

No. 1-10-1935

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 1576
	)	
TYRONE SMITH,	)	Honorable
	)	John J. Moran, Jr.,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE ROCHFORD delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Karnezis concurred in the judgment.

**ORDER**

¶ 1 **Held:** Where the trial court properly evaluated defendant's comment regarding his retained counsel's trial performance, and defendant forfeited review of his claim that the trial court misapprehended the appropriate sentencing range, defendant's conviction and sentence are affirmed.

¶ 2 Following a bench trial, defendant, Tyrone Smith, was convicted of delivery of a controlled substance, a Class 2 felony, and sentenced to five years' imprisonment. On appeal, defendant contends the trial court failed to make the proper inquiry when, after the guilty finding, defendant said he wanted to terminate his retained counsel because counsel did not use information defendant provided to him to challenge the veracity of the police officer's testimony. Defendant also contends his sentence, which did not include an extended term, must be vacated and his case remanded for resentencing because the trial court misapprehended the applicable sentencing range and erroneously believed defendant was eligible for an extended-term sentence. We affirm.

No. 1-10-1935

¶ 3 The record shows defendant was initially represented by the public defender of Cook County. At a subsequent status hearing, private counsel retained by defendant filed his appearance and the public defender withdrew. Retained counsel represented defendant throughout the remainder of the proceedings before the trial court.

¶ 4 At trial, the sole witness, Chicago Police Officer Roy Evans, testified that at approximately 11:30 p.m. on December 12, 2009, he was on patrol in an unmarked vehicle driven by his partner, Officer Michael Lewis, when he saw defendant and a woman standing next to a fence engaged in a drug transaction. Defendant placed an item into the woman's hand in exchange for money. The officers stopped, exited their vehicle, and approached defendant and the woman from behind. Officer Evans spun defendant around and saw defendant had a \$20 bill in his hand. At the same time, Officer Lewis turned the woman around and Officer Evans saw she was holding two small knotted plastic bags, each containing suspect heroin or cocaine. Officer Lewis took the two plastic bags from the woman's hand and gave them to Officer Evans, who also took the \$20 bill from defendant. A custodial search of defendant was conducted at the scene, but nothing more was recovered from him. At the police station, Officer Evans inventoried the suspect narcotics and the money recovered from defendant in accordance with police procedure.

¶ 5 The parties stipulated that the two plastic bags recovered from the woman tested positive for 0.3 grams of cocaine. The trial court found defendant guilty of delivery of a controlled substance.

¶ 6 Immediately thereafter, defense counsel informed the court that defendant just terminated him as his attorney. The court informed defendant that he had received a "vigorous defense" and that an attorney can "only play the cards that are dealt." The court stated counsel did everything he possibly could have done and suggested defendant allow counsel to continue representing him through the post-trial motion and sentencing. The court informed defendant that it could later appoint counsel to represent him on appeal, and appellate counsel could raise a claim of ineffective assistance of trial counsel if he found a basis for it. The court explained it was a concern that defendant was

No. 1-10-1935

unrepresented if he terminated his counsel at this time. The court advised defendant "think about it before you do anything and talk to your attorney," and that the court would see defendant on his next court date. The following colloquy then occurred:

"THE DEFENDANT: Can I just say one thing, sir?

THE COURT: Sure.

THE DEFENDANT: Before I came in here, I gave [defense counsel] –

[DEFENSE COUNSEL]: He is going to talk about evidence, and I am not going to defend myself–

THE DEFENDANT: I gave him a piece of evidence that I wanted to present.

THE COURT: Under Krankel the Court is allowed to have a brief inquiry into this matter which may or may not require – What is it you gave him?

THE DEFENDANT: Evidence I gave him, I had told him that the officer when he pulled me over I had money in my hand and other objects. I had two cell phones, and I got proof that I had other money in my pocket.

