2020 IL App (1st) 180732-U

No. 1-18-0732

Order filed July 17, 2020

Sixth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 15 CR 7608
	)	
JAMES FINNEY,	)	Honorable
	)	Thomas V. Gainer, Jr.,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justice Cunningham concurred in the judgment.
Presiding Justice Mikva specially concurred.

ORDER

¶ 1 *Held*: Defendant's 13 year sentence for second degree murder is affirmed where the record establishes that the trial court did not improperly consider a factor inherent in the offense and did not abuse its discretion in weighing the factors in aggravation and mitigation during sentencing.

¶ 2 Following a bench trial, defendant James Finney was convicted of second degree murder (720 ILCS 5/9-2(a)(2) (West 2014)) and sentenced to 13 years' imprisonment. On appeal, defendant argues the trial court improperly considered a factor inherent in the offense, his

unreasonable belief that his use of force against the victim was necessary to defend himself, as a factor in aggravation and disregarded the factors in mitigation in sentencing defendant. We affirm.

¶ 3 Defendant was charged with six counts of first degree murder arising from the shooting death of David Finney, defendant's brother.[1] At trial, the evidence showed that, on April 10, 2015, David, his girlfriend Latori "Cherry" Coleman, and Waukean Rayford left the store David owned and traveled to David's house, where David lived with defendant. When they arrived, David noticed the fence at the house was missing and said he needed to "ask this a**h** in here," meaning defendant, what happened to it. Inside the house, Coleman went to David's bedroom to prepare for bed, while David spoke with defendant in the living room. Coleman came out briefly and saw defendant and David arguing about financial issues. She then "settled back down" in the bedroom. From the bedroom, Coleman overheard defendant and David continue to argue and call each other names, and heard a sound "like, someone being pushed." Coleman then heard wrestling sounds, "bumping around, and things falling over," which went on for three to four minutes. When the wrestling sounds ended, she heard David speaking "kind of soft, like subtle," and sounding "concerned." She then heard a gunshot. She heard defendant say "[y]eah n***a, I just popped yo a**. What you gonna do?" After three to five minutes, Coleman left the room and saw David laying in the hallway, after which police and paramedics arrived. Coleman never saw David with any weapon. Rayford similarly saw defendant and David arguing. While he was waiting outside for a pizza delivery, he heard them "tussling and wrestling" and then a shot.

[1] As defendant shares the same last name as the victim, his brother, we will refer to David Finney by his first name.

¶ 4 Police officers arrested defendant, who told them he put the gun in a car and did not know its owner. The parties stipulated that on April 8, 2016, a Chicago police officer recovered a firearm which was tested and found to be the source of a fired cartridge casing recovered at the scene of the shooting. The parties further stipulated that David's autopsy showed he had "a peripheral blood ethanol level at 122 milligrams per deciliter and a vitreous humor ethanol level at 175 milligrams per deciliter" and the cause of his death was a gunshot wound to the chest with the manner of death being homicide. Lastly, the parties stipulated that, according to the results of a gunshot residue test administered to defendant upon arrest, he "discharged a firearm, contacted a PGSR related item, or had both of his hands in the environment of a discharged firearm."

¶ 5 After the State rested, defendant moved for a directed finding, arguing the State did not prove all the elements of first degree murder as it did not prove defendant acted without lawful justification. The court denied defendant's motion.

¶ 6 Defendant then presented Keshia Williams, who testified that, when she was a customer in David's store, she saw him arguing with another customer. When she had "some words" with him about how he treated his customers, he pointed a gun at her and told her, "b****, get the f*** out of here before I kill you." Williams did not know either defendant or David, and had filed a police report regarding David's threatening her with a gun.

¶ 7 In closing, defendant argued he acted in self-defense with the reasonable belief that his actions were necessary to save his life, contending the danger to his life was "imminent" and "real." He argued the intoxicated David was a "bully" and "manipulator" who "pushed and pushed" defendant "into a corner where he had no other options," but to defend himself. Defendant argued

in the alternative that he should be found guilty of second degree murder, where he acted in unreasonable self-defense and he acted in provocation based on mutual combat.

¶ 8 The court found defendant guilty of second degree murder. In ruling, the court noted David had been "highly intoxicated" at the time of the incident and was "in a very angry state of mind when he entered the house" to confront defendant. The court found defendant and David had a physical altercation, which David initiated, after which defendant produced a gun and fired after David "spoke in a very quiet, subtle tone." Stating the circumstantial evidence suggested David was the initial aggressor for the verbal and physical altercations and Williams' testimony corroborated he was " a very aggressive person," the court found defendant believed he had the right to use the force he did in self-defense, but that his belief was "horribly" unreasonable. The trial court denied defendant's motion for a new trial, and the case proceeded to sentencing.

