2019 IL App (4th) 170096-U

NOS. 4-17-0096, 4-17-0097 & 4-17-0098 cons.

FILED
May 23, 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.	)	Livingston County
SAMANTHA HOLZHAUER,	)	Nos. 16CF106, 15CF288,
Defendant-Appellant.	)	and 15CF39
	)	
	)	Honorable
	)	Jennifer Hartmann
	)	Bauknecht,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justice DeArmond concurred in the judgment.
Justice Harris dissented.

ORDER

¶ 1 *Held:* Because the record does not conclusively establish the trial court's sentencing decision was not affected by the trial court's reliance on an improper double enhancement, the case is remanded for a new sentencing hearing.

¶ 2 In September 2016, defendant, Samantha Holzhauer, entered guilty pleas in three separate cases. In case No. 15-CF-39, defendant pleaded guilty to aggravated driving under the influence of any drug or combination of drugs (aggravated DUI) and unlawful possession of a controlled substance. In case No. 15-CF-288, defendant pleaded guilty to theft. Finally, in case No. 16-CF-106, defendant pleaded guilty to two counts of unlawful delivery of a controlled substance and two counts of unlawful possession of a controlled substance. In November 2016, the trial court sentenced defendant to concurrent two-year terms of imprisonment in case No. 15-

CF-39, a two-year term of imprisonment in case No. 15-CF-288, and concurrent sentences of three years' imprisonment for unlawful possession and four years' imprisonment for unlawful delivery in case No. 16-CF-106. The court ordered the sentences in case Nos. 15-CF-288 and 16-CF-106 to be served concurrently with each other but consecutively to the sentences in case No. 15-CF-39. Defendant appeals, arguing the trial court improperly sentenced her because it applied a double enhancement with regard to an aggravating factor. We affirm defendant's convictions but remand the cases in this consolidated appeal for a new sentencing hearing.

¶ 3 I. BACKGROUND

¶ 4 On February 23, 2015, the State charged defendant by information in case No. 15-CF-39 with aggravated driving while under the influence of any drug or combination of drugs (625 ILCS 5/11-501(a)(4), (d) (West 2014)), unlawful possession of a controlled substance (heroin) (720 ILCS 570/402(c) (West 2014)), and unlawful possession of drug paraphernalia (720 ILCS 600/3.5(a) (West 2014)).

¶ 5 On October 5, 2015, the State charged defendant by information in case No. 15-CF-288 with residential burglary (720 ILCS 5/19-3(a) (West 2014)) and theft (720 ILCS 5/16-1(a)(1) (West 2014)).

¶ 6 On March 29, 2016, the State charged defendant by information in case No. 16-CF-106 with two counts of unlawful delivery of a controlled substance (720 ILCS 570/401(d) (West 2014)) and two counts of unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2014)).

¶ 7 On September 20, 2016, defendant entered guilty pleas to aggravated driving while under the influence of any drug or combination of drugs and unlawful possession of a controlled substance in case No. 15-CF-39, theft in case No. 15-CF-288, and all the counts (two

counts of unlawful delivery of a controlled substance and two counts of unlawful possession of a controlled substance) in case No. 16-CF-106.

¶ 8 The trial court held defendant's sentencing hearing on November 21, 2016. The court admitted both the presentence investigation report (PSI) and a supplemental PSI. The State noted it did not have any additional evidence in aggravation. Defense counsel presented no additional evidence in mitigation. The State recommended defendant receive six years in prison, which the State broke down as follows: two years for aggravated DUI in case No. 15-CF-39; two years for theft in case No. 15-CF-288; and four years on both counts of unlawful delivery of a controlled substance and three years on both counts of unlawful possession of a controlled substance in case No. 16-CF-106. The State noted the sentences in case No. 16-CF-106 would run consecutively to defendant's sentence for aggravated DUI in case No. 15-CF-39.

¶ 9 The State argued aggravating factors necessitated a prison sentence in this case instead of probation. According to the State, defendant's acts caused or threatened serious harm, and she had a history of delinquency and a litany of pending felony charges. The State also contended a prison sentence would have a deterrent effect on others.

¶ 10 Defendant's counsel in case No. 15-CF-39 argued the facts and defendant's criminal history at the time of the offenses in that case did not justify a prison sentence. Defendant had a different attorney in case Nos. 15-CF-288 and 16-CF-106. Defendant's attorney in these cases argued drug court would be helpful for defendant and acknowledged defendant's case was serious. However, counsel argued defendant was not a drug dealer in the conventional sense but was only selling drugs to maintain her habit. Counsel also argued defendant was not a danger to the community. According to defense counsel, "She's not out selling to make money. She only sells to people that she's using with, which obviously is not an

excuse, but it's an explanation as to what's occurring with the drug addiction that she is an addict. She needs treatment, and incarceration would not serve the needs of justice in that fashion."

