2020 IL App (4th) 170813-U

NO. 4-17-0813

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 17, 2020
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
DARVELL L. WILLIAMS,	)	No. 16CF1340
Defendant-Appellant.	)	
	)	Honorable
	)	Robert Freitag,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Justices Knecht and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, holding the trial court neither improperly considered factors inherent in the offense nor failed to properly consider defendant's minimal criminal history when it imposed the sentence and defendant has forfeited review of these claims.

¶ 2 After a jury trial, defendant was convicted of attempted murder (720 ILCS 5/8-4(a), 9-1 (West 2016)), multiple counts of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2016)), reckless discharge of a firearm (720 ILCS 5/24-1.5(a) (West 2016)), aggravated unlawful use of a firearm (720 ILCS 5/24-1.6(a)(1) (West 2016)), unlawful use of weapons by a felon (720 ILCS 5/24-1.1(a) (West 2016)), and possession of a firearm with defaced identification marks (720 ILCS 5/24-5(b) (West 2016)). After denying his posttrial motion, the trial court sentenced defendant to 20 years' imprisonment on the attempted murder conviction with a 20-year statutory enhancement for personally discharging a firearm (see 720 ILCS 5/8-4(c)(1)(C) (West 2016)), eight years each for two separate counts of aggravated

discharge of a firearm, eight years for the unlawful use of weapons, and three years for reckless discharge of a firearm, with all sentences to run concurrently followed by terms of mandatory supervised release.

¶ 3 The defendant's motion for reconsideration of sentence was denied.

¶ 4 This appeal follows.

¶ 5 I. BACKGROUND

¶ 6 In November 2016, the State charged defendant with attempted murder, multiple counts of aggravated discharge of a firearm, aggravated unlawful use of a weapon, aggravated discharge of a firearm, unlawful possession of a weapon by a felon, multiple counts of reckless discharge of a weapon, and possession of a weapon with defaced identification marks. The charges arose from an encounter between defendant and an individual named Willie Love, with whom defendant had an ongoing dispute. As Love walked away, defendant fired eight or nine shots from a 9-millimeter handgun at him. Although none of the slugs hit Love, one lodged in a mail box several feet from Love; one traveled across the street to a Lowe's home improvement store, shattering the window of a van in which an employee was taking her lunch break; one hit a minivan containing a husband, wife, and three children driving past; and one shattered a window in the Lowe's store, striking a cabinet less than a foot from an employee.

¶ 7 In July 2017, after a jury trial, defendant was found guilty of all counts, excluding one of the original counts of aggravated unlawful use of a weapon dismissed by the State pretrial. At sentencing, the trial court entered judgment on attempted murder, two counts of aggravated discharge of a firearm, one count of unlawful use of weapons by a felon, and one count of reckless discharge of a firearm. The court sentenced defendant to 20 years' imprisonment on the attempted murder with a 20-year enhancement for the discharge of a

firearm, for a total of 40 years on that count, eight years for each count of aggravated discharge of a firearm, eight years for unlawful use of weapon by a felon, and three years for the reckless discharge of a firearm; all sentences to run concurrently.

¶ 8 In September 2017, defendant filed a motion for reconsideration of sentence, arguing simply that his sentences were excessive. The court denied the motion and defendant appeals. Defendant's singular issue on appeal is that his sentences were excessive due to the trial court's improper consideration of a factor inherent in the offense as aggravation and the trial court's failure to properly consider his minimal criminal history. We disagree.

¶ 9 II. ANALYSIS

¶ 10 A. Forfeiture

¶ 11 The State argues defendant forfeited these issues for review since they were never raised in his motion for reduction of sentence. Section 5-4.5-50(d) in the Unified Code of Corrections (730 ILCS 5/5-4.5-50(d) (West 2016)) (formerly section 5-8-1(c) as cited in the State's brief) states in pertinent part: "A defendant's challenge to the correctness of a sentence or to any aspect of the sentencing hearing shall be made by a written motion filed with the circuit court clerk within 30 days following the imposition of sentence." The rationale for this statute has been repeated numerous times:

> "Requiring a written post-sentencing motion will allow the trial court the opportunity to review a defendant's contention of sentencing error and save the delay and expense inherent in appeal if they are meritorious. Such a motion also focuses the attention of the trial court upon a defendant's alleged errors and gives the appellate court the benefit of the trial court's reasoned judgment on those issues." *People v. Reed*, 177 Ill. 2d 389, 394, 686 N.E.2d 584, 586 (1997).

