2019 IL App (4th) 180295-U

NOS. 4-18-0295, 4-18-0296 cons.

FILED
July 19, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KIMBERLY BINNION, Defendant-Appellant.	))))))))	Appeal from the Circuit Court of Coles County Nos. 14CF87 17CF204 Honorable Brien J. O'Brien, Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant did not waive her argument the trial court erroneously sentenced her to mandatory consecutive prison terms.

(2) The trial court committed plain error by sentencing defendant to consecutive sentences under the mistaken belief the law required it to do so.

¶ 2 In November 2017, defendant, Kimberly Binnion, was sentenced to two consecutive three-year terms for forgery (720 ILCS 5/17-3(a)(2) (West 2012)) and escape (720 ILCS 5/31-6(a) (West 2016)). Defendant appeals her sentence, arguing the trial court committed plain error when it sentenced her to consecutive terms under the mistaken belief the law required it do so. We agree with defendant and modify defendant's sentence.

¶ 3 I. BACKGROUND

¶ 4 This case comes to us on a consolidated appeal of two trial court judgments against defendant. In case No. 14-CF-87, defendant was charged with forgery. In case No. 17-CF-204, the State charged defendant with escape.

¶ 5 Defendant, in November 2014, entered a negotiated plea for forgery. Pursuant to the plea agreement, the trial court sentenced defendant to 24 months' probation. According to the factual basis for the plea, defendant wrote a $350 check on another individual's account without permission and presented it to the Days Inn in Mattoon, Illinois.

¶ 6 After sentencing, the trial court transferred defendant to Macoupin County to serve her probation. Defendant did not comply with the terms of that probation. In June 2015, defendant admitted using cannabis. In September 2015, a hearing was held on defendant's probation status. Defendant failed to appear for that hearing. Defendant's probation officer reported defendant had not completed public-service employment, "never made a payment," continued to test positive for cannabis, and was "on probation for at least two other counties." The court ordered defendant to serve 30 days "of her stayed jail time."

¶ 7 In November 2015, the Coles County probation office filed a report of a probation violation and recommended a petition to revoke defendant's probation. The report indicates defendant failed to report to the probation officer since June 2015, had not participated in public-service employment, and had not made a payment since being sentenced to probation.

¶ 8 In December 2016, another hearing regarding defendant's probation was held. Defendant failed to appear. The trial court ordered defendant serve 60 days of stayed jail time. Defendant was released from incarceration on February 3, 2017.

¶ 9 A March 24, 2017, affidavit signed by a probation officer indicates defendant

continued to fail to comply with the terms of her probation. Defendant failed to report to her probation officer since her release. Defendant was not residing at her last reported address. A warrant was issued for defendant's arrest. Defendant was arrested on April 18, 2017.

¶ 10 On April 20, 2017, the trial court ordered defendant serve 30 days of her stayed jail time. Defendant asked the court to stay her mittimus so she could arrange for childcare and secure her social-security income. The court agreed to do so, staying the mittimus until May 1, 2017. The court warned defendant if she failed to report additional charges could be filed.

¶ 11 Defendant failed to report to the Coles County jail; the State charged her with escape. In September 2017, defendant admitted the allegation she violated her probation for her forgery conviction, and she entered an open guilty plea to escape. As the trial court began to admonish defendant about the penalties she faced, the State informed the court her sentences must be served consecutively: "And, Your Honor, I notice it was not on the Information but given that the charge is escape it would also be mandatory consecutive to 14-CF-87 if she's sentenced to the Department of Corrections." The trial court thanked the State for the clarification and the following question and answer occurred:

> "THE COURT: *** As [the State] has pointed out any sentence imposed in that case would be mandatory consecutive to 14-CF-87, which would mean it would follow or be added onto any sentence in that case. Do you understand the possible penalties?
>
> DEFENDANT BINNION: Yes, Your Honor."

The court accepted defendant's admission to the allegations in the petition to revoke and her

guilty plea to escape.