\* \* \*

THE COURT: If I were [defense counsel], I wouldn't bring that up either. The reason is is (*sic*) because if he brings that up, the State is going to stand up and argue that you have been selling drugs all day long and all that money is drug money, and that's what they are going to argue. It's a double-edged sword. All it does is open up evidence that can be inferred against you or for you, but it creates other issues given those circumstances, and the only way that you could deal with that is that if you testified, but if you testified I am sure that he advised you that then the Court would be aware of your prior criminal history, which I was not aware of. So those are all trial strategy type issues."

¶ 7 The court further stated: "[y]our attorney exercised his professional expertise in making trial

No. 1-10-1935

strategy decisions on your behalf. Everything you have told me so far has a solid basis and strategy for making those types of decisions." The court then set a date for post-trial motions. Defendant's motion for a new trial was subsequently denied.

¶ 8 The sentencing range for a Class 2 felony includes three to seven years of imprisonment. At sentencing, defense counsel noted defendant had only one prior case in his criminal background, a 1997 Michigan conviction for second degree murder and a felony firearm offense. Counsel informed the court he had investigated the facts of that case and found the Michigan second degree murder offense was similar to the same offense in Illinois in that they both involve defendant having an unreasonable belief that his life was endangered. Counsel explained the facts of defendant's prior case to the court as follows:

"Some gentlemen were in an argument with his brother. These people came—not gentlemen—but these people came to the defendant's house, to Mr. Smith's house, with weapons and fired their weapons. And there was an exchange of gunfire, and there was a finding that Mr. Smith had killed one of the people. So, the whole thing happened at his home. And at the time he had no criminal history whatsoever."

Counsel argued, based on those facts, an extended-term sentence for the Class 2 felony in this case would not be appropriate.

¶ 9 The State informed the court that defendant may have been on parole from the Michigan conviction at the time of the offense in this case, but it was not certain. The State asked that defendant be sentenced to the appropriate amount of prison time based on the facts in this case and his background. The State did not request an extended-term sentence, nor did it discuss defendant's eligibility for an extended term.

¶ 10 The trial court stated it would not consider whether defendant was possibly on parole at the time of this offense without more certainty. The court expressly stated defendant was convicted of a Class 2 felony in this case and, based on his background, he could be sentenced from 3 to 14 years'

No. 1-10-1935

imprisonment, an extended-term sentencing range, and fined up to \$25,000. The court further stated it considered the nature, circumstances and seriousness of the offense, the facts and evidence heard at trial and at the sentencing hearing, the information contained in the presentence investigation report, the arguments of counsel, and the statutory factors in aggravation and mitigation, which it specified in detail. The trial court then sentenced defendant to a term of five years' imprisonment, a non-extended term. Defense counsel immediately filed a written motion to reconsider the sentence, which argued *in toto*: "[t]he sentence is excessive, not considerate of his background and violates the 8th Amendment prohibition of cruel and unusual punishment." The trial court denied the motion.

¶ 11 On appeal, defendant first contends the trial court misapprehended the law and failed to make the appropriate inquiry into his claim that trial counsel rendered ineffective assistance when counsel did not use the information defendant provided him to challenge the veracity of Officer Evans' testimony. Defendant asserts the court erroneously evaluated his claim without appointing new counsel to represent him, rejected his claim and talked him out of his decision to terminate counsel, thereby denying him his right to counsel of his choice.

¶ 12 The State argues the trial court was not required to make any inquiry into defendant's claim because defendant was represented by retained counsel and such inquiries are only required where counsel has been appointed. Alternatively, the State argues the trial court properly inquired into defendant's claim regarding defense counsel's performance and determined it was a matter of trial strategy which did not require the appointment of new counsel.

