2019 IL App (4th) 170238-U

NO. 4-17-0238

FILED
October 16, 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
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
STEVEN P. HENDERSHOTT,	)	No. 15CF1354
Defendant-Appellant.	)	
	)	Honorable
	)	John Casey Costigan,
	)	Judge Presiding.

PRESIDING JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Knecht and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding defendant's claims were forfeited where he failed to demonstrate that plain-error review excused his forfeiture. Further, although counsel never raised defendant's motion to reconsider claims, defendant suffered no prejudice and thus failed to establish ineffective assistance of counsel.

¶ 2 Defendant, Steven P. Hendershott, pleaded guilty to one count of aggravated driving under the influence (DUI) causing great bodily harm (625 ILCS 5/11-501(d)(1)(C) (West 2014)). After hearing, the trial court sentenced defendant to a term of five years and six months' incarceration in the Illinois Department of Corrections (IDOC). Defendant appeals, asserting he is entitled to remand for a new sentencing hearing because the trial court failed to consider a factor in mitigation and inappropriately or inaccurately considered certain factors in aggravation. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In October 2015, a grand jury returned an indictment against defendant alleging four counts of aggravated DUI causing great bodily harm (625 ILCS 5/11-501 (d)(1)(C) (West 2014)), Class 4 felonies carrying a possible penalty of probation or 1 to 12 years in prison (625 ILCS 5/11-501(d)(2)(F) (West 2014)). The charges stemmed from an incident during which defendant, while traveling south in the northbound lanes on Interstate 55 at approximately 45 miles per hour, struck an oncoming passenger vehicle containing James and Funda Pradke and their two children, one an infant and the other age four. James and Funda were severely injured in the collision and their four-year-old son's arm was amputated by a passenger restraint system.

¶ 5 Defendant was also severely injured in the accident and was unable to answer questions at the accident site. Officers noticed an empty alcoholic beverage bottle in and an odor of alcohol coming from the vehicle. A medical blood draw showed defendant had a blood-alcohol content of 0.130.

¶ 6 Ultimately, defendant pleaded guilty to one count of aggravated DUI causing great bodily harm (625 ILCS 5/11-501(d)(1)(C) (West 2014)), corresponding with the injuries to Funda Pradke. In exchange for his guilty plea, three aggravated DUI charges, as well as a misdemeanor DUI charge and an operating an uninsured motor vehicle charge, were dismissed.

¶ 7 Next, the matter proceeded to sentencing.

¶ 8 A. Presentence Investigation Report

¶ 9 Prior to the sentencing hearing, the State filed a presentence investigation report (PSI). The PSI revealed the following information. Defendant's prior criminal history included a 2005 conviction for possession of liquor by a minor, a 2007 conviction for possession of liquor by a minor, and a 2009 conviction for possession of drug paraphernalia and consumption of

liquor by a minor. The PSI identified several unprosecuted arrests, including a 2005 arrest for drug paraphernalia.

¶ 10 The PSI also included information on defendant's past substance abuse and treatment. Defendant first began drinking alcohol and using cannabis at age 16 and reported using both substances on a regular basis. In August 2010, defendant began treatment at the Institute for Human Resources Counseling Services (IHR), where he was diagnosed with alcohol and cannabis dependence. Defendant was unsuccessfully discharged in November 2010. In April 2011, defendant began outpatient treatment at Chestnut Health Systems at the direction of the Livingston County probation office. Defendant successfully completed Level II treatment in June 2011 but declined to participate in the recommended Level I treatment and was discharged.

¶ 11 In March 2016, after the accident, defendant began substance abuse treatment at IHR. Defendant was unsuccessfully discharged in May 2016 for excessive absence and his refusal to cease using tetrahydrocannabinol (THC) from cannabis. In August and September 2016, defendant reengaged in treatment and received a recommendation of 75 hours of treatment for severe alcohol and cannabis usage. Defendant was successfully discharged from treatment in January 2017. Defendant provided four negative drug screens between September and December 2017.

¶ 12 According to the PSI, since 2011, defendant worked as a certified nursing assistant (CNA), though he could not work immediately following the accident. In April 2016, Pontiac Healthcare and Rehab (Pontiac Healthcare), his prior employer, rehired defendant full-time.