¶ 9 The presentence investigation report (PSI) presented at sentencing showed defendant had no prior felony convictions. He had successfully completed supervision sentences for misdemeanor battery to a police officer and driving while license suspended in 2014 and reckless driving in 2008, and had three pending charges for driving under the influence of drugs and an intoxicating compound. Defendant reported he had a good childhood and relationship with his parents before they died, whom he described as "loving, caring, and supportive." Defendant indicated no one in his immediate family had ever had a substance abuse problem, and his brother who died "was involved with the criminal justice system in the past." Defendant reported he completed high school in Chicago and attended Olive Harvey College for one-and-a-half-years, and completed a forty-hour program at Security Training Center in 1995. Defendant stated that prior to his arrest, he was employed through a temporary labor agency as a machine operator at

Pactiv Plastic Company and was in the process of training for the forklift operator position. Defendant denied ever using any illegal drugs. Defendant had participated in Alcoholics Anonymous and Narcotics Anonymous programs while in jail.

¶ 10 In aggravation, the State argued the aggravation in the case "is the facts of the case themselves." The State noted the shooting of an unarmed victim based upon "the provocation of the words and the physical struggle that ensued" displayed the "most unreasonable of excuses," resulting in the death of defendant's own brother. The State requested the maximum sentence of 20 years' imprisonment.

¶ 11 In mitigation, defense counsel argued defendant would not reoffend, because it had been "an isolated incident based on what happened with his brother" that evening. Further, defendant had no other felony convictions, had been working until his arrest, and educationally had been successful. Counsel also noted defendant had been taking care of his sick parents until they both died in 2012 and had been participating in therapeutic programs at the jail trying to improve himself. Counsel requested the "absolute minimum" sentence.

¶ 12 In allocution, defendant apologized for what had happened and asked God for forgiveness. Defendant stated he loved his brother and wished "this wouldn't have happened." Defendant asked the court to be merciful and lenient in sentencing.

¶ 13 The trial court sentenced defendant to 13 years' imprisonment in the Illinois Department of Corrections. The court stated it had reviewed the presentence investigation report, and found defendant's lack of felony convictions was "something in his favor." Then, stating it had reviewed "all" the factors in aggravation, it found the most important factor in considering the appropriate sentence was the seriousness of the crime. The court commented that, although the victim was the

initial aggressor and started the physical altercation that resulted in his death, defendant's conduct in using the force he did was unreasonable. The court noted Coleman's testimony that, "after all of the physical altercation stopped, the victim began talking in a very calm, almost plaintive *** way as if he was surprised to see the gun, and then the gunshot went off." The court agreed with the State that defendant's conduct "was the height of unreasonableness" and "very, very unreasonable, especially the way that the victim acted once the weapon was displayed." The court stated, "We don't have the exact words, but by the tone he was almost pleading, but the defendant shot him anyway."

¶ 14 Defendant argued in his motion to reconsider his sentence that the sentence was excessive in light of his background, the nature of his participation in the offense, and the factors in mitigation, and that the court improperly considered in aggravation matters that are implicit in the offense. The trial court denied defendant's motion.

¶ 15 On appeal, defendant requests we reduce his sentence to a minimum of four years or, alternatively, remand for re-sentencing, where the trial court improperly considered the unreasonableness of defendant's conduct, a factor inherent in the second degree murder offense, in aggravation, and failed to consider defendant's factors in mitigation at sentencing.

¶ 16 As an initial matter, the State argues defendant forfeited review of his claims because he failed to contemporaneously object to the issues at the sentencing hearing. *See People v. Hillier*, 237 Ill. 2d 539, 544-45 (2010) (holding that to preserve claims for appeal, a defendant must make both a contemporaneous objection and file a written postsentencing motion raising the issue). Defendant raised the claims in his posttrial motion but did not make contemporaneous objections at sentencing. He argues we may nevertheless review his improper factor claim under the plain

error doctrine, and he did not forfeit his excessive sentencing claim because it was sufficiently raised in the posttrial motion. We address the claims *seriatim*.

¶ 17 We conclude that defendant did not preserve his claims for review. As stated by our supreme court, "[i]t is well settled that, to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required." *Hillier*, 237 Ill. 2d at 544. Here, defendant failed to make a contemporaneous objection at the sentencing hearing. Thus, defendant did not properly preserve his claims of sentencing error.