¶ 13 In *People v. Krankel*, 102 Ill. 2d 181 (1984), our supreme court found the trial court erred when it failed to appoint new counsel to represent the defendant at a hearing on his *pro se* post-trial motion claiming ineffective assistance of his appointed trial counsel and remanded the case for a new hearing on that issue. *Id.* at 189. The supreme court subsequently held there is no requirement that new counsel be appointed every time a defendant raises a *pro se* post-trial claim of ineffective assistance of counsel. *People v. Nitz*, 143 Ill. 2d 82, 134 (1991). Instead, when a defendant raises

No. 1-10-1935

such a claim, the trial court should first examine the factual basis of that allegation. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). The court can evaluate a defendant's *pro se* claim by either discussing the allegations with the defendant and asking for more specific details, questioning trial counsel regarding the facts and circumstances surrounding the defendant's allegations, or relying on its own knowledge of counsel's performance at trial and determining whether the allegations are facially insufficient. *Id.* at 78-79. If the court finds the claims reveal possible neglect of the case, then it should appoint new counsel to represent the defendant at a hearing on his *pro se* motion. *Id.* at 78. However, if the trial court finds the defendant's allegations are without merit or pertain only to matters of trial strategy, new counsel should not be appointed and the court may deny the *pro se* motion. *Id.* On review, the appellate court determines whether the trial court's inquiry into the defendant's *pro se* claim was adequate. *Id.*

¶ 14 In this case, even if we were to accept defendant's assertion that *Krankel* inquiries apply where counsel is privately retained, the record reveals that the trial court was aware of the inquiry process delineated by *Krankel* and its progeny, and conducted an adequate inquiry here. When defendant told the court he had given counsel a piece of evidence he wanted to present, counsel stated he was not going to defend himself. The trial court correctly advised counsel: "[u]nder *Krankel* the Court is allowed to have a brief inquiry into this matter." The record shows the trial court then followed the procedure discussed in *Moore* when it evaluated defendant's claim by asking him for more details, specifically asking defendant what evidence he gave counsel. The trial court expressly found that counsel's decision not to present defendant's evidence—that he was in possession of two cell phones and additional money—was based upon counsel's "professional expertise in making trial strategy decisions" on defendant's behalf. The court explained to defendant how such evidence could have been used against him, and that counsel had a "solid basis and strategy" for not presenting that evidence. Based on its finding that defendant's challenge to counsel's performance pertained only to a matter of trial strategy, the trial court properly concluded that defendant's allegation was without

No. 1-10-1935

merit. Accordingly, the trial court's decision, that it was not necessary to appoint new counsel and conduct a hearing on defendant's claim, was correct.

¶ 15 In addition, we reject defendant's argument that the trial court did not honor his right to counsel of his choice, or that the court advised him on his choice of counsel. The record shows the trial court explained it was concerned defendant may have been unrepresented at the hearings on his posttrial motion and sentencing if defendant terminated his counsel's representation. The court did not prevent defendant from terminating counsel, but advised him to "think about it before you do anything and talk to your attorney." Defendant could have terminated trial counsel and retained other counsel to represent him prior to the hearing on his post-trial motion, but he did not. Counsel continued to represent defendant at that hearing and at sentencing. Defendant did not express any further concerns with counsel's representation, nor did defendant ever request other counsel. Based on this record and the facts and circumstances in this case, we find no error by the trial court in addressing defendant's *pro se* posttrial claim that counsel rendered ineffective assistance.

¶ 16 Defendant next contends his sentence must be vacated and his case remanded for resentencing because the trial court misapprehended the applicable sentencing range and erroneously believed he was eligible for an extended-term sentence. Defendant claims the trial court mistakenly believed his second degree murder conviction from Michigan was equivalent to Illinois' second degree murder conviction—a Class 2 felony—when it is actually equal to our involuntary manslaughter offense—a Class 3 felony.

¶ 17 The State argues defendant's claim is forfeited because he did not object during the sentencing hearing to either the classification or the applicability of the Michigan murder conviction, and did not raise the issue in his motion to reconsider his sentence. Alternatively, the State argues defendant was eligible for an extended-term sentence and that the trial court considered the proper sentencing range and factors before imposing a *non-extended* term of five years' imprisonment.

¶ 18 In his reply brief, defendant contends his claim was properly preserved for appeal because his

No. 1-10-1935

motion to reconsider his sentence alleged that his sentence was "not considerate of his background." Alternatively, defendant argues this issue may be considered under the plain-error doctrine. Defendant notes he cited to two cases in his opening brief that address plain error, and makes no further plain-error argument.