¶ 12 In *People v. Hanson*, 2014 IL App (4th) 130330, 25 N.E.3d 1, this court addressed an excessive sentence claim raised for the first time on appeal. The defendant there, much like defendant here, contended the trial court abused its discretion by imposing an improper sentence, citing comments made by the court while explaining his sentencing decision from the bench. Finding forfeiture, we said:

> " 'Defendant's claim is precisely the type of claim the forfeiture rule is intended to bar from review when not first considered by the trial court. Had defendant raised this issue in the trial court, that court could have answered the claim by either (1) acknowledging its mistake and correcting the sentence, or (2) explaining that it did not improperly sentence defendant based on his conduct on probation. If the court did not change the sentence, then a record would have been made on the matter now before us, avoiding the need for this court to speculate as to the basis for the trial court's sentence.' " *Hanson*, 2014 IL App (4th) 130330, ¶ 17 (quoting *People v. Rathbone*, 345 Ill. App. 3d 305, 310, 802 N.E.2d 333, 337 (2003)).

¶ 13 Defendant makes no effort to argue his motion for reconsideration included either of the issues he raises here as reasons for the court's "excessive sentence," and rightly so. Although defendant's motion claimed his sentences were excessive, it did so in only the most general of terms—"given the facts and circumstances, the sentences are excessive." Counsel's argument at the hearing focused on a reweighing of the various factors in aggravation and mitigation and said nothing about the claims he raises here. Perhaps because they were not an issue for defendant or his counsel. While it is true the trial court is not to consider incompetent evidence, improper aggravating factors, or ignore pertinent mitigation when fashioning a

sentence (see *People v. Hernandez*, 204 Ill. App. 3d 732, 740, 562 N.E.2d 219, 225 (1990)), "[t]he defendant bears the burden to affirmatively establish that the sentence was based on improper considerations, and we will not reverse a sentence *** unless it is clearly evident the sentence was improper." *People v. Etherton*, 2017 IL App (5th) 140427, ¶ 29, 82 N.E.2d 693.

¶ 14 B. Plain Error

¶ 15 Despite having forfeited his claims, defendant contends his procedural default is excusable under the doctrine of plain error. Illinois Supreme Court Rule 615 (a) (eff. Jan. 1, 1967) provides: "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court."

¶ 16 However, the doctrine of plain error is " 'a narrow and limited exception to the general [rule of procedural default].' " *People v. Bannister*, 232 Ill. 2d 52, 65, 902 N.E.2d 571, 580 (2008) (quoting *People v. Szabo*, 113 Ill. 2d 83, 94, 497 N.E.2d 995, 999 (1986)). We noted in *People v. Ahlers*, 402 Ill. App. 3d 726, 734, 931 N.E.2d 1249, 1256 (2010), "the plain-error doctrine is not a general savings clause, to be used as a means by which to preserve all errors affecting substantial rights that have not been brought to the trial court's attention." We will review unpreserved sentencing errors raised for the first time on appeal when a clear and obvious error occurred and (1) the evidence is closely balanced or (2) the error is so serious it affected the fairness of the defendant's trial and challenged the integrity of the judicial proceedings. *Rathbone*, 345 Ill. App. 3d at 311-12. Under both prongs of the plain-error analysis the burden remains on the defendant. *People v. Wilmington*, 2013 IL 112938, ¶ 43, 983 N.E.2d 1015. We begin our analysis by determining whether there was error at all. "Whether a trial court

considered an improper factor when sentencing a defendant is a question of law, which we review *de novo*." *People v. Winchester*, 2016 IL App (4th) 140781, ¶ 72, 66 N.E.3d 601.