¶ 13 The PSI also detailed defendant's mental health history. From the ages of 15 to 17, defendant saw a psychiatrist for depression. Defendant reported experiencing anxiety attacks

and attempting suicide at the age of 16. He had been diagnosed with generalized anxiety and adjustment disorder with depression. Defendant also reported being sexually abused between the ages of 14 and 18. Defendant neglected to report the abuse at the time when it happened due to concern he would not be believed, but he disclosed the abuse to a friend prior to the accident and to his parents after the accident.

¶ 14 As detailed in the PSI, defendant suffered significant injuries in the accident. Defendant sustained numerous fractures and lacerations and underwent multiple surgeries following the accident. Defendant was confined to a wheelchair for a period after the accident and underwent physical therapy in November and December 2015.

¶ 15 B. Sentencing Hearing

¶ 16 At the sentencing hearing, defendant requested a correction to a scrivener's error in the PSI. The State then presented evidence in aggravation.

¶ 17 Trooper Jason Pignon testified he was the first officer on the scene of the accident. Trooper Pignon described the condition of the vehicles and their occupants at the scene of the accident. He also detailed the injuries suffered by the victims and defendant after the accident.

¶ 18 James Pradke made a victim impact statement, during which he explained how the accident affected his life and work, and the lives of his family, including his four-year-old son who was now an amputee.

¶ 19 In mitigation, Kathy Finkenbinder, the activity director at Pontiac Healthcare, testified regarding defendant's value as a CNA. Finkenbinder characterized defendant as a "one of a kind" professional who went "above and beyond" while working for Pontiac Healthcare. Finkenbinder testified that male CNAs are particularly valuable because they are difficult to find

and relate well to male residents. Finkenbinder also testified that if defendant was incarcerated, he likely would not be employable as a CNA. Finkenbinder knew if defendant did not work for a period of two years, he would lose his CNA license. On cross-examination, Finkenbinder admitted that although she did not foresee a healthcare institution hiring defendant after a period of incarceration due to background check procedures, she was not aware of any requirement that would bar defendant from employment.

¶ 20 Jill Hendershott, defendant's mother and a housekeeper at Pontiac Healthcare, testified that the accident did not "depict" defendant. She explained there was a misunderstanding related to finances between her and defendant shortly before the accident. Hendershott testified defendant held a very important role in their family, serving as a father figure to his sister's four children. She further testified the accident had greatly affected defendant. According to her, defendant experienced physical pain, suffered from nightmares, and had bouts of depression.

¶ 21 Defendant presented two group exhibits. Group Exhibit #1 contained three letters from defendant's coworkers attesting to defendants work as a CNA, defendant's discharge summary from IHR, and a printout of defendant's employee profile from Pontiac Healthcare's website. Group Exhibit #2 contained a letter from defendant's sister describing defendant as a father figure to her children and indicating defendant's remorse for the accident. The exhibit also contained the accident reconstruction report.

¶ 22 The State recommended a sentence of eight years' incarceration in the IDOC. In mitigation, defense counsel argued defendant had been a victim of sexual assault during his teen years (from ages 14 to 18) and had led "a law abiding life." Defense counsel requested probation and a term in the county jail.

¶ 23 Defendant gave a statement in allocution. Defendant expressed his remorse for the accident, acknowledging his actions were "terrible." Defendant apologized to the Pradke family and committed to holding himself accountable and working through his problems.

¶ 24 The trial court "considered the factual basis, the pre-sentence investigation report, the history, character and attitude of the defendant ***, the evidence and arguments, the statement in allocution *** the relevant statutory factors in aggravation ***, and the relevant statutory factors in mitigation ***." The trial court noted a number of factors were presented in aggravation and mitigation and stated, "I'm going to go over some of those that I think are particularly relevant here today."

¶ 25 In mitigation, the trial court noted defendant's lack of intent to cause harm. Although defendant had a criminal history, this was defendant's first felony, and defendant was unlikely to reoffend if he were no longer involved with drugs and alcohol. The court also considered the statements of those who spoke to defendant's character. The court considered defendant's statement in allocution, to which the court stated, "I do believe that you are remorseful for what happened in this particular situation."

