2011 IL App (1st) 093007-U

THIRD DIVISION
September 28, 2011

No. 1-09-3007

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. 06 CR 12661
	)	
GEORGE GOMEZ,	)	Honorable
	)	Stuart J. Goebel,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SALONE delivered the judgment of the court.
Presiding Justice Steele and Justice Murphy concurred in the judgment.

O R D E R

¶ 1 *Held*: Judgment on murder conviction affirmed where defendant forfeited appellate review of sole sentencing challenge by failing to object or file a post-sentencing motion.

¶ 2 Following a bench trial, defendant was found guilty of first degree murder in the shooting death of Ivan Sanchez, then sentenced to 35 years' imprisonment plus 15 years' for his use of a firearm. On appeal, defendant does not challenge the sufficiency of the evidence to sustain his conviction, but contends that the 50-year sentence imposed by the court is excessive given the substantial mitigating evidence.

¶ 3 At trial, evidence was presented by the State that defendant and a co-defendant, who is not party to this appeal, drove around the Northwest side of Chicago in the late evening hours of September 19, 2004, looking for rival gang members. At some point, defendant exited the car, approached a parked car in which the victim and his girlfriend were sitting, shouted gang slogans, and fired five shots into the driver's side. After defendant was identified as the shooter, he gave a videotaped statement to police in which he stated that he was driving his mother's car that evening, that he and co-defendant were members of a gang, and that he knew that co-defendant had a gun. He also stated that co-defendant left the car, shot someone, and that he picked him up later. On this evidence, the court found defendant guilty of murder.

¶ 4 At sentencing, the parties corrected the pre-sentence investigation report to reflect defendant's current age as 23. The same report also indicated that defendant had been employed as a factory worker and as a temporary employee in the past, and had been attending high school classes while incarcerated.

¶ 5 The State read victim impact statements from three of the victim's family members, and cited as aggravation the serious harm caused by defendant's conduct, that the offense was gang-related, and that defendant did not know the victim. The State then argued for a lengthy sentence to deter others.

¶ 6 In mitigation, defense counsel informed the court that defendant had no prior criminal convictions or juvenile adjudications, that he has family support, attended school while incarcerated, had "a long work history," was less than 20 years old when the shooting occurred, but acknowledged that defendant had been involved in gang activity as was evidenced by his tattoos. Counsel then elicited mitigation testimony from defendant's brother, sister, and mother.

¶ 7 In announcing its sentencing decision, the court set forth the factors it had considered

before imposing an aggregate 50-year sentence. After imposing sentence, the court admonished defendant that if he sought to:

> "challenge the sentence or any aspect of the sentencing hearing, prior to taking an appeal, you must file in the trial court within 30 days of today's date a written motion asking the court to reconsider the sentence imposed or to reconsider any challenges to the sentencing hearing."

¶ 8 We observe that the record filed on appeal does not contain a motion to reconsider sentence or a report of proceedings from any hearing that may have been held after sentencing, and that the memorandum of orders also does not reflect the filing of any post-trial sentencing motions. On appeal, however, defendant solely challenges the propriety of his sentence.

¶ 9 Section 5-8-1(c) of the Unified Code of Corrections (730 ILCS 5/5-8-1(c) (West 2006)) requires a defendant seeking to challenge his sentence or any aspect of his sentencing hearing to file a written motion within 30 days of the imposition of sentence. In *People v. Reed*, 177 Ill. 2d 389, 394 (1997), the supreme court interpreted the plain language of that statute as a clear indication that a post-sentencing motion was the functional equivalent of a post-trial motion for purposes of preserving issues for appeal. It is now well settled that, to preserve a claim of sentencing error for appellate review, both a contemporaneous objection and a written postsentencing motion raising the issue are required. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Here, our review of the sentencing hearing shows that defendant did not object to the court's consideration of the sentencing factors at the sentencing hearing, nor did he file a written motion to reconsider the sentence imposed.

¶ 10 Neither party on appeal has raised the issue of forfeiture; however, it is clear in this case that defendant forfeited his sentencing challenge. We find this case analogous to *People v.*

Freeman, 404 Ill. App. 3d 978, 993-97 (2010), where this court, despite neither party raising the issue, concluded that the defendant forfeited his sentencing issue for failing to raise a contemporaneous objection at his sentencing hearing. The supreme court has stated that one of the most important functions of the appellate courts is determining whether an issue has been properly preserved for review. *People v. Smith*, 228 Ill. 2d 95, 106 (2008); *see Freeman*, 404 Ill. App. 3d at 994. Accordingly, we "must conclude," as we did in *Freeman*, that defendant has forfeited his argument for failing to object to the challenged issues at his sentencing hearing and failing to file a post-sentencing motion. *Freeman*, 404 Ill. App. 3d at 994.

¶ 11 We recognize that forfeited arguments related to sentencing issues may be properly reviewed for plain error. *Hillier*, 237 Ill. 2d at 544. As with trial errors, defendant must show that the evidence at the sentencing hearing was closely balanced or the error was so egregious as to deny defendant a fair sentencing hearing. *Hillier*, 237 Ill. 2d at 544. Under either prong of the plain error rule, defendant bears the burden of persuasion. *Hillier*, 237 Ill. 2d at 545. This court must "hold the defendant to his burden of demonstrating plain error," and if he fails to meet that burden, we must honor the procedural default. *Hillier*, 237 Ill. 2d at 545, 549; *Freeman*, 404 Ill. App. 3d at 994. Here, defendant has failed to argue either prong of the plain error doctrine; thereby, he "cannot meet his burden of persuasion" and has forfeited plain error review. *Hillier*, 237 Ill. 2d at 544-46; *Freeman*, 404 Ill. App. 3d at 994.

¶ 12 Nevertheless, were we to address defendant's sentencing challenge, we would find it without merit. Defendant argues that his sentence was excessive given his youth, lack of previous convictions, strong work ethic, and potential for rehabilitation; and that the sentencing court failed to take these factors into account in making its determination. Defendant's argument is belied by the record, which includes a sentencing hearing that spans over 47 pages of the record, where multiple mitigation witnesses testified, counsel argued at length as to each of the

factors defendant raised on appeal, and the sentencing court reviewed the PSI, which also addressed each of these factors. The sentencing court clearly stated that it considered defendant's "potential," his lack of previous criminal history, and each of the mitigating factors argued by counsel and set forth in the sentencing statute, before it imposed a sentence within the authorized statutory range. Accordingly, we would find defendant's argument to be without merit.

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

¶ 14 Affirmed.