¶ 17 Defendant's claim of improper reliance is based on the following comment by the court:

> "The State has suggested that in aggravation the court ought to consider the threat of serious harm. I understand that argument. I think it's a very logical argument to make. However, the court believes that in these offenses, the attempt murder, the aggravated discharges in particular, *the threats of serious harm is inherent in the offense itself, and, therefore, it would be inappropriate for the court to consider that factor in further aggravation*. That's not to say that the court is prohibited from and, in fact, the court is authorized to consider the facts and circumstances of the offense, which would involve that threat of serious harm, of course. So the court will and does consider the facts and circumstances of the offense in and of themselves in imposing sentence but certainly not as additional aggravation." (Emphasis added.)

¶ 18 This came in direct response to the State's suggestion that the fact "this offense certainly threatened serious harm" should be considered as an additional factor in aggravation. Defendant now contends the court did, in fact, consider the threat of serious harm as an aggravating factor, extrapolating the court's intent from other comments made at sentencing. We frequently see situations where the words of a trial court at sentencing have been taken out of context or were less than clear in their meaning and used as support for such a claim. In this situation, it is difficult to imagine what more a trial court could do beyond stating "it would be inappropriate for the court to consider that factor in aggravation," and that it was expressly not

considering "threat of serious harm" "as additional aggravation," for it to be obvious to a defendant the court was not considering "threat of serious harm" as an additional aggravating factor. Apparently, as a reviewing court, defendant would have us conclude even though the court said it was not, "we," like the old radio character "The Shadow," "know what evil lurks in the hearts of men."

¶ 19 This is an argument made with no consideration for the comments of the trial court in context and in stupefying disregard for the actual words of the court themselves. "[T]he reviewing court should not focus on a few words or statements of the trial court. Rather, the determination of whether or not the sentence was improper must be made by considering the entire record as a whole." *People v. Ward*, 113 Ill. 2d 516, 526-27, 499 N.E.2d 422, 426 (1986). The trial court began its ruling by noting it considered "all the relevant statutory factors in aggravation and mitigation." The court repeated it again after ruling on which counts merged for purposes of conviction and sentencing: "As I indicated at the beginning of my comments, the court has considered all the aggravating and mitigating factors that apply here, and the court, of course, considers the evidence presented at trial, the facts of the offense itself." The court then expressly declined the State's invitation to consider "threat of serious harm" as a factor in aggravation, noting it would be "inappropriate" to do so. The court discussed a number of other factors in aggravation and mitigation—none of which defendant takes issue.

¶ 20 Defendant seeks to compare the language of this trial court to that found in *People v. Sanders*, 2016 IL App (3d) 130511, 58 N.E.3d 661 and concludes "just as in *Sanders*, the trial court recognized that serious harm was a factor implicit in the offense of attempt murder, but nevertheless considered the serious-harm factors to aggravate [defendant's] sentence." There are two problems with this conclusion. First, the trial court is well within its judicial discretion at

sentencing to comment on the facts and circumstances of the offense. Even *Sanders* says that. "The court may consider the nature and circumstances of an offense, including the nature and extent of each element of the offense as committed by the defendant." *Sanders*, 2016 IL App (3d) 130511, ¶ 13 (citing *People v. James*, 255 Ill. App. 3d 516, 532, 626 N.E.2d 1337, 1349 (1993)). Second, unlike the trial judge here who expressly stated he was not considering threat of harm as an aggravating factor, the trial court in *Sanders* noted "threat of serious harm" was inherent in the offense of murder but then went on to consider it along with other factors in aggravation:

> "[A]mong other things, the defendant's conduct did cause or threaten serious harm. It may be inherent in the actual fact he committed a murder, but it did occur, and that the defendant has a history of prior delinquency of [*sic*] criminal activity. And that the sentence is necessary to deter others from committing the same crime, and that the defendant was convicted of a felony while he was serving a period of probation." (Internal quotation marks omitted.) *Sanders*, 2016 IL App (3d) 130511, ¶ 6.

The trial court here said nothing comparable to the court in *Sanders*. In fact, it said the opposite—it would not consider the threat of serious harm as an aggravator. The only other comment upon which defendant apparently relies here (since he quoted it) came from the court's observation about the facts of the offense:

> "[I]t's truly but for the grace of God that we're not here on a murder case, even a multiple murder case. It is incredible that none of those projectiles struck a human being given the area, given the time of day, given the activity, and so it's just completely incredible that we're sitting here only on these charges."

¶ 21 It is difficult to understand how, from the comments quoted, defendant finds evidence "the trial court recognized that serious harm was a factor implicit to the offense of attempt murder, but nevertheless considered the serious-harm factor to aggravate [defendant's] sentence." This argument runs counter to the presumption to which trial courts are entitled, *i.e.*, that they base their sentencing determinations on proper legal reasoning (see *People v. Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 22, 979 N.E.2d 1014) and ignores defendant's burden to "affirmatively establish" the trial court relied on an improper sentencing factor. *People v. Williams*, 2018 IL App (4th) 150759, ¶ 18, 99 N.E.3d 590.

¶ 22 Defendant nevertheless claims immunity from forfeiture because this is second-prong "structural" error in the plain-error analysis. He is wrong. Although there may have been structural error in *Sanders* where the trial court was found to have actually relied on an improper factor at sentencing, the same is not true here where the trial court expressly noted "serious threat of harm" could not constitute an aggravating factor and said it would not consider it as such. Ultimately, we find no error here, structural or otherwise.

¶ 23 " 'The sentence imposed by the trial court is entitled to great deference and will not be reversed on appeal absent an abuse of discretion.' " *People v. Wheeler*, 2019 IL App (4th) 160937, ¶ 39, 126 N.E.3d 787 (quoting *People v. McGuire*, 2017 IL App (4th) 150695, ¶ 38, 92 N.E.3d 494). This is because we recognize the trial court is in the best position to gauge a number of relevant factors when deciding an appropriate sentence, such as "the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." (Internal quotation marks omitted.) *People v. Musgrave*, 2019 IL App (4th) 170106, ¶ 56, 141 N.E.3d 320. Only when a sentence varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense can a trial court be found to have abused

its discretion at sentencing. *Wheeler*, 2019 IL App (4th) 160937, ¶ 39. A sentence within the statutory guidelines provided by the legislature is presumed to be proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46, 19 N.E.3d 1070.

¶ 24 In considering the propriety of a sentence, the balance to be struck amongst aggravating and mitigating factors is a matter of judicial discretion and should not be disturbed absent an abuse of that discretion. *People v. Crenshaw*, 2011 IL App (4th) 090908, ¶ 24, 959 N.E.2d 703. "The weight to be accorded each factor in aggravation and mitigation in setting a sentence of imprisonment depends on the circumstances of each case." *Hernandez*, 204 Ill. App. 3d at 740. "In considering the propriety of a sentence, the reviewing court must proceed with great caution and must not substitute its judgment for that of the trial court merely because it would have weighed the factors differently." *People v. Fern*, 189 Ill. 2d 48, 53, 723 N.E.2d 207, 209 (1999).

¶ 25 Defendant has failed to show how the imposition of a sentence in the mid-range of what was statutorily possible was error. The court considered the nature of the offense, shooting at the victim eight or nine times, in a busy location; defendant's prior conviction for robbery; and the need for deterrence. In mitigation, the court recognized the letters from friends and family and the defendant's statement in allocution. The court imposed all sentences to run concurrently and found, contrary to the State's argument, that several offenses merged for purposes of sentencing.

¶ 26 Based on this record, we cannot conclude the trial court erred by improperly considering a factor inherent in the offense as an aggravating factor for sentencing. Defendant's claim the trial court gave "undue" consideration to his prior conviction is also without merit. The court considered the seriousness of the offense, as it was entitled to do.

¶ 27 Absent a finding of error, there is no need to proceed to a plain error analysis. It is also of note, this was not a case where the evidence was closely balanced, even if we got to that point. The defendant was positively identified by not only the victim, but his own girlfriend, as the shooter; his attorney acknowledged the same in closing argument. He also acknowledged defendant was prohibited from possessing a firearm at the time. The gun used in the shooting, which had its serial numbers filed off, was found hidden in the furnace room of his residence. He was found to have gunshot residue on his hands and the spent shell casings from the gun were found wrapped in rubber gloves in his garbage can.

¶ 28 There being no plain error to save defendant, the issues raised on appeal have been forfeited.

¶ 29 III. CONCLUSION

¶ 30 For the reasons set forth above, we conclude the defendant's issues are forfeited and the judgment and sentence of the trial court are affirmed.

¶ 31 Affirmed.