defendant's assertions, the record does not reflect that the court was singularly focused on aggravating factors or that it ignored mitigating evidence. Instead, the record indicates the court found the seriousness of the offense and the evidence in aggravation outweighed other considerations. Accordingly, we find no error and decline to excuse defendant's forfeiture.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we grant the State its statutory assessment of $50 against defendant as costs of this appeal.

¶ 36 Affirmed.