¶ 12 At the sentencing hearing, the State reminded the trial court the sentence on escape "would be mandatory consecutive." Before imposing sentence, the court summarized its findings as to mitigating and aggravating factors:

> "I find the following factors in mitigation to exist. Those being that the Defendant's conduct neither caused nor threatened serious physical harm to another.
>
> That the defendant did not contemplate that her criminal conduct would cause or threaten serious physical harm to another.
>
> And that the imprisonment of the defendant, I will say[,] may[] endanger her medical condition.
>
> Factors in aggravation that exist, obviously, the defendant's history of prior criminal activity[and t]he fact that a DOC sentence would be necessary to deter others from committing the same crime.
>
> The factor that I believe to be particularly significant here, and is listed as one of the factors in mitigation, but it is described as the fact that the defendant would be particularly likely to comply with the terms of a period of probation.
>
> In this case, my finding is that that factor clearly does not exist.
>
> As is set forth in the presentence investigation report,

[defendant] has had six different opportunities where a community[-]based sentence was imposed. And on each of those occasions, the result was an unsuccessful discharge.

At some point in time, we have to try a different option. And I think that's where we are today.

I recognize that [defendant] has had a difficult past, and maybe a difficult present; but based upon the evidence I have heard in this case, I cannot in good conscience sentence her to another period of probation, because it has been tried and has failed in each instance.

So, the decision that I have reached after considering all of the evidence is that in case number 14 CF 87, [defendant] will be sentenced to 3 years in the [DOC]. That would be followed by a one[-year] term of mandatory supervised release.

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With respect to cause number 17 CF 204, as [the State] has pointed out, the sentence in that case is mandatory consecutive to 14 CF 87. And I will sentence [defendant] to 3 years in the [DOC], to be followed by a one[-]year term of mandatory supervised release."

¶ 13 This appeal followed. In this court, defendant filed a petition to expedite her appeal, alleging she will complete the consecutive-sentences term in September 2019 and may be

released in August 2019. We granted her petition.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendant argues the trial court erroneously imposed consecutive sentences on the mistaken belief the sentence for escape must be served consecutively to the sentence for forgery. Defendant acknowledges she did not raise the issue before the trial court and therefore forfeited her claim but urges we may grant her relief under the plain-error doctrine. Defendant asks this court to modify her sentence from consecutive sentences so that they may be served concurrently.

¶ 16 The State does not dispute the trial court erroneously sentenced defendant under a misapprehension of the law but argues defendant waived this argument and is thus not entitled to relief under the plain-error doctrine. Pointing to defendant's statement agreeing she understood the possible penalties, which included an admonition she would have to serve the sentences consecutively, and her plea, the State contends she affirmatively accepted the error and waived any challenge to the sentence. The State further maintains the waiver in this case is particularly problematic because defendant received rather lenient 3-year terms, when she could have been sentenced to 10 years for escape and 5 years for forgery.

¶ 17 The parties thus dispute whether the events that occurred at the plea hearing constitute waiver or forfeiture. Waiver and forfeiture are distinct doctrines. *People v. Hughes*, 2015 IL 117242, ¶ 37, 69 N.E.3d 791. Waiver results from the voluntary relinquishment of a known right. *Id.* Forfeiture is the failure to comply with procedural requirements. *Id*. While representing their clients, counsel may (1) make tactical decisions not to object to otherwise objectionable matters, resulting in the waiver of that matter on appeal or (2) fail to realize the

objectionable nature of a matter, causing procedural forfeiture. *People v. Bowens*, 407 Ill. App. 3d 1094, 1098, 943 N.E.2d 1249, 1256 (2011). The distinction between the two doctrines has consequences in plain-error doctrine. While plain-error analysis applies to cases involving forfeiture, it does not apply to matters involving waiver. *People v. Schoonover*, 2019 IL App (4th) 160882, ¶ 15, ___ N.E.3d ___.

¶ 18 In support of its argument, the State relies on *People v. Dunlap*, 2013 IL App (4th) 110892, 992 N.E.2d 184. In *Dunlap*, this court concluded the defendant *waived* his challenge to the imposition of a $400 public-defender reimbursement upon deciding defendant affirmatively acquiesced to the amount of the reimbursement and to the materials the court relied upon to set that amount. *Id.* ¶ 11. In reaching this decision, we noted the court stated it intended to impose the reimbursement and asked defendant if there was anything he wanted to say on that matter. Both defendant and defense counsel responded they had nothing to say. *Id.* ¶ 10.

