

No. 1-09-2826

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 04 CR 18355
)	
BERNARD MIMS,)	Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

ORDER

HELD: Improper factors contrary to the evidence played a dominant role in determining defendant's sentence. We reverse the sentencing decision of the circuit court and remand the case for resentencing.

¶ 1 Following a bench trial, defendant Bernard Mims was found guilty of first degree murder and attempt murder. This appeal comes to us following its remand for resentencing, where defendant received a 95-year term of imprisonment. Defendant contends his sentence was imposed based on improper factors, absent consideration of mitigating evidence, and is excessive. Defendant contends, in the alternative, that counsel was constitutionally ineffective for failing to raise sentencing errors below. We reverse and remand.

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¶ 2 Trial evidence showed that defendant shot at three Cook County corrections officers, Dwayne Baker, Darrell Garrett, and Edward Ross, when they were standing in front of Chicago's Rosenwald Building, where they also worked as part-time security guards. The State theorized that defendant, a Black Disciples gang member, shot Baker because he thought he was a rival Gangster Disciple. Baker died as a result of the gunshot wound. Garrett and Ross were not injured. Two eyewitnesses to the crime identified defendant as the shooter. The court found defendant guilty of the murder of Baker and the attempt murder of Garrett and Ross.

¶ 3 Prior to the sentencing hearing, defense counsel requested additional time to file a more complete presentence investigation report. The court rejected this request, and proceeded to the sentencing hearing.

¶ 4 The State presented evidence in aggravation that defendant had been arrested for the battery of a Chicago police detective on the stairs of the court building and had been discovered with marijuana in his possession while incarcerated in the Cook County jail. The State concluded by asking the court to take judicial notice of defendant's prior conviction.

¶ 5 In mitigation, defendant's mother testified that defendant, who had six children, was GED-educated, and when arrested, was buying and selling real estate. Prior to that, he had been a cook in restaurants. She further noted defendant's federal lawsuit against the police, in which he received a \$100,000 settlement based on physical injuries. Counsel noted defendant's lack of violent criminal background, that he had been exposed to violence by police, and also had supported his family financially.

¶ 6 After considering the evidence and argument, the court sentenced defendant to 75 years for murder, which included the 20-year firearm enhancement, and 20 years for the two counts of attempt murder. The court ordered the attempt murder counts to be served concurrently, but consecutive to the murder count.

¶ 7 Defendant filed a direct appeal. He argued the evidence was insufficient to sustain his

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convictions, the State did not establish the elements for attempt murder, the trial court erred in admitting gang evidence, the trial court erred in sentencing defendant absent a complete presentence investigation report, and his murder sentence was excessive. See *People v. Mims*, No. 1-06-2812 (2008) (unpublished order under Supreme Court Rule 23). This court affirmed defendant's convictions, but vacated his sentence and remanded the case for resentencing. We concluded that the omissions in the presentence report arose from a misunderstanding between defendant and his counsel and the report "fell short of satisfying the statutory requirements[.]" *Mims*, No. 1-06-2812, order at 18.

¶ 8 A different judge presided over defendant's resentencing, and defense counsel presented a new presentence investigation report to the court. Defense counsel added in mitigation that defendant lived on the streets from age nine and essentially raised himself because his mother was a drug addict. Counsel confirmed that defendant had a history of steady employment in the restaurant industry and dabbled in real estate investments just prior to his arrest in this case.

¶ 9 The State rested on the evidence in aggravation presented at the initial sentencing hearing.

¶ 10 The court stated that it had considered the trial evidence, the evidence at the first and subsequent sentencing hearing, the new presentence investigation report, and the evidence in mitigation and aggravation.

¶ 11 The court then reviewed the facts of the case, stating that defendant "was convicted of *** firing a loaded semi-automatic or automatic weapon in the direction of three people[.]" who were "fully employed, working, solid citizens," resulting in the death of "a correctional officer." The court noted defendant, "[j]ust opened [fire] on the streets of the City of Chicago" and stated it was wanton and "unpalatable in the extreme."

¶ 12 In aggravation the court found the "deterrence and the impact that the crime had on the community cannot be understated." The court also noted that the individual killed was a correctional officer, then stated that defendant: "Shot and killed one man, shot and injured two

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others." The court noted on the record that in response to the latter statement, defendant had rolled his eyes. Defendant then stated, "I ain't do it though" and persisted in asserting his innocence. After providing defendant with a second opportunity at allocution, the court stated defendant's manner of denying his guilt was essentially not worth considering. Rather, the court stated: "What I've got here are three people that were shot, one killed ." At that point, defendant said "[i]t was one person they said was shot[,]" and the court responded: "I stand corrected. One shot and un-killed, one killed. In any event it's an extremely serious case that cannot be understated."

