2019 IL App (4th) 170068-U

NO. 4-17-0068

FILED
August 2, 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.	)	Woodford County
ADAM S. ROGERS,	)	No. 15CF15
Defendant-Appellant.	)	
	)	Honorable
	)	Charles M. Feeney III,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's failure to include a time limit on the victim's counseling in its restitution order did not constitute plain error.

¶ 2 In February 2015, a grand jury indicted defendant, Adam S. Rogers, on one count of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2014)). After a March 2016 trial, a jury found defendant guilty. At an April 2016 hearing, the Woodford County circuit court sentenced defendant to 40 years' imprisonment to run consecutive to his sentence in a prior case and ordered him to pay up to $25,000 in restitution. In November 2018, defendant filed a motion to reconsider his sentence, which the court dismissed as untimely.

¶ 3 Defendant appeals, contending the circuit court's restitution order did not comply with the requirements of the restitution statute. We affirm.

¶ 4 I. BACKGROUND

¶ 5 The grand jury's indictment was based on defendant's actions from August 1, 2014, to December 25, 2014, against S.R. (born in 2004). [The evidence at defendant's March 2016 trial revealed the victim, S.R., was defendant's daughter.] As stated, the jury found defendant guilty of predatory criminal sexual assault of a child.

¶ 6 On April 18, 2016, the circuit court held defendant's sentencing hearing. The evidence necessary to determine the issue on appeal is set forth below.

¶ 7 Kelli C., S.R.'s mother, testified S.R. attended counseling once a week for 30 minutes during the school day. S.R. continued to meet with the same counselor during the summer. Kelli planned for S.R. to continue counseling because she observed improvements in S.R.'s demeanor after counseling. Specifically, S.R. seemed happier and more outgoing. Kelli intended to send S.R. to counseling until it was no longer needed. S.R.'s counselor had told Kelli S.R. would need counseling until at least high school.

¶ 8 The State also presented a group of letters, which the circuit court admitted without objection. One of the letters was from S.R.'s counselor and stated, in pertinent part, the following:

> "The therapy [S.R.] receives as of current is provided by the MVCPC under a United Way Grant and ranges from $90.00 to $139.00 a session. I foresee [S.R.] needing continued therapeutic support due to transitions during middle and high school as well as when starting intimate relationships as a young adult. [S.R.]'s dissociation and fear of remembering is a barrier to her moving forward socially, emotionally and mentally. [S.R.]'s young adulthood will have situations where she is retriggered and from her history of being retraumatized I fear for at risk behaviors such as sexual promiscuity, coping mechanisms of alcohol and

drugs if therapy is not maintained."

¶ 9 The prosecutor asked for $25,000 in restitution placed in a "pool" instead of a larger fine. Counseling bills would be submitted for payment. Defense counsel argued against restitution, noting a good manner for calculating restitution for future counseling costs did not exist.

¶ 10 The circuit court sentenced defendant to 40 years' imprisonment to run consecutive to his sentence in Woodford County case No. 15-CF-3. The court also ordered "a pool, a restitution, of up to $25,000 for counseling for that child." The court noted S.R.'s counselor's letter indicated S.R. would need counseling into adulthood and the prosecutor gave a very conservative estimate that was very fair to defendant. The court's written order stated the following: "up to $25,000.00 for counseling of victim upon proof of counseling being given to the court."

¶ 11 On May 18, 2016, defendant filed a motion for a new trial, which he later amended. After an October 3, 2016, hearing, the circuit court denied defendant's amended motion for a new trial.

¶ 12 On November 2, 2016, defendant filed a motion to reconsider his sentence, and the State filed a motion to dismiss it. After a January 5, 2017, hearing, the circuit court granted the State's motion to dismiss because defendant's motion to reconsider was untimely.

¶ 13 On January 6, 2017, defendant filed a notice of appeal. In an October 25, 2018, supervisory order, our supreme court directed us to allow defendant to file a late notice of appeal in this case and "to treat the late notice of appeal as a properly perfected appeal from the circuit court's judgment entered on April 18, 2016, in case No. 15 CF 15." *Rogers v. Justices of the Appellate Court, Fourth District*, No. 124108 (Ill. Oct. 25, 2018) (supervisory order).

Defendant's late notice of appeal was filed in this court on November 14, 2018. Accordingly, this court has jurisdiction of defendant's appeal.

