

2012 IL App (1st) 102942-U

No. 1-10-2942

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FIFTH DIVISION  
July 20, 2012

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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. 08 CR 13482
	)	
SADELL HOLMES,	)	Honorable
	)	Michael Brown,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HOWSE delivered the judgment of the court.  
Presiding Justice Epstein and Justice McBride concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Defendant's conviction for attempted first degree murder affirmed; defendant's 15-year sentence for attempted first degree murder vacated where trial court's consideration of improper aggravating factors amounted to plain error; mittimus modified; cause remanded for resentencing.
- ¶ 2 Following a bench trial, defendant Sadell Holmes was found guilty of attempted first degree murder and two counts of aggravated battery, then sentenced to 15 years' imprisonment on

his attempted first degree murder conviction. On appeal, defendant contends that the trial court abused its sentencing discretion by relying on improper aggravating factors in imposing the 15-year term. He also requests that his mittimus be modified to reflect the correct statutory provision and class of offense for his attempted first degree murder conviction.

¶ 3 The record shows that on May 24, 2008, 20-year-old defendant Holmes chased 20-year-old Robby Leason into a yard where he struck him in the head with a baseball bat. He subsequently gave a handwritten statement to police admitting that "it was a big mistake, and that he didn't know it was going to go that way."

¶ 4 At trial, Robby testified that he lost some of his hearing as a result of the attack, cannot feel anything on the left side of his body, and has undergone surgery on his head. The trial court took notice of a seven-inch scar on the left side of Robby's head that "begins near the rear crown of his head, and it continues in a semi-circle and ends behind the left ear."

¶ 5 Chicago police sergeant Michael Kelly testified that when he spoke with Robby in his hospital room almost one month after the incident, Robby had "difficulty forming an actual thought," his speech was "slurred and stuttered," and he used nonverbal communication to acknowledge him. Ultimately, the trial court found defendant guilty of attempted first degree murder and two counts of aggravated battery.

¶ 6 At sentencing, the trial court provided the parties with an opportunity to make corrections to the presentence investigation report (PSI), and accepted defendant's proposed corrections. The State then argued in aggravation that defendant should be incarcerated for a "substantial period of time" based on the facts of the case and the "serious injury" that he caused to Robby by hitting him in the head with the bat, noting that the court had an opportunity to observe the effects of that attack on Robby when he testified. In mitigation, defense counsel pointed out, *inter alia*, defendant's good relationship with his two children, his goals to obtain his GED and attend

college to study computer graphics and technology, and his decision to stop using drugs because they were "counterproductive to the plans for his life." Counsel also noted that defendant helped his father participate with the Cease Fire organization, and is a member of Solid Foundation Church. In sum, counsel stated that "we have a young man who is 20 years old who made a stupid, horrible mistake," pointing out that defendant had no prior felony convictions. Counsel thus requested the minimum sentence which would be a "serious amount of time in the penitentiary for a serious mistake." Finally, defendant stated in allocution, *inter alia*, that he made a "bad decision," that he was sorry for his actions, and that he had established a "closer" relationship with God during his incarceration.

¶ 7 In announcing sentence, the court highlighted the various protections defendant was afforded in the criminal justice system, and noted that Robby received no such protections when defendant "executed justice out there in that back yard that particular day." The court then acknowledged observing Robby when he testified and seeing "how he was," and stated, "I saw that he will never be the man that he was intended to be because he was hit in the head. And he lost his mind as a result of that action." Returning to the criminal justice metaphor, the court stated that defendant had "sentenced [Robby] to a life sentence of being a cripple. Because it was all a big mistake. He was the wrong guy."

¶ 8 The court further acknowledged the limitations of its sentencing authority to impose a "truly just" sentence, namely, to have defendant "take care of the victim for the rest of his life." In furtherance of this notion, the court remarked that Robby would need to be dressed, fed, transported, and financially supported because he cannot work, and would also need medical procedures, all of which will fall on Robby's family which had been similarly sentenced "to a life of taking care of a cripple." The court then merged defendant's convictions, and sentenced him to 15 years' imprisonment for attempted first degree murder.

¶ 9 In this appeal from that judgment, defendant first contends that the trial court abused its sentencing discretion by relying on improper aggravating factors in imposing sentence. He specifically cites the court's comments on the victim's "long-term medical prognosis" and status as an "innocent bystander" which, he claims, were unsupported by the record. Defendant claims that the extent of these comments demonstrates that the trial court was biased against him, and requests this court to vacate his sentence and remand his case for resentencing before a different judge.

¶ 10 Defendant acknowledges that he forfeited this sentencing issue by failing to raise it in a post-trial motion, as required (*People v. Reed*, 177 Ill. 2d 389, 394 (1997)), but he claims that it should be reviewed for plain error, as the evidence was closely balanced and the court's reliance on an improper factor impinged upon his fundamental right to liberty.

¶ 11 We observe that the plain error rule is a narrow exception to the waiver rule. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). To obtain plain error relief in the sentencing context, defendant must show that the evidence at sentencing was closely balanced, or the error was so serious as to deny defendant a fair sentencing hearing. *Hillier*, 237 Ill. 2d at 545. Under both prongs, defendant bears the burden of persuasion, and must first show that a clear or obvious error occurred. *Hillier*, 237 Ill. 2d at 545.