¶ 18 Nevertheless, sentencing issues raised for the first time on appeal may be reviewed under the plain-error doctrine. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 11. In the sentencing context, a reviewing court may address a forfeited claim if a clear and obvious error occurred and either (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so serious that it deprived the defendant of a fair sentencing hearing. *Hillier*, 237 Ill. 2d at 545. "When a defendant fails to establish plain error, the result is that the 'procedural default must be honored.' " *People v. Naylor*, 229 Ill. 2d 584, 593 (2008) (quoting *People v. Keene*, 169 Ill. 2d 1, 17 (1995)). The initial consideration in this analysis is whether a clear and obvious error occurred at all. *Hillier*, 237 Ill. 2d at 545.

¶ 19 The parties disagree as to the standard of review for defendant's claim that the court improperly considered a factor inherent in the offense of second degree murder as an aggravating factor. Defendant argues the proper standard is *de novo*, while the State argues the proper standard of review is abuse of discretion. The imposition of a sentence is generally within the trial court's discretion, and we will not alter a sentence imposed by the trial court absent an abuse of that discretion. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8. However, the question of whether

a court relied on an improper factor in aggravation in imposing a sentence is a question of law that we review *de novo*. *Id.*; *People v. Chaney*, 379 Ill. App. 3d 524, 527 (2008); *People v. Phelps*, 211 Ill. 2d 1, 12 (2004). We presume the trial court based its sentence on proper legal reasoning, and defendant has the burden to establish the sentence was based on improper consideration. *People v. Dowding*, 388 Ill. App. 3d 936, 942-43 (2009).

¶ 20 In determining an appropriate sentence, the trial court must weigh both aggravating and mitigating factors. See 730 ILCS 5/5-5-3.1, 3.2 (West 2018). It is presumed, absent contrary evidence, that the court considered those factors when presented. *Sauseda*, 2016 IL App (1st) 140134, ¶¶ 19-20. Moreover, a sentence that is within the prescribed statutory range is presumed to be appropriate and will not be deemed excessive unless the defendant affirmatively shows that his sentence varies greatly from the purpose and spirit of the law or is manifestly disproportionate to the nature of the offense. *People v. Fern*, 189 Ill. 2d 48, 54 (1999).

¶ 21 However, "a factor implicit in the offense for which the defendant has been convicted cannot be used as an aggravating factor in sentencing for that offense." *People v. Phelps*, 211 Ill. 2d 1, 11 (2004). The reasoning behind this prohibition is that we assume the legislature, in determining the appropriate range of punishment for an offense, took into account the factors inherent in the offense. *People v. Gonzalez*, 151 Ill. 2d 79, 84 (1992). The court's use of one of those same factors as the basis for imposing a harsher penalty than might otherwise be imposed constitutes an improper double use of the single factor. *Id*. However, this rule is not intended to be applied rigidly as sentences vary in accordance with the circumstances of the particular case. *Valadovinos*, 2014 IL App (1st) 130076, ¶ 47. Thus, in determining whether improper factors were considered, we focus on the entire record as opposed to a few words or statements made by the

sentencing court. *Id*. "Even if the sentencing court mentions the improper fact, a defendant must show the court relied on the improper fact when imposing its sentence." *Id*. For the following reasons, defendant cannot make such a showing here.

¶ 22 A sentence that falls within the statutory range is presumed proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46. Here, defendant was convicted of second degree murder. Second degree murder is a Class 1 felony, with a sentencing range of 4 to 20 years' imprisonment. 720 ILCS 5/9-2(a)(2) (West 2014); 730 ILCS 5/5-4.5-30(a) (West 2014). Defendant's 13-year sentence was within the sentencing range and is, therefore, presumed to be proper. *Knox*, 2014 IL App (1st) 120349, ¶ 46. Second degree murder occurs when a person commits the offense of first degree murder and a mitigating factor is present, here that "at the time of the killing he or she believes the circumstances to be such, if they existed, would justify or exonerate the killing * * * but his or her belief is unreasonable." 720 ILCS 5/9-2(a)(2) (West 2014). Defendant argues the court improperly considered his unreasonable belief, which is implicit in the offense, in aggravation at sentencing.