¶ 11 In her statement of allocution, defendant acknowledged what she had done was wrong but denied being a drug dealer or a thief. She stated her addiction had taken over her life and made her put her son, who she identified as the most important person in her life, on the "back burner." According to defendant, she would not have committed the crimes for which she was being sentenced if she was not an addict. She told the court, "I would really like you to help me get my life back and learn how to live a sober life and regain the time that I lost with my son and be a role model to him that he needs."

¶ 12 The trial court first addressed whether probation would be appropriate. The court stated "it would likely not deprecate the serious nature of the offense and be inconsistent with the ends of justice if the Defendant was placed on a term of probation or conditional discharge." However, the court noted defendant committed offenses while on bond and the seriousness of her offenses escalated over time. The court did note defendant did not have any prior felonies and also recognized defendant's offenses were triggered by her addiction to heroin but disagreed with the suggestion defendant was not a drug dealer and a thief. The court told defendant:

> "And I often draw the distinction and I am going to draw that distinction again when you are considering aggravation and mitigation that there's a distinction between those people who are using and part of the drug problem and those people who are selling and contributing to the drug problem. And somebody has to go up to Chicago and get this heroin, and the person that does that is the drug dealer. They are bringing it back, and they are selling it. And so

in that manner I think it is a little bit more concerning and particularly in a case like this when you are already on bond conditions.

The time to reach out for help started actually long before February 22nd of 2015. But February 22nd of 2015 should have been a wake up call. It was not. And there continued to be very serious offenses after that date that not only hurt Miss Holzhauer but hurt the community as a whole. All right? You know, while I recognize that your boyfriend was not seeking restitution, the bottom line is there was harm done to somebody in the community by your actions in the stealing of his personal property and then of course pawning it for drug money.

Same thing with the delivery charges. There's a harm to people in the community. You are not only part of the problem at that point, but you are contributing to the problem.

So I think that deterrence is an aggravating factor. I never believe that it's a real strong factor for several reasons. First of all, there isn't anybody in here reporting on this; and it's not going to make it to the papers. It may, however, be talked about among the drug users in the community and perhaps those people that are driving up to Chicago. Will it cause any of them to pause and maybe not drive up there? Probably not. But I think that insofar as sending a message in general to the community, hey, we recognize we have a drug problem and we recognize that there's a difference between those people who are using and those people who are distributing. And regardless of whether you are a small distributor, dealer or a large scale, I think the message is the same. Again, not the strongest factor but certainly it's a factor to consider.

You were as I said on bond at the time that the offenses were committed. And I think the State has a strong argument that your conduct caused or threatened serious harm particularly obviously with the DUI charge but also with the delivery charges, especially when you consider that the substance you were distributing was heroin. We know people are overdosing on heroin just all the time, and that requires law enforcement to respond. That requires EMT's to respond, and that creates a heightened opportunity for issues when you've got speeding emergency vehicles trying to respond to a scene, you are taking them away from another scene, potential people dying. I mean, it's an endless vicious cycle.

So here as I started and I'm going to end with the same statement, individually perhaps any one of these offenses would most likely result in a term of probation. But when I look at them as a whole, I think that if the Defendant was sentenced to a term of probation on these offenses that occurred over an extended period of time while she was on bond and continued to escalate that it would deprecate the very serious nature of the charges and be inconsistent with the ends of justice. Only when I refused to lower your bond the third time on the delivery charges, only then did, obviously you got clean and you went to treatment. But it's easy to say, hey, you know, I want to maintain sobriety when you are sitting in jail and you have no choice but to maintain sobriety."

The court then sentenced defendant to concurrent terms of two years in case No. 15-CF-39, two years in case No. 15-CF-288, and four years for the delivery charges and three years for the possession charges in case No. 16-CF-106. The sentences in case Nos. 15-CF-288 and 16-CF-

106 were concurrent to each other but consecutive to the sentence in case No. 15-CF-39.