¶ 12 We further observe that a trial court has wide latitude in sentencing defendant to a term within the prescribed statutory range, so long as it does not consider incompetent evidence, improper aggravating factors, or ignore pertinent mitigating factors. *People v. Perkins*, 408 Ill. App. 3d 752, 762-63 (2011). The court's discretion is not unfettered, and its reliance on improper factors, including prejudice, speculation, and conjecture may require that defendant's sentence be vacated and the cause remanded for resentencing. *People v. Dempsey*, 242 Ill. App. 3d 568, 597 (1993).

¶ 13 Here, the record shows that the trial court's remarks at sentencing focused, in large part, on the long-term injuries suffered by the victim of defendant's beating. The court specifically noted that the victim had "lost his mind," was now "a cripple," and would have to be taken care of for the rest of his life, and remarked upon the daily care that the victim would need provided to him as a result, such as being dressed, fed, transported, and financially supported because he could not work. The court also commented that he would need additional medical procedures.

¶ 14 Although the State correctly points out that the trial court is presumed to have considered only competent and relevant evidence in imposing sentence (*People v. Smith*, 176 Ill. 2d 217, 241 (1997)), and to have based its sentencing determination on proper legal reasoning (*People v. Bowman*, 357 Ill. App. 3d 290, 303-04 (2005)), we find those presumptions contradicted by the record. In the case at bar, the record fails to show that the trial court heard any medical evidence regarding the victim's particular injuries, nor testimony from the victim or his family regarding his care needs, necessary medical procedures, or prospects for the future. We acknowledge that the trial court observed the victim at trial, however, its comments on his physical condition at sentencing were not supported by any record evidence and thus amounted to conjecture on the part of the trial court. See *People v. Vaughn*, 56 Ill. App. 3d 700, 706 (1978) (psychological analysis of defendant by the trial court was not based on any evidence presented and amounted to pure speculation). We thus find that defendant has demonstrated error by the trial court in considering these matters, and turn to whether this evidence rises to the level of reversible error. *People v. Naylor*, 229 Ill. 2d 584, 602 (2008).

¶ 15 Automatic reversal is not required in every instance where the court considers an improper aggravating factor in sentencing (*People v. Luna*, 409 Ill. App. 3d 45, 51 (2011)), however, in this case, we conclude that the trial court's consideration of matters in sentencing

that were not based on the record affected defendant's right to a fair sentencing hearing and constituted reversible error (*Naylor*, 229 Ill. 2d at 603).

¶ 16 A remand for resentencing is required where the reviewing court cannot determine the weight given to an improper sentencing factor. *Luna*, 409 Ill. App. 3d at 51, quoting *People v. Gilliam*, 172 Ill. 2d 484, 521 (1996). Here, we are unable to determine how much weight was given to the improper aggravating factors by the trial court. Although the court discussed the victim's long-term injuries and needs at length, and with some particularity, it also appears that the court did so in an attempt to make a larger point to defendant about his poor judgment and the far-reaching consequences of his conduct. In light of this uncertainty, however, we find that the trial court's consideration of the improper aggravating factor was reversible error. *Luna*, 409 Ill. App. 3d at 51.

¶ 17 Having so concluded, we next determine whether the evidence presented at defendant's sentencing hearing was closely balanced. *Naylor*, 229 Ill. 2d at 605; *People v. Thomas*, 178 Ill. 2d 215, 251 (1997). The evidence at defendant's sentencing hearing showed that defendant hit the victim in the head with a bat with serious repercussions. The State argued in aggravation that defendant should be incarcerated for a "substantial period of time" based on the facts of this case and the "serious injury" that he caused to Robby by hitting him in the head with the bat, noting that the court had an opportunity to observe the effects of that attack on Robby when he testified. Against this evidence, defense counsel offered as evidence in mitigation defendant's young age, lack of prior felony convictions, community involvement, and attempt at education, and defendant expressed remorse for the incident. Under these circumstances, we find the evidence to be closely balanced and thus choose to err on the side of fairness, vacating defendant's sentence for attempted first degree murder and remanding the cause for resentencing. *Naylor*, 229 Ill. 2d at 608.

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¶ 18 Defendant next contends that his mittimus should be modified to reflect the correct statutory provision and class of offense for his attempted first degree murder conviction. The State concedes that the correction is warranted. We agree, and, pursuant to our authority under Illinois Supreme Court Rule 615(b), we direct the clerk to modify defendant's mittimus to reflect his conviction of the Class X offense of attempted first degree murder under section 8-4(c)(1) of the Criminal Code of 1961 (720 ILCS 5/8-4(c)(1) (West 2008)).

¶ 19 For the reasons stated, we affirm defendant's conviction of attempted first degree murder, vacate his sentence on that conviction and remand the cause to the trial court for resentencing, and order the clerk to modify his mittimus as directed.

¶ 20 Affirmed in part; vacated in part; mittimus modified; cause remanded.