¶ 23 From our review of the record as a whole, we find that, while the court did emphasize the unreasonableness of defendant's conduct in sentencing him, it did so in the context of the seriousness of the offense, properly focusing on the manner and circumstances of David's death and not on the unreasonableness of defendant's belief that the killing was justified. See *People v. Kelley*, 2015 IL App (1st) 132782, ¶ 94 (the seriousness of the offense is the most important factor in sentencing); *People v. Kibayasi*, 2013 IL App (1st) 112291, ¶ 58 (finding no error in sentencing where the trial court's comments regarding the victim's death referenced the manner and circumstances of the victim's death rather than the death itself as an aggravating factor).

¶ 24 The court's comments at sentencing regarding the unreasonableness of defendant's belief that the shooting was justified were a part of the court's proper discussion of the nature, circumstances, and context of the offense. See *Sauseda*, 2016 IL App (1st) 140134, ¶ 15 (finding that a trial court's commentary on the nature and circumstances of a defendant's crimes does not necessarily result in improperly using as aggravation the elements of the offense). In the court's ruling, it first reiterated its finding at trial regarding defendant's unreasonable belief that the shooting was justified, as it explained that defendant "was unreasonable in doing what he did, using the force that he did, even though the victim I found was the initial aggressor." The court then discussed the circumstances of the incident, including that victim came home angry about a missing fence, the physical altercation was started by the victim, lasted for a period of time, and ended when defendant pulled out a weapon. The court then continued explaining the facts and circumstances of the incident, stating that when the altercation stopped, the victim started talking in a calm and "plaintive" manner, "as if he was surprised to see the gun," after which the gunshot went off.

¶ 25 Following the court's discussion of the circumstances of the incident, the court did recite again its finding that defendant had an unreasonable belief that shooting the victim was justified, as it stated that defendant "believed the circumstances to be such that if they existed would justify or exonerate the killing under the principle stated in Article 7 of this Code, but his or her belief is unreasonable." However, the record shows that the court then switched to explaining defendant's conduct and the "height of unreasonableness" of the manner and circumstances in which David's death came about, as it stated that defendant's shooting David was "very, very unreasonable, especially the way the victim acted once the weapon was displayed" and that David "was almost

pleading, but the defendant shot him anyway." Thus, the record shows that the court found defendant's *conduct* in shooting a pleading victim after the fight was over was unreasonable and that it relied upon the unreasonableness of the manner of the shooting when sentencing defendant. Accordingly, from our review of the record as a whole, the court properly based its sentence on the unreasonableness of the manner and circumstances of the shooting, on the unreasonableness of the degree and gravity of defendant's conduct in shooting the unarmed, pleading victim and not on the unreasonableness of defendant's belief that he was shooting in self-defense. See *People v. Saldivar*, 113 Ill. 2d 256, 269, 271-72 (1986) (the nature and circumstances of the offense and the force employed and physical manner in which the death occurred are appropriate considerations in aggravation).

¶ 26 We acknowledge that, in the court's sentencing ruling, it reiterated its finding at trial that defendant had an unreasonable belief that shooting David was justified. However, as previously discussed, from our review, we find that the court's comments were a necessary part of its discussion on the nature and circumstances of the offense. See *Sauseda*, 2016 IL App (1st) 140134, ¶ 15 ("a sentencing hearing is likely the only opportunity a court has to communicate its views regarding the defendant's conduct and thus we do not agree that a trial judge's commentary on the nature and circumstances of a defendant's crimes necessarily results in improperly using elements of the offense as factors in aggravation"). Further, the court was not required to refrain from any mention of factors inherent in the offense (*Sauseda*, 2016 IL App (1st) 140134, ¶ 15), and we find the court committed no clear or obvious error in considering the unreasonableness of the manner and circumstances of David's death at sentencing (*Kibayasi*, 2013 IL App (1st) 112291, ¶ 58). We therefore decline to review this claim for plain error. *Hillier*, 237 Ill. 2d at 545.

¶ 27 Defendant also argues that his sentence is excessive because the trial court "failed to place the proper weight upon the vast amount of mitigating evidence." He argues the court failed to adequately consider that he was a high-school graduate with no prior felony convictions and a steady employment history who "expressed deep remorse for an offense that was otherwise unlikely to recur." We agree with defendant that he sufficiently preserved this issue where he extensively argued the evidence demonstrating his rehabilitation potential at sentencing and raised his lack of "publishable background" in his motion to reconsider sentence. See *People v. Heider*, 231 Ill. 2d 1, 18 (2008) (finding no forfeiture of sentencing claim where the trial court had the opportunity to review the same essential claim the defendant raised on appeal).