¶ 13 The court noted, in light of the appellate court mandate to file a new presentence report, it had "taken a particular interest in the mitigation aspect" of sentencing. In mitigation the court noted the circumstances of defendant's upbringing were "far from ideal" in that he had "an absentee mother, an absentee father" and was "in a tough economic circumstance." The court, however, ultimately found the evidence in mitigation insufficient "to alter" the original sentence.

¶ 14 After viewing the evidence as "freshly" as possible, including the presentence report, the court concluded the original sentence was "absolutely appropriate given the facts" of the case; notwithstanding the mitigation offered. Accordingly, the court sentenced defendant to the same consecutive term of 75 years for murder and 20 years for attempt murder.

¶ 15 On appeal, defendant again challenges his sentence. Defendant contends the court erred at resentencing because it misstated the facts and relied on facts not in evidence. In support thereof, defendant notes that the court incorrectly stated that he shot three people, killing one and injuring two, when in fact only Baker had been shot and killed and the attempt murder victims, Garrett and Ross, had not been shot nor otherwise injured.

¶ 16 Although defendant acknowledges he forfeited his claim of error by failing to raise it contemporaneously and in the posttrial motion, he urges this court to apply plain error review. Because an allegation that the trial court relied on an improper factor at sentencing implicates

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defendant's fundamental right to liberty, we agree that we may review defendant's claim for plain error. See *People v. Bennett*, 329 Ill. App. 3d 502, 518 (2002); *People v. Ross*, 303 Ill. App. 3d 966, 984 (1999).

¶ 17 Where the sentencing judge relies on improper factors contrary to the evidence in the record, the sentence should be vacated and the cause remanded for resentencing. See *People v. Zapata*, 347 Ill. App. 3d 956, 964 (2004); *Ross*, 303 Ill. App. 3d at 984-85. This is so unless we conclude from the record that the weight accorded to the improperly-considered aggravating factor was so insignificant that it did not lead to an increase in the defendant's sentence. *Ross*, 303 Ill. App. 3d at 984.

¶ 18 In this case, while considering the nature of the offense as an aggravating factor (see *People v. Hopkins*, 363 Ill. App. 3d 971, 988 (2005)) and just prior to imposing the sentence, the court misstated the facts and relied on facts contrary to the record evidence. The court noted that, after opening fire in the middle of Chicago streets, defendant "[s]hot and killed one man, shot and injured two others." After an interchange with defendant, the court then stated: "What I've got here are three people that were shot, one killed – [.]" At that point, defendant corrected the court, stating "[i]t was one person they said was shot." The court responded: "I stand corrected. One shot and un-killed, one killed."

¶ 19 Pursuant to this Court's August 3, 2011 order entered in accordance with Supreme Court Rule 329, the parties entered into a stipulation that the transcript of defendant's resentencing hearing accurately reflected the circuit court's statement, "One shot and un-killed, one killed."

¶ 20 It appears that the court was under the mistaken impression that defendant shot and injured more than one of the correctional officers. However, the facts establish that defendant shot and killed one officer and the other two individuals remained unharmed, i.e., they were not shot or otherwise injured. While the court's earlier statement – that defendant "was convicted of *** firing a loaded semi-automatic or automatic weapon in the direction of three people[.]"

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resulting in the death of "a correctional officer" – was correct, it is not consistent with the court's later statement that defendant's shooting "in the direction" of the three officers resulted in injury to all.

¶ 21 The State contends that even if the court misstated the facts, the misstatement was not a dispositive factor at sentencing. We disagree. The court specifically stated it would not consider defendant's denial of guilt in aggravation; rather, the court found the most aggravating factor was the serious nature of the offense, the injury to the officers, and the threat to citizens on the street. After defendant corrected the court's misstatement that three people were shot, and shortly before issuing the sentence, the court said defendant's actions resulted in "[o]ne shot and un-killed, one killed." Based on the totality of the record, we cannot say the court's apparent misunderstanding of the facts played an insignificant part in the court's calculation of defendant's sentence. See *Zapata*, 347 Ill. App. 3d at 966; *Ross*, 303 Ill. App. 3d at 985. To the contrary, the court's misunderstanding of key facts appears to have dominated sentencing.

¶ 22 Because the court relied on an improper factor at sentencing, we reverse and remand this case for resentencing. However, we reject defendant's request on remand for a substitution of judge. Although the resentencing judge in this case misunderstood the facts underlying defendant's conviction, there is no evidence of judicial bias or prejudice towards defendant. Based on the foregoing, we also decline to consider defendant's remaining contentions that the court failed to consider mitigating evidence and imposed an excessive sentence and that counsel was constitutionally ineffective for failing to challenge sentencing errors.

¶ 23 Reversed and remanded.