¶ 26 In aggravation, the trial court noted defendant's criminal history, stating "by the nature of those offenses the Court finds those particularly aggravating in this situation." The court highlighted defendant's possession of liquor by a minor offenses in 2005 and 2007, and the 2009 offenses of possession of drug paraphernalia and consumption of liquor by a minor, which were charged on the same day. The trial court categorized each of those offenses as an opportunity for treatment that defendant failed to take advantage of. The trial court referenced uncharged conduct, including a 2005 arrest for possession of drug paraphernalia. As a further aggravating factor, the trial court considered defendant's history with drug and alcohol abuse,

stating defendant was "unsuccessfully discharged in 2010" from treatment and "discharged in 2011 unsuccessfully." The trial court noted that, after the accident, defendant was "unsuccessfully discharged in 2016 for too many absences. The counselors noting in their notes that you were resistant ***[,] [y]ou continued to use THC at that point in time." Finally, the court emphasized the need for deterrence, stating "this Court believes that a sentence is necessary to deter others from committing the same offense."

¶ 27 Defendant was sentenced to five years and six months in the IDOC. Defendant filed a motion to reconsider sentence, which was denied.

¶ 28 This appeal followed.

¶ 29 II. ANALYSIS

¶ 30 On appeal, defendant asserts this court should remand for a new sentencing hearing because the trial court "greatly exaggerated the degree of aggravating evidence" and failed to consider a mitigating factor. The State contends defendant has waived these issues by failing to raise them before the trial court. However, defendant asks this court to review these claims under the plain-error doctrine.

¶ 31 A. Standard of Review

¶ 32 One seeking relief under plain-error analysis bears the burden to make the showing required to demonstrate entitlement to relief under plain error. *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007).

> "[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (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 and 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." *Id.*

¶ 33 Thus, relief is only available under the plain-error doctrine if the defendant can "first show that a clear and obvious error occurred." *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184, 1187 (2010).

¶ 34 In determining an appropriate sentence, the trial court must consider "the defendant's personal history, including his age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education." *People v. Maldonado*, 240 Ill. App. 3d 470, 486, 608 N.E.2d 499, 509 (1992). It is not the role of this court to substitute its judgment for that of the trial court merely because we would have reached a different conclusion. *People v. Alexander*, 239 Ill. 2d 205, 213, 940 N.E.2d 1062, 1066 (2010). Rather, we review the trial court's sentence for an abuse of discretion. *Id.* at 212. "A sentence will be deemed an abuse of discretion where the sentence is 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *Id.* (quoting *People v. Stacey*, 193 Ill. 2d 203, 210, 737 N.E.2d 626, 629 (2000)).

¶ 35 Aggravated DUI is a Class 4 felony (625 ILCS 5/11-501(d)(2)(F) (West 2014)), and although probation may be imposed, there is also a possible penalty of 1 to 12 years' imprisonment in the IDOC. In this instance, defendant received a five-year, six-month sentence. "A sentence which falls within the statutory range is not an abuse of discretion unless it is manifestly disproportionate to the nature of the offense." *People v. Jackson*, 375 Ill. App. 3d 796, 800, 874 N.E.2d 592, 595 (2007).

¶ 36 B. Defendant's Sentence

¶ 37 Defendant first contends the trial court erred by failing to consider at sentencing the sexual abuse defendant endured as a teen, thereby mitigating defendant's behavior. Sentencing decisions must be based on a consideration of all relevant factors and the specific circumstances of each case. *People v. Fern*, 189 Ill. 2d 48, 53, 723 N.E.2d 207, 209 (1999). The court must not ignore relevant mitigating factors. *People v. Flores*, 404 Ill. App. 3d 155, 157, 935 N.E.2d 1151, 1154 (2010). However, "a trial court is not required to expressly outline its reasoning for sentencing, and absent some affirmative indication to the contrary (other than the sentence itself), we must presume that the court considered all mitigating factors on the record." *People v. Jones*, 2014 IL App (1st) 120927, ¶ 55, 8 N.E.3d 470. This presumption may be overcome only by showing explicit evidence from the record that the court did not consider mitigating evidence. *Flores*, 404 Ill. App. 3d at 158.

¶ 38 The record shows the trial court explicitly stated it considered "the factual basis, the pre-sentence investigation report, the history, character and attitude of defendant, *** the evidence and arguments, and the statement in allocution." The court also considered "the relevant statutory factors in aggravation *** and the relevant statutory factors in mitigation ***." Although the trial court did not explicitly discuss defendant's history as a victim of sexual abuse as a factor in mitigation, the court stated, "I'm going to go over *some* of those [factors] that I think are particularly relevant here today." (Emphasis added). Here, where the record lacks an explicit showing demonstrating that the court failed to consider defendant's history as a victim of sexual abuse, we presume the trial court considered the sexual abuse as a mitigating factor. Therefore, no clear and obvious error occurred.