¶ 28 As noted, a trial court's sentencing decision is reviewed under the abuse of discretion standard of review. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). A reviewing court will find 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*. The trial court has broad discretion in imposing a sentence, and its sentencing decision is afforded great deference, because the trial judge "observed the defendant and the proceedings," and is in a better position to weigh factors including defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *Id*. The reviewing court " 'must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently.' " *Id.* at 213 (quoting *People v. Stacey*, 193 Ill. 2d 203, 209 (2000)). However, we must interpret sentencing laws "in accord with common sense and reason" rather than merely rubber stamp the trial court's judgment, so as to "avoid an absurd or unduly harsh sentence." *People v. Allen*, 2017 IL App (1st) 151540, ¶ 1.

¶ 29 A sentence should reflect both the seriousness of the offense and the objective of restoring the offender to useful citizenship. Ill. Const. 1970, art. I § 11*; People v. Neasom*, 2017 IL App (1st) 143875, ¶ 48. While a trial court must consider all factors in aggravation and mitigation, the seriousness of the offense is the most important factor in sentencing rather than the mitigating evidence. *Kelley*, 2015 IL App (1st) 132782, ¶ 94. The trial court is presumed to consider "all relevant factors and any mitigation evidence presented" (*People v. Jackson*, 2014 IL App (1st) 123258, ¶ 48), but has no obligation to recite and assign a value to each factor (*People v. Perkins*, 408 Ill. App. 3d 752, 763 (2011)). Rather, the defendant must make an affirmative showing that the court did not consider the relevant sentencing factors. *People v. Burton,* 2015 IL App (1st) 131600, ¶ 38.

¶ 30 Defendant has not made that showing here. Defendant's sentence falls within the statutory sentencing range for second degree murder and is presumed proper. *Knox*, 2014 IL App (1st) 120349, ¶ 46. Nevertheless, defendant argues that, because his background indicated he possessed the capability and potential for rehabilitation, the trial court should have considered it as a strong mitigating factor. The court found the most important factor in sentencing defendant was the seriousness of the crime, which it could appropriately weigh heavily in aggravation. See *Kelley*, 2015 IL App (1st) 132782, ¶ 94. It was not required to lend more weight to mitigating factors than to the seriousness of the offense, in which defendant shot a pleading man after the physical altercation had stopped and then taunted the victim. *Id.*

¶ 31 Further, defendant's education, work and family history, and lack of a felony criminal background were fully set forth in the presentence investigation report. Not only is the court presumed to have considered this mitigating evidence (*Jackson*, 2014 IL App (1st) 123258, ¶ 48),

the court here stated it had considered the report. The court was again apprised of these mitigating factors, as well as defendant's likelihood not to reoffend, when defense counsel argued in mitigation. In fact, the court specifically mentioned defendant's lack of prior felony convictions and found it "something in his favor," establishing the weight the court accorded this particular mitigating factor. The court was not required to recite and assign a value to every factor, and thus its failure to mention more of the mitigating evidence defendant raises here does not demonstrate that it failed to consider that evidence. *Perkins*, 408 Ill. App. 3d at 763. Defendant has not made an affirmative showing that the trial court did not properly consider the mitigating sentencing factors establishing his rehabilitative potential, and we will not substitute our judgment for that of the trial court by reweighing the factors on review. See *Alexander*, 239 Ill. 2d at 212. Accordingly, we find the trial court did not abuse its discretion in sentencing defendant to 13 years' imprisonment. Thus, no error occurred and we decline to review this claim for plain error.

¶ 32 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 33 Affirmed.

¶ 34 MIKVA, J., specially concurring, in part.

¶ 35 I join in all aspects of this order, other than the court's suggestion, *supra* ¶ 17, that Mr. Finney failed to preserve his objection to the court's consideration of an improper factor at sentencing. As our supreme court has made clear, where, as here, the error occurred while the court was explaining the sentence, it was not necessary for counsel to interrupt with an objection. *People v. Heider*, 231 Ill. 2d 1, 18 (2008); *People v. Saldivar*, 113 Ill. 2d 256, 266 (1986) ("To preserve any error of the court made at [the time it imposed sentence], it was not necessary for counsel to interrupt the judge and point out that he was considering wrong factors in aggravation[.]"). Rather,

Mr. Finney needed to preserve this issue in his motion to reconsider his sentence, which he did by stating that the court "considered in aggravation matters that are implicit in the offense[.]" This issue was preserved.

¶ 36 However, because I agree with this court that the trial court neither considered an improper factor at sentencing nor failed to consider mitigating factors, I join in the court's order.