¶ 14 II. ANALYSIS

¶ 15 A. Illinois Supreme Court Rule 472

¶ 16 In February 2019, while this appeal was pending, our supreme court adopted new Illinois Supreme Court Rule 472, which addresses the correction of certain errors in sentencing. Ill. S. Ct. R. 472 (eff. Mar. 1, 2019). The new rule covers "[e]rrors in the imposition or calculation of fines, fees, assessments, or costs." Ill. S. Ct. R. 472(a)(1) (eff. Mar. 1, 2019). Subsequently, on May 17, 2019, the supreme court amended Rule 472 to provide that, "[i]n all criminal cases pending on appeal as of March 1, 2019, or appeals filed thereafter in which a party has attempted to raise sentencing errors covered by this rule for the first time on appeal, the reviewing court shall remand to the circuit court to allow the party to file a motion pursuant to this rule." Ill. S. Ct. R. 472(e) (eff. May 17, 2019). "No appeal may be taken" on the ground of any of the sentencing errors enumerated in the rule "unless such alleged error has first been raised in the circuit court." Ill. S. Ct. R. 472(c) (eff. May 17, 2019).

¶ 17 The State asserts "assessments" in Rule 472(a)(1) includes a restitution order. It notes no case law exists on whether restitution is an "assessment" under the rule. We disagree restitution is an "assessment."

¶ 18 Restitution is determined in accordance with section 5/5-5-6 of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-5-6 (West 2014)). That statute frequently refers to "restitution" as a "sentence." 730 ILCS 5/5-5-6 (West 2014). It does not use the term "assessment." Moreover, our supreme court could have easily included restitution in the list contained in Rule 472(a)(1), and it did not. Accordingly, we find Rule 472(a)(1) does not apply

to restitution orders, and we will address defendant's argument on appeal.

¶ 19 B. Restitution Order

¶ 20 Defendant contends the circuit court erred by imposing a restitution order that did not comply with the requirements of the restitution statute, specifically subsection (f-1) (730 ILCS 5/5-5-6(f-1) (West 2014)). He recognizes he forfeited the issue by failing to raise it in the circuit court but contends we should review it under the plain error doctrine (Ill. S. Ct. R. 615 (eff. Jan. 1, 1967)). Defendant also asserts he did not receive effective assistance of trial counsel based on counsel's failure to preserve for appeal his restitution claim. The State argues the circuit court properly imposed restitution under section 5-5-6(g) of the Unified Code (730 ILCS 5/5-5-6(g) (West 2014)).

¶ 21 The plain error doctrine permits a reviewing court to consider unpreserved error under the following two scenarios:

> "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1058 (2010).

¶ 22 We begin our plain error analysis by first determining whether any error occurred at all. *Sargent*, 239 Ill. 2d at 189, 940 N.E.2d at 1059. If error did occur, this court then considers whether either of the two prongs of the plain error doctrine has been satisfied. *Sargent*, 239 Ill. 2d at 189-90, 940 N.E.2d at 1059. Under both prongs, the defendant bears the burden of

persuasion. *Sargent*, 239 Ill. 2d at 190, 940 N.E.2d at 1059. Here, defendant asserts a second-prong error.

¶ 23 As to ineffective assistance of counsel, we analyze such claims under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163 (1999). To obtain reversal under *Strickland*, a defendant must prove (1) his counsel's performance failed to meet an objective standard of competence and (2) counsel's deficient performance resulted in prejudice to the defendant. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. The *Strickland* Court noted that, when a case is more easily decided on the ground of lack of sufficient prejudice rather than that counsel's representation was constitutionally deficient, the court should do so. *Strickland*, 466 U.S. at 697. To satisfy the prejudice prong, the defendant must prove a reasonable probability exists that, but for counsel's unprofessional errors, the proceeding's result would have been different. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163-64.

¶ 24 The record is unclear under which subsection of 5-5-6 of the Unified Code (730 ILCS 5/5-5-6 (West 2014)) the circuit court imposed restitution on defendant. The subsections at issue provide the following:

> "(f-1)(1) In addition to any other penalty prescribed by law and any restitution ordered under this Section that did not include long-term physical health care costs, the court may, upon conviction of any misdemeanor or felony, order a defendant to pay restitution to a victim in accordance with the provisions of this subsection (f-1) if the victim has suffered physical injury as a result of the offense that is reasonably probable to require or has required long-term physical health care for more than 3 months. As used in this subsection (f-1) 'long-term

physical health care' includes mental health care.

(2) The victim's estimate of long-term physical health care costs may be made as part of a victim impact statement under Section 6 of the Rights of Crime Victims and Witnesses Act or made separately. The court shall enter the long-term physical health care restitution order at the time of sentencing. An order of restitution made under this subsection (f-1) shall fix a monthly amount to be paid by the defendant for as long as long-term physical health care of the victim is required as a result of the offense. The order may exceed the length of any sentence imposed upon the defendant for the criminal activity. The court shall include as a special finding in the judgment of conviction its determination of the monthly cost of long-term physical health care.