¶ 19 A sentencing issue is forfeited on appeal where defendant failed to object during the sentencing hearing and failed to raise the issue in his post-sentencing motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Here, defendant did not object during the sentencing hearing, to either the classification or the applicability of his Michigan murder conviction, to the trial court's sentencing determination in this case. Nor did he expressly challenge the classification or use of the Michigan conviction in his written motion to reconsider his sentence. Consequently, we find the issue is forfeited because defendant failed to preserve it for appeal.

¶ 20 In addition, we decline to consider defendant's claim as plain error. The plain-error doctrine is a limited and narrow exception to the forfeiture rule that applies only where the evidence at the sentencing hearing was closely balanced, or the error was so substantial, it denied defendant a fair sentencing hearing. *Id.* at 545. It is defendant's burden to persuade the court that a clear or obvious error occurred, and if he fails to do so, his claim is forfeited. *Id.* Where defendant fails to present an argument on how either of the two prongs of the doctrine is satisfied, he has forfeited plain-error review of his claim. *Id.* at 545-46. Here, defendant cites to two cases that addressed plain error, but presented no plain-error argument. We find defendant has failed to meet his burden of persuasion and, therefore, this court cannot reach the merits of his sentencing claim. *Id.* at 549-50.

¶ 21 Moreover, as noted by the State, it was defense counsel who informed the trial court that defendant's Michigan conviction was similar to Illinois' second degree murder offense, and counsel acknowledged defendant was eligible for an extended-term sentence. Our supreme court has stated, a defendant's agreement to a procedure that he later challenges on appeal "goes beyond mere waiver" and is sometimes referred to as estoppel. *People v. Harvey*, 211 Ill. 2d 368, 385 (2004) (citing *People*

No. 1-10-1935

*v. Villarreal*, 198 Ill. 2d 209, 227 (2001)). It is well settled, " '[u]nder the doctrine of invited error, an accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error.' " *Id.* (quoting *People v. Carter*, 208 Ill. 2d 309, 319 (2003)). "To permit a defendant to use the exact ruling or action procured in the trial court as a vehicle for reversal on appeal 'would offend all notions of fair play' \*\*\*, and 'encourage defendants to become duplicitous' \*\*\*." *Harvey*, 211 Ill. 2d at 385 (quoting *Villareal*, 198 Ill. 2d at 227 and *People v. Sparks*, 314 Ill. App. 3d 268, 272 (2000)).

¶ 22 Here, the record shows defense counsel expressly stated he had investigated the facts involved in defendant's Michigan murder case and found the Michigan second degree murder offense was similar to the same offense in Illinois. Counsel then provided the court with the facts from defendant's Michigan murder case, explaining how people came to defendant's house and fired guns, and when defendant returned fire, he killed one of those people. Counsel argued that based on those facts, an extended-term sentence would not be appropriate in this case. The record, thus, reveals defendant did not object to his eligibility for an extended-term sentence at the sentencing hearing but, instead, counsel acknowledged defendant was eligible for an extended term. The State did not present any evidence or argument regarding defendant's eligibility for an extended term. We, therefore, find that when the trial court found defendant eligible for a sentence in the extended range, it did so based solely on the information provided by defense counsel. Accordingly, defendant cannot now claim on appeal that the trial court erred in its consideration of his Michigan second degree murder conviction.

¶ 23 Finally, we note that defendant's sentence is not void. The trial court did not impose an extended-term . A sentence that does not conform with a statutory requirement is void and may be challenged at any time. *People v. Thompson*, 209 Ill. 2d 19, 24-25 (2004). Here, defendant's five-year sentence falls directly in the middle of the standard statutory range of three to seven years' imprisonment for a Class 2 felony. 730 ILCS 5/5-4.5-35 (West 2009). Defendant's sentence was

No. 1-10-1935

clearly authorized by statute and, thus, is not void. *Hillier*, 237 Ill. 2d at 547.

¶ 24 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 25 Affirmed.