

No. 1-10-3238

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. 09 CR 18382
)
 DUARD GILOT,) Honorable
) Sharon Sullivan,
 Defendant-Appellant.) Judge Presiding.

PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

ORDER

¶ 1 *Held:* Any delay by the State in its investigation of burglary offense and charging of defendant, which purportedly deprived defendant of the benefits of a concurrent term and time-served credit, did not violate defendant's due process of law where defendant had no right to serve his sentence in this case concurrently with his sentence in an unrelated burglary.

¶ 2 After a bench trial, defendant Duard Gilot was convicted of residential burglary and sentenced to seven years of imprisonment. Defendant now appeals, contending that the State's delay in investigating and charging him with the offense, where the delay occurred while

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defendant was serving time for an unrelated burglary, violated his due process rights because it resulted in defendant losing the benefits of a concurrent term and time-served credit. We affirm.

¶ 3

BACKGROUND

¶ 4 On May 31, 2008, while Georgia Evans was attending her mother's memorial service, defendant entered Evans's first floor apartment and stole some of her