(3) After a sentencing order has been entered, the court may from time to time, on the petition of either the defendant or the victim, or upon its own motion, enter an order for restitution for long-term physical care or modify the existing order for restitution for long-term physical care as to the amount of monthly payments. Any modification of the order shall be based only upon a substantial change of circumstances relating to the cost of long-term physical health care or the financial condition of either the defendant or the victim. The petition shall be filed as part of the original criminal docket.

(g) In addition to the sentences provided for in Sections *** 11-1.40 ***of the Criminal Code of 1961 or the Criminal Code of 2012, the court may order any

person who is convicted of violating any of those Sections or who was charged with any of those offenses and which charge was reduced to another charge as a result of a plea agreement under subsection (d) of this Section to meet all or any portion of the financial obligations of treatment, including but not limited to medical, psychiatric, or rehabilitative treatment or psychological counseling, prescribed for the victim or victims of the offense.

The payments shall be made by the defendant to the clerk of the circuit court and transmitted by the clerk to the appropriate person or agency as directed by the court. Except as otherwise provided in subsection (f-1), the order may require such payments to be made for a period not to exceed 5 years after sentencing, not including periods of incarceration." 730 ILCS 5/5-5-6(f-1), (g) (West 2014).

¶ 25 Defendant insists the circuit court's order was entered pursuant to subsection (f-1) of the restitution statute. However, the court did not make the special finding setting forth "its determination of the monthly cost of long-term physical health care." 730 ILCS 5/5-5-6(f-1)(2) (West 2014). Moreover, defendant was convicted of violating section 11-1.40(a)(1) of the Criminal Code of 2012 (720 ILCS 5/11-1.40(a)(1) (West 2014)), which is one of the crimes to which subsection (g) applies. See 730 ILCS 5/5-5-6(g) (West 2014).

¶ 26 Defendant further asserts subsection (g) refers to subsection (f-1) and thus a restitution order under subsection (g) must also comply with subsection (f-1). We disagree. Subsection (g) refers to subsection (f-1) in the context of the length of the period for which the circuit court may order the defendant to make payments. See 730 ILCS 5/5-5-6(g) (West 2014). Unlike subsection (g), subsection (f-1) places no limitation on the length of time for which the

court may order a defendant to make payments for long term care for the victim.

¶ 27 We agree with the State the court entered its restitution order under subsection (g) of the restitution statute. This court has previously found section 5-5-6(g) of the Unified Code (Ill. Rev. Stat. 1991, ch. 38, ¶ 1005-5-6(g)) permits a restitution order for such prospective expenses when the court specifies a maximum dollar limit and time frame for completing counseling in the restitution order. *People v. Benson*, 251 Ill. App. 3d 144, 151, 621 N.E.2d 981, 986 (1993). Defendant claims the circuit court's restitution order was indefinite because it did not provide a time frame for completing counseling. Subsection (g) itself places a cap on the length of time a defendant has to pay for counseling. That section limits the period to "5 years after sentencing, not including periods of incarceration." 730 ILCS 5/5-5-6(g) (West 2014). Moreover, the circuit court did place a financial cap of $25,000 on the counseling expenses.

¶ 28 Additionally, in support of his argument a restitution order that does not comply with the statute constitutes plain error under the second prong, defendant cites *People v. Jones*, 206 Ill. App. 3d 477, 482, 564 N.E.2d 944, 947 (1990), which this court declined to follow in *People v. Hanson*, 2014 IL App (4th) 130330, ¶ 36, 25 N.E.3d 1. There, we reiterated our prior holding, which states as follows:

> " '[I]t is not a sufficient argument for plain[-]error review to simply state that because sentencing affects the defendant's fundamental right to liberty, any error committed at that stage is reviewable as plain error. Because all sentencing errors arguably affect the defendant's fundamental right to liberty, determining whether an error is reviewable as plain error requires more in-depth analysis.' " *Hanson*, 2014 IL App (4th) 130330, ¶ 37 (quoting *People v. Rathbone*, 345 Ill. App. 3d 305, 311, 802 N.E.2d 333, 338 (2003)).

Here, defendant's plain error argument is simply the error affects his fundamental right to liberty.

¶ 29 Given defendant's superficial plain error argument, the order's financial cap, and the time limitation contained in the statute, we find the circuit court's failure to include a time frame for paying for the victim's counseling neither rises to the level of plain error nor constitutes prejudice for purposes of ineffective assistance of counsel.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm the Woodford County circuit court's judgment.

¶ 32 Affirmed.