¶ 19 *Dunlap* is distinguishable. In this case, neither defendant nor defense counsel was asked if they had anything to add to the question of whether consecutive sentences would be imposed. Defendant was asked only if she understood the penalties she faced. It would be unfair to find a non-lawyer defendant, who simply stated she understood what the trial court was saying to her, voluntarily relinquished a known right when the prosecutor, defense counsel, and the trial judge did not know the law. At no point did defense counsel agree to consecutive sentences. Both defendant and defense counsel remained silent. In these circumstances, we find forfeiture, not waiver, occurred. See *Schoonover*, 2019 IL App (4th) 160882, ¶ 18 (finding no waiver resulted as the defendant and counsel remained entirely silent on the issue and neither expressed agreement with the trial court's action).

¶ 20 Having found the facts and circumstances indicate forfeiture, we turn to the question of whether this court may grant relief under the plain-error doctrine. To obtain relief from an error in sentencing under the plain-error doctrine, defendant must first show a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184, 1187 (2010). Defendant must then establish either (1) the evidence at the sentencing hearing was closely balanced or (2) the error was so egregious it denied defendant a fair sentencing hearing. *Id*. Defendant carries the burden of proof. *Id*.

¶ 21 Defendant has met her burden showing clear or obvious error occurred—a conclusion not disputed by the State. The State charged defendant with escape under section 31-6(a) of the Criminal Code of 2012 (720 ILCS 5/31-6(a) (West 2016)). Unlike the escape offense in section 3-6-4 of the Unified Code of Corrections (730 ILCS 5/3-6-4 (West 2016)), for which a consecutive sentence is mandatory (730 ILCS 5/5-8-4(d)(7) (West 2016)), no such requirement exists under section 31-6(a). The trial court was not statutorily required to sentence defendant to consecutive terms of imprisonment. The transcripts from the plea and sentencing hearings establish the court believed it was mandated to do so. Clear error occurred.

¶ 22 Defendant has also met her burden of establishing the second prong of the plain-error doctrine: the error was so serious it denied defendant a fair sentencing hearing (see *Hillier*, 237 Ill. 2d at 545). We note the State does not argue the trial court's misapprehension was not so egregious it denied defendant a fair sentencing hearing. In the case of *People v. Lashley*, 2016 IL App (1st) 133401, ¶ 69, 57 N.E.3d 780, the court concluded plain error occurred when the trial court "misapprehended the law in ordering that defendant serve his sentence in the case consecutively ***." The court cited decisions of the Illinois Supreme Court that recognized

"[t]he imposition of an unauthorized sentence affects substantial rights" (*People v. Hicks*, 181 Ill. 2d 541, 545, 693 N.E.2d 373, 375 (1998)) and " '[p]lain error may properly be invoked where a court misapprehends or misapplies the law' " (*In re Danielle J.*, 2013 IL 110810, ¶ 32, 1 N.E.3d 510).

¶ 23 As in *Lashley*, we find the trial court's misapprehension she must serve consecutive sentences was so serious it denied defendant a fair sentencing hearing. In this case, there is no evidence supporting the imposition of a discretionary consecutive sentence under section 5-8-4(c)(1) of the Unified Code of Corrections (730 ILCS 5/5-8-4(c)(1) (West 2016)), which authorizes a court to impose consecutive sentences upon a finding such is required to protect the public. Both forgery and escape, as occurred here, are nonviolent offenses. No evidence shows defendant was a dangerous or violent person. Defendant was denied her right to be sentenced according to the law.

¶ 24 Having found, in this case, the imposition of the consecutive sentence under the mistaken belief such sentence was mandatory constitutes plain error, we turn to the question of the appropriate relief. Defendant urges this court to follow *People v. Cameron*, 2012 IL App (3d) 110020, 977 N.E.2d 909, and modify the improperly imposed consecutive sentences to concurrent terms. The State maintains this court, if it finds plain error occurred, should remand for resentencing. The State argues a plea agreement is an enforceable contract and the State, when making its sentencing recommendations, was acting under the assumption defendant would serve consecutive terms.

¶ 25 Regarding the State's arguments, we note there was no plea agreement reached on the escape charge. Defendant entered an open plea, agreeing to be sentenced according to the

law. In addition, the argument for resentencing based on the fact the State would have sought lengthier sentences is belied by the fact defendant will, within two months, have served the consecutive sentences the State secured at sentencing. Resentencing, at this point, will serve no purpose.

¶ 26 In light of these circumstances, we agree with the approach taken in *Cameron* and will accordingly modify defendant's sentences so that they are served concurrently.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we affirm the judgment in part and modify the terms of the trial court's sentencing order to make the terms of imprisonment imposed for those two convictions to run concurrently with each other.

¶ 29 Affirmed in part; modified in part.