¶ 13 After defendant filed a motion to reconsider her sentences, the trial court held a hearing on the motion in January 2017. In addressing defendant's argument the trial court erred by considering the harm to the community as an aggravating factor in sentencing defendant, the trial court stated:

> "Well, there were a number of aggravating factors in this case and a number of mitigating factors that the Court considered. Here, in reviewing the matter, and I know that generally I point out during sentencing hearings the harm that could be caused to the community by way of other people, you know, the first responders and the argument that I guess is being made by the defendant here in this case. But even assuming that the legislature has already considered that in determining the classification and not giving that particular issue much weight. And I mention that always because I think it is a concern; but, here, notwithstanding that, I still think that the sentence is well within the range, that the aggravating factors that exist here greatly outweigh the mitigating factors. And I believe that the sentence is appropriate. So the motion to reconsider is denied."

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 Defendant argues the trial court improperly sentenced her because the court relied on aggravating factors which the legislature accounted for when it classified the level of the offenses at issue. "[W]hether a court relied on an improper factor in imposing a sentence ultimately presents a question of law to be reviewed *de novo*." *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8, 973 N.E.2d 459.

¶ 17 "[C]onduct that is an essential element of an offense cannot be used to enhance the punishment for that offense ***." *People v. Catron*, 285 Ill. App. 3d 36, 38, 674 N.E.2d 141, 143 (1996). However, a trial court may consider the nature and circumstances of the offense as it occurred. *Catron*, 285 Ill. App. 3d at 38, 674 N.E.2d at 143.

¶ 18 Our supreme court has stated "[s]ound public policy demands that a defendant's sentence be varied in accordance with the particular circumstances of the criminal offense committed." *People v. Saldivar*, 113 Ill. 2d 256, 269, 497 N.E.2d 1138, 1143 (1986). Even though two offenses may be punishable under the same statute, "[c]ertain criminal conduct may warrant a harsher penalty than other conduct ***." *Saldivar*, 113 Ill. 2d at 269, 497 N.E.2d at 1143.

> "[T]he commission of any offense, regardless of whether the offense itself deals with harm, can have varying degrees of harm or threatened harm. The legislature clearly and unequivocally intended that this varying quantum of harm may constitute an aggravating factor. While the classification of a crime determines the sentencing range, the severity of the sentence depends upon the *degree of harm* caused to the victim and as such may be considered as an aggravating factor in determining the exact length of a particular sentence, *even in cases where serious bodily harm is arguably implicit in the offense for which a defendant is convicted*." (Emphases in original.) *Saldivar*, 113 Ill. 2d at 269, 497 N.E.2d at 1143.

¶ 19 Defendant argues the widespread harm of possessing and delivering heroin was considered by the legislature in classifying the offenses of possessing and delivering heroin. In *People v. McCain*, 248 Ill. App. 3d 844, 851-52, 617 N.E.2d 1294, 1300 (1993), the Second

District stated:

> "It is well recognized that drugs and drug-related crimes cause great harm to our society. The extent of this harm is demonstrated in the criminal justice system on a daily basis. In that regard, some courts have noted that it is improper to consider this general societal harm as an aggravating factor in a drug case. [Citations.] If a trial court intends to consider the societal harm defendant's conduct threatened to cause as an aggravating factor, the record must demonstrate that the conduct of the defendant had a greater propensity to cause harm than that which is merely inherent in the offense itself. ***
>
> It is not improper *per se* for a sentencing court to refer to the significant harm inflicted upon society by drug trafficking. It is important that defendant's understand why they are subject to the penalties provided by law and why they have received their particular sentences. The harm that the crime causes society is an inherent consideration which underlies the basic range of penalties specified by the legislature. Commenting on the problems caused by drug-related crime encourages rehabilitation by providing a context in which a defendant may develop feelings of remorse. We do not wish to discourage courts from addressing such relevant considerations, but we suggest that sentencing courts attempt to segregate such general commentary from the balancing of sentencing factors."

¶ 20 The State argues the trial court's comments regarding the harm to society were insignificant and do not merit a new sentencing hearing. In *People v. Scott*, 2015 IL App (4th) 130222, ¶¶ 55-56, 25 N.E.3d 1257, this court relied on our supreme court's reasoning in *People*

v. Bourke, 96 Ill. 2d 327, 332, 449 N.E.2d 1338, 1340 (1983), that remand is not automatically warranted when a trial court has considered an improper sentencing factor. In *Bourke,* our supreme court stated:

> "[R]eliance on an improper factor in aggravation does not always necessitate remandment for resentencing. *Where the reviewing court is unable to determine the weight given to an improperly considered factor, the cause must be remanded for resentencing.* [Citations.] However, where it can be determined from the record that the weight placed on the improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence, remandment is not required." (Emphasis added.) *Bourke*, 96 Ill. 2d at 332, 449 N.E.2d at 1340.

