

2011 IL App (1st) 100993-U
No. 1-10-0993

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 C6 60328
)	
ROBERT HUMPHRIES,)	Honorable
)	Brian K. Flaherty,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Salone concurred in the judgment.

ORDER

HELD: Where extended portion of surveillance video showing controlled drug sale did not weaken officers' testimony regarding transaction such that result of defendant's trial would have been different, defense counsel was not ineffective in failing to play entire video, and record supported defendant's sentence; the trial court's judgment was affirmed.

¶ 1 Following a bench trial, defendant Robert Humphries was convicted of the delivery of a controlled substance. Defendant was sentenced to an enhanced term of nine years in prison based upon his prior convictions. On appeal, defendant contends his trial counsel was ineffective in failing to show portions of a surveillance video of the controlled drug transaction

that would have impeached the testimony of the officers who witnessed and took part in the exchange. Defendant also argues the trial court relied on inappropriate factors in sentencing. We affirm defendant's conviction and sentence.

¶ 2 At trial, Chicago Heights police detective Mario Cole testified that on October 31, 2007, his department was working with the Cook County sheriff's narcotics unit on a drug investigation. At about 11 a.m., Cole observed defendant sell drugs to Investigator Enyart of the Cook County sheriff's narcotics unit. Cole watched the transaction through the open window of a surveillance van.

¶ 3 Cole identified defendant in court as the man who sold drugs to Enyart. Cole also said he recognized defendant from previous encounters during Cole's nine years on the Chicago Heights police force. After the drug transaction, the officers returned to the Chicago Heights police station, where Cole prepared a photo array of three pictures that included a photo of defendant. Enyart viewed the photo array and identified defendant as the person from whom he purchased drugs.

¶ 4 Enyart testified he had worked on narcotics investigations for the last eight years that resulted in between 500 and 1,000 arrests. He said crack cocaine was typically packaged in small zipper-type plastic bags and a bag containing between .1 and .2 gram sold for \$10.

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¶ 5 Enyart testified he rode a bicycle to the area where the surveillance was set up and told a man on the street he needed "a couple of rocks." The man pointed in the direction of defendant. Enyart told defendant he needed "two," and defendant waved him over. Enyart, still on his bicycle, rode into an alley and handed defendant \$20 in prerecorded funds. Defendant handed Enyart a bag containing cocaine.

¶ 6 In contrast to Cole's testimony that he showed Enyart three photos, Enyart testified that Cole showed him one photo on a computer that Enyart identified as defendant. Before trial, Enyart viewed the surveillance video. Enyart said the video accurately depicted his transaction with defendant, whom Enyart said he had never seen before these events.

¶ 7 On cross-examination, Enyart said the \$20 in prerecorded funds was not recovered from defendant, and he did not request the bag of cocaine be tested for fingerprints. Enyart testified that when he returned to the police department, Cole said he knew defendant from a prior arrest; however, Cole did not state defendant's name. Defendant was not arrested that day because, according to Enyart, his arrest would have compromised an ongoing investigation of repeat drug offenders. Defendant was arrested in January 2009. Enyart said about 10 minutes elapsed from the time of the transaction until he viewed defendant's photo.

¶ 8 The surveillance video was shown during both Enyart's and Cole's testimony. During Enyart's testimony, 2 minutes and 41 seconds of the video was played (from 11:14:16 to 11:16:57). Cole described the events while the video was being shown. Defendant approached Enyart at the time of 11:15:16 on the video. After the transaction, the video depicted defendant looking in the direction of the van, and the video was stopped at 11:17. The video and defendant's photograph were entered into evidence. The defense did not present any witnesses.

¶ 9 In finding defendant guilty, the court stated the case rested on the credibility of the witnesses. The court noted Cole recognized defendant from his prior interactions and also pointed out the discrepancies between Cole's and Enyart's account of the photo identification; however, the court stated it had viewed the video and "[c]ertainly that looks like Mr. Humphries to me."

¶ 10 On appeal, defendant first contends his counsel was ineffective for failing to play an additional portion of the surveillance video at trial. Defendant points out that at 11:19 on the video, or about two minutes after the transaction, the video shows that officers approached defendant and "frisked" him.

¶ 11 Defendant argues that portion of the video depicted "another phase to the day's events" and contradicted the

officers' testimony that he was not arrested that day because it would have jeopardized their ongoing drug investigation. He contends the unaired portion of the video constituted valuable impeachment evidence that challenges the credibility of the State's account.

¶ 12 Defendant posits two reasons his trial attorney did not play that part of the video: (1) counsel did not watch the video beyond the point of the transaction; or (2) counsel watched the full video but made a tactical decision not to present the video in its entirety. As to the first point, the record establishes that at a pre-trial court date, defense counsel told the court that the State had given him a copy of the video and counsel would "show [his] client what purports to be on that video" at the next court date.