¶ 39 Defendant next contends that the trial court erred by considering convictions in 2005 and 2007, as well as two convictions in 2009, as true and separate opportunities for

treatment. Defendant argues that, as for the 2005 and 2007 convictions for possession of liquor by a minor, defendant was a teenager and it was therefore unrealistic to expect him to seek treatment without guidance from the court. Further, defendant argues the trial court treated the 2009 convictions as two separate opportunities for treatment when the convictions were on the same day. Therefore, the trial court should have only found one missed opportunity for treatment rather than four.

¶ 40 Defendant offers no citation to authority in support of his argument that a 17-year-old is incapable of recognizing a problem and seeking to correct it based on a criminal conviction. Instead, defendant cites *Miller v. Alabama*, 567 U.S. 460 (2012), for the proposition that juveniles are constitutionally different from adults in sentencing. *Miller*, 567 U.S. at 471. However, the *Miller* case centers around the sentencing *of* juvenile defendants, not the weight a juvenile conviction should be given at the sentencing of an adult defendant. Further, defendant provides no support for his argument that the 2007 conviction, when defendant was 19 years old and therefore no longer a juvenile, should not be considered a missed opportunity for treatment.

¶ 41 Defendant also contends the court treated the two 2009 convictions as two separate opportunities for treatment. Even if the court did consider the convictions as two distinct opportunities for treatment, because there is no reason the court could not consider the 2005 and 2007 convictions, the court would have been considering four missed opportunities for treatment rather than three. Further, although the convictions occurred on the same day, the convictions were two drug or alcohol related convictions for the court to consider in defendant's history. We conclude the court had ample history of defendant's convictions related to drugs and alcohol to consider as aggravating factors, and therefore no error occurred.

¶ 42 Defendant next argues the trial court committed plain error by considering in aggravation his unprosecuted arrest for possession of drug paraphernalia in 2005.

¶ 43 "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. "[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. Jackson*, 149 Ill. 2d 540, 548, 599 N.E.2d 926, 930 (1992) (citing *People v. La Pointe*, 88 Ill. 2d 482, 498-99, 431 N.E.2d 344, 351 (1981)). The standard to admit such evidence is that it be "relevant and reliable." *Jackson*, 149 Ill. 2d at 549. Therefore, this court has held "the mere listing of prior arrests, not resulting in convictions, in a presentence report does not satisfy the accuracy requirement of *La Pointe*. We therefore hold that mere arrests, standing alone, without further proof of the conduct alleged, are inadmissible in the sentencing determination." *People v. Thomas*, 111 Ill. App. 3d 451, 454, 444 N.E.2d 288, 290 (1983). Here, the trial court erroneously considered defendant's unprosecuted arrest for drug paraphernalia in 2005, a clear error we may consider under plain-error review.

¶ 44 Defendant next argues the trial court inaccurately characterized the completion of his substance abuse treatment in 2011 as an unsuccessful discharge. The court stated as to the 2011 treatment: "In 2011 the Livingston County Probation Office directed you to go to treatment and you chose not to participate. You were discharged in June of 2011 unsuccessfully." As detailed in the PSI, defendant attended Level II treatment and successfully completed the program on June 8, 2011. However, although treatment providers recommended defendant participate in Level I treatment, he chose not to continue treatment and was discharged on June

20, 2011. Defendant therefore argues the trial court erred by stating defendant was unsuccessfully discharged.

¶ 45 Even though the details of defendant's attempted substance abuse treatment show he was partially successful by completing Level II treatment, the fact remains that defendant chose to not complete Level I treatment as recommended by his treatment providers. Further, it is evident by defendant's continued use of drugs and alcohol that the treatment was, in the end, unsuccessful. We do not find error in the trial court's characterization of the 2011 treatment as an unsuccessful attempt at treatment in defendant's lengthy history of substance abuse.

¶ 46 Defendant next argues the trial court placed too much emphasis on defendant's continued cannabis use. Although defendant concedes the illegal cannabis use had "some proper aggravating value," defendant argues that because he was using THC for pain management for injuries sustained in the accident, the court abused its discretion by finding defendant's continued cannabis use was "very aggravating."

¶ 47 The trial court noted defendant's use of THC for pain management after the accident, stating, "The Court understands that." However, the trial court also noted defendant did not have a prescription for THC for pain control. Defendant chose to illegally self-medicate with cannabis rather than seek legal treatment for his ongoing pain. The trial court properly afforded greater weight to defendant's illegal use of cannabis than defendant's excuse of pain management. A reviewing court must not reweigh the factors or substitute its judgment for that of the trial court. *People v. Little*, 2011 IL App (4th) 090787, ¶ 24, 957 N.E.2d 102. Therefore, the trial court properly considered defendant's continued illegal use of cannabis as an aggravating factor.

¶ 48 Finally, defendant claims the trial court's errors cumulatively denied him a fair sentencing hearing. However, we find only one error, which renders the issue moot. *People v. Medley*, 111 Ill. App. 3d 444, 450, 444 N.E.2d 269, 273 (1983) ("The doctrine of cumulative error cannot be applied when there is only one error. Therefore, the issue of cumulative error in this case is moot.").

¶ 49 Because we have found the trial court erroneously considered defendant's 2005 arrest, we consider whether the evidence was closely balanced. As defendant has not asserted the alleged error deprived him of a fair sentencing hearing, we limit our review to the closely balanced evidence prong. *Hillier*, 237 Ill.2d at 545-46 ("[W]hen a defendant fails to present an argument on how either of the two prongs of the plain-error doctrine is satisfied, he forfeits plain-error review.").

¶ 50 Defendant argues the evidence was closely balanced given the similar number of mitigating and aggravating factors. Defendant identifies six factors in mitigation: (1) defendant did not contemplate his conduct would cause or threaten harm; (2) defendant had no prior felony convictions; (3) most, if not all, of defendant's criminal history involved drugs and alcohol; (4) defendant was a passionate and caring person who worked long hours as a CNA; (5) defendant completed substance abuse treatment and his drug screens were clean; and (6) defendant showed genuine remorse for his actions. In aggravation, defendant identifies five factors: (1) the serious harm caused, (2) defendant's four prior misdemeanor convictions and other arrests, (3) defendant's failed attempts at treatment, (4) defendant's continued illegal use of THC after the accident, and (5) deterrence.

¶ 51 However, the mere number of factors in aggravation and mitigation are not indicative of how close the evidence was balanced. "[T]he weight to be assigned to factors in

aggravation and mitigation and the balance between those factors are matters within the sentencing court's discretion." *People v. Lefler*, 2016 IL App (3d) 140293, ¶ 31, 48 N.E.3d 257. Here, although there were several factors in mitigation, the court placed more weight on defendant's extensive history of substance abuse, evidenced by his criminal history and substance abuse treatment history, and the need for deterrence for very serious and avoidable conduct. On this record, we find no abuse of discretion and no plain error.

¶ 52 C. Ineffective Assistance of Counsel

¶ 53 Alternatively, defendant argues he received ineffective assistance of counsel where defense counsel failed to raise his alleged errors in defendant's motion to reconsider sentence. Defendant asserts this court should remand for a new sentencing hearing. We review ineffective-assistance-of-counsel claims *de novo*. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25, 960 N.E.2d 27. To prove ineffective assistance of counsel, defendant must demonstrate counsel's (1) performance fell below an objective standard of reasonableness; and (2) deficient performance resulted in prejudice to the defendant such that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). If a defendant fails to prove either prong of the *Strickland* test, his claim for ineffective assistance of counsel must fail. *People v. Williams*, 2012 IL App (1st) 100126, ¶ 26, 976 N.E.2d 476. We first address the second prong.

¶ 54 To demonstrate prejudice, defendant must show the results of the proceeding would have been different had his attorney raised the alleged errors in his motion to reconsider sentence. As discussed above, we find the only error that occurred was the consideration of defendant's 2005 arrest. At the hearing on the motion to reconsider sentence, the court considered defendant's criminal history related to drugs and alcohol and defendant's "long

history of substance use." We do not find that the improper consideration of a single arrest significantly impacted the sentence the trial court imposed when recognizing the properly weighed aggravating factors. We conclude defense counsel's failure to raise the alleged errors in defendant's motion to reconsider sentence did not prejudice defendant, and thus, was not ineffective assistance.

¶ 55 III. CONCLUSION

¶ 56 For the reasons stated, we affirm the trial court's judgment.

¶ 57 Affirmed.