In *Bourke*, the supreme court stated the record demonstrated the trial court placed insignificant weight on the improper aggravating factor it mentioned in sentencing the defendant, and the improper factor did not result in a greater sentence. *Bourke*, 96 Ill. 2d at 333, 449 N.E.2d at 1341. The court noted the State did not mention the improper aggravating factor during its closing argument. Instead, the State focused on the defendant's flagrant probation violations, including the commission of other crimes. *Bourke*, 96 Ill. 2d at 333, 449 N.E.2d at 1341. The court also recognized the defendant's sentences were substantially below the maximum sentences allowed. Unlike in *Conover*, the court was able to determine the defendant's sentence was not increased by the improper sentencing factor. *Bourke*, 96 Ill. 2d at 333, 449 N.E.2d at 1341. In *Scott*, like in *Bourke*, the State did not make an argument regarding an improper aggravating factor. *Scott*, 2015 IL App (4th) 130222, ¶ 55.

¶ 21 In this case, the trial court determined probation was not appropriate. The cumulative sentencing range defendant faced on the charges in all three cases was between 4

years and 10 years in prison. The court could have sentenced defendant to prison from one year to three years for aggravated DUI (625 ILCS 5/11-501(a)(4), (d)(1)(G), (d)(2)(A) (West 2014); 730 ILCS 5/5-4.5-45(a) (West 2014)) and from three years to seven years for unlawful delivery of a controlled substance (720 ILCS 570/401(d) (West 2014); 730 ILCS 5/5-4.5-35(a) (West 2014)). Defendant's sentence on the unlawful delivery charge was required to run consecutive to her sentence for aggravated DUI because defendant was on pretrial release when the unlawful delivery occurred (730 ILCS 5/5-8-4(d)(8) (West 2014)).

¶ 22 Considering defendant continued to commit crimes when she was released on bond on the aggravated DUI charge, we conclude the trial court did not abuse its discretion in finding probation was inappropriate. We also note the sentences imposed on defendant by the trial court required her to serve six years in prison, which is only two years higher than the minimum term of imprisonment and four years less than the maximum prison sentence defendant could have received. As a result, this is not a case where the trial court relied on an improper sentencing factor and imposed the maximum possible sentence.

¶ 23 However, the State did rely on the improper aggravating factor in asking the trial court to sentence defendant to at least six years in prison, and, as we have already noted, the court discussed the improper aggravating factor in sentencing defendant. In fact, the trial court stated, "I think the State has a strong argument that your conduct caused or threatened serious harm particularly obviously with the DUI charge but also with the delivery charges." This was not a situation where the trial court discussed the societal harm caused by drug use and distribution separately from its discussion of the aggravating factors in the case.

¶ 24 Although defendant did not receive the maximum sentence, we do not agree with the State's argument the record clearly shows the trial court did not place much weight on

societal harm in sentencing defendant. We recognize at the hearing on the motion to reconsider sentence the trial court referenced its practice of pointing out the societal harm caused by drug use and distribution in the community. We note Judge Bauknecht recently commented on the societal harm caused by drugs and those who deal drugs in the community when sentencing the defendant in *People v. McGath*, 2017 IL App (4th) 150608, ¶ 62, 83 N.E.3d 671. The defendant in *McGath* also argued Judge Bauknecht subjected him to a double enhancement at sentencing by considering societal harm as a factor in aggravation. *McGath*, 2017 IL App (4th) 150608, ¶ 65. Although the argument was forfeited in *McGath*, this court stated the defendant's claim was without merit. *McGath*, 2017 IL App (4th) 150608, ¶ 73. However, it is not clear from *McGath* whether the State argued the societal harm was an aggravating factor as it did in this case.

¶ 25 In the case *sub judice*, we are faced with a situation where both the State and the trial court were treating societal harm as an aggravating factor. Further, considering the trial court noted the State had a strong argument defendant's conduct caused or threatened serious harm, we are unable to determine whether the improper factor contributed to a greater sentence. As a result, we must remand this case for a new sentencing hearing.

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we affirm defendant's convictions but remand this case for a new sentencing hearing.

¶ 28 Remanded with directions.

¶ 29 JUSTICE HARRIS, dissenting.

¶ 30 I respectfully dissent. Even assuming the trial court's comments pertaining to societal harm were improper, it is clear she gave the factor little weight when sentencing defendant. At the hearing on the motion to reconsider, the court specifically addressed this asserted error, noting the sentence imposed was "well within the range" and she had "not giv[en] that particular issue much weight." In my view, the court's consideration of the societal harm posed by the offense was insignificant and remandment for a new sentencing hearing is unnecessary.