¶ 13 As to the second alternative, defendant contends that if his attorney watched the entire video, counsel's choice not to mount a defense and play the whole video at trial was unreasonable. Defendant argues the unplayed portion of the video impeached the officers' account that an arrest of defendant that day would have jeopardized their ongoing drug investigation. Defendant contends the court could have given more weight to the officers' testimony in the absence of any contradictory accounts, such as the end of the video.

¶ 14 To establish the ineffective assistance of counsel, a defendant must establish his attorney's representation fell below an objective standard of reasonableness and also that the performance caused prejudice to his case such that, without the error, the trial's result would have been different. *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984), adopting *Strickland v. Washington*, 466 U.S. 668 (1984). Given the variety of circumstances faced by defense counsel and the range of legitimate decisions regarding how best to represent a defendant, judicial scrutiny of counsel's choices is highly deferential. *People v. Harris*, 129 Ill. 2d 123, 156 (1989).

¶ 15 If we can dispose of defendant's *Strickland* claim because he suffered no prejudice, we need not address whether counsel's actions were objectively unreasonable. See *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011). Where, as here, a bench trial is conducted, the trial judge has the task of determining the credibility of witnesses, weighing the evidence and drawing reasonable inferences therefrom, and under that standard, this court will not substitute its judgment for that of the trial court on those points. *People v. Cooper*, 194 Ill. 2d 419, 431 (2000); *People v. Little*, 322 Ill. App. 3d 607, 618 (2001). The uncontradicted testimony at trial established that defendant sold crack cocaine to an undercover police officer. Defendant was identified immediately after the transaction by the officer, who

viewed a photo. In addition, defendant was known to the surveillance officer, Cole, who also testified. The trial court viewed the surveillance video and stated that defendant appeared to be the man shown in the video selling the drugs. A depiction of the officers approaching defendant after the controlled drug purchase would not have impeached the officers' testimony such that the trial court would have acquitted him.

¶ 16 As to the trial court's indication that the person on the video resembled defendant, defendant contends "the image on the tape was not so convincing" that the court could rely on it to convict him. Again, it is not the role of this court to substitute its judgment for that of the trial court as the finder of fact. See *People v. Brazziel*, 406 Ill. App. 3d 421-22 (2010). The positive testimony of a single, credible witness is sufficient to support a conviction, even if that testimony were to be contradicted by the defense. See *People v. Stanley*, 397 Ill. App. 3d 598, 610-11 (2009). Defendant was identified by both Cole and Enyart. In conclusion on this point, defense counsel was not ineffective in failing to play the entire surveillance video because such a showing would not have changed the result of defendant's trial.

¶ 17 Defendant's remaining contentions on appeal involve his nine-year sentence. Defendant argues the trial court relied on an inappropriate sentencing factor, and he also asserts the

court effectively punished him for failing to accept responsibility for his actions when he addressed the judge during sentencing.

¶ 18 The State responds that defendant did not object on either basis when the trial court entered its sentence and that defendant's contentions thus can only be considered under the plain error doctrine. Forfeited arguments relating to sentencing can be reviewed for plain error. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). As with trial errors, a defendant must show either: (1) the evidence at the sentencing hearing was closely balanced; or (2) the error was so egregious as to deny the defendant a fair sentencing hearing. *Hillier*, 237 Ill. 2d at 545. Under either of those tests, the defendant has the burden of demonstrating plain error. *Hillier*, 237 Ill. 2d at 545.

¶ 19 Before discussing plain error in relation to this case, it is important to set out the pertinent sentencing statutes. Defendant was convicted of delivery of a controlled substance under section 401(d) of the Illinois Controlled Substances Act (the Act) (720 ILCS 570/401(d) (West 2006)). That count was merged with defendant's conviction under section 408(a) of the Act (720 ILCS 570/408(a) (West 2006)) which allows for an enhanced sentence if a defendant is convicted of a second or subsequent drug offense. Pursuant to section 408(a), a defendant

may be sentenced to imprisonment of "up to twice the maximum term otherwise authorized." 720 ILCS 570/408(a) (West 2006).

¶ 20 Because a conviction under section 401(d) is a Class 2 felony, the sentencing range for the principal offense was three to seven years (730 ILCS 5/5-8-1(a)(5) (West 2006)), and the maximum sentence therefore increased to 14 years under section 408(a). 720 ILCS 570/408(a) (West 2006). Therefore, the applicable sentencing range in this case was between 3 and 14 years in prison. Defendant was sentenced to nine years.

¶ 21 Defendant first argues the trial court incorrectly described his previous residential burglary conviction as a "crime of violence" and erred in considering that prior conviction as a factor in his sentencing.

¶ 22 The record reveals that at sentencing, the State noted several of defendant's previous crimes, including a residential burglary conviction, and requested a sentence of 10 years. The court had defendant's pre-sentence investigation listing nine previous convictions, including assault, battery, residential burglary, attempted residential burglary and drug possession and delivery. Defense counsel argued in mitigation that defendant "had a problem with drugs" but his prior convictions included "[n]o incidents of violence" and it was unclear whether his burglary conviction involved a weapon so as to be considered a forcible felony.

¶ 23 The State points out that residential burglary has been described as an "inherently violent crime" for purposes of sentencing in a death penalty case. See 720 ILCS 5/9-1(b)(6)(c) (West 2008); *People v. Adkins*, 239 Ill. 2d 1, 63-64 (2010). We note that this is not a case involving the death penalty. However, even if it was incorrect for the court to have referred to residential burglary as a crime of violence, the evidence at the sentencing hearing was not closely balanced; furthermore, the error did not deprive defendant of a fair sentencing hearing. The record does not reflect that the court unduly relied on the residential burglary conviction, among defendant's lengthy list of prior crimes, in imposing sentence. The court observed the instant offense was defendant's 10th felony conviction and also noted the seriousness of defendant's acts of selling drugs in neighborhoods. The court stated its sentence was based on the factors presented in aggravation and mitigation and in defendant's pre-sentence report.

¶ 24 Defendant's second argument regarding his sentence is that the court improperly implied defendant would have received a shorter sentence had he admitted his guilt. The following colloquy occurred at sentencing after the State asked for a 10-year sentence and defense counsel argued defendant should receive the minimum of six years.

"DEFENDANT: How can you want to give me 10 years for .2 grams of cocaine. That is nuts. I am just trying to figure on it. I am speaking what's on my mind. I ain't saying nothing wrong, am I?"

THE COURT: You can say whatever you want.

DEFENDANT: Okay. I mean, if I was selling drugs, I do sell drugs, but I don't sell it to get no house, no mansion. *** I ain't got no violence in my background. I don't do the crazy stuff, snatching purses, robbing. *** I am doing it to keep from robbing people. That is all I got to say, man."

¶ 25 The court noted defendant's prior convictions for residential burglary and attempted residential burglary and observed the instant offense represented defendant's 10th felony conviction. The court continued:

"THE COURT: You have been to the penitentiary - I can't even count the number of times you have been to the penitentiary. And so instead of on your own dealing with this problem, you seem to be blaming society.

DEFENDANT: No.

THE COURT: Well, I don't know who else you're blaming. It's your problem and your problem only, and you go around and - I am telling you if somebody is

selling drugs in my neighborhood, I am going [to] try to stop it. *** And for you to say that you're selling drugs so you don't rob and kill people makes no sense whatsoever, and it also makes me appreciate the fact that you don't understand how serious this is.

DEFENDANT: But .2 grams. I know a guy that got caught with 400 pounds of marijuana, and he only got two years.

THE COURT: Usually what happens when people want to give statements, they usually kind of let's say, Judge, I am sorry for what happened, at least accept responsibility. You're not accepting responsibility whatsoever.

DEFENDANT: I said -

THE COURT: You're not accepting responsibility. You're comparing yourself to somebody else. And I will bet you that guy didn't have ten felony convictions in his background.

Therefore, it's the sentence of the Court based on your comments, based on the factors that I have - argument in aggravation, mitigation, and the factors that I read in your Presentence Investigation, nine years Illinois Department of Corrections, three years mandatory supervised release[.]"

¶ 26 Defendant contends the above exchange suggests the court was punishing him for his failure to accept responsibility for his actions. Defendant points to the court's observations that a defendant who speaks in mitigation of his sentence usually apologizes for his behavior or otherwise accepts responsibility and notes the court's comment that defendant was "not accepting responsibility whatsoever." He argues the court's remark implied that had defendant used a more penitent tone in addressing the court, he would have received a shorter sentence.

¶ 27 We decline to read such a presumption into the court's statements. Indeed, as defendant concedes, a defendant's stated remorse, or lack thereof, is a proper subject for consideration at sentencing. See *People v. Mulero*, 176 Ill. 2d 444, 462 (1997). The trial court's determination as to the appropriate punishment is entitled to great deference and will not be altered absent an abuse of discretion. *People v. Sims*, 403 Ill. App. 3d 9, 24 (2010). The seriousness of an offense or the need to protect the public may outweigh mitigating factors and the goal of a defendant's rehabilitation. *Sims*, 403 Ill. App. 3d at 24. The trial court was well within its discretion to consider those circumstances in imposing a sentence that was near the middle of the applicable sentencing range. The court's remarks indicated that it considered defendant's criminal record

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as well as his failure to accept responsibility for his actions, and such considerations were proper factors in sentencing.

¶ 28 Because we have found no error in defendant's sentencing, he has not established plain error. See *People v. Freeman*, 404 Ill. App. 3d 978, 985 (2010). Defendant's assertion that he should receive a new sentencing hearing based on the court's errors is thereby rejected.

¶ 29 Accordingly, defendant's convictions and sentence are affirmed.

¶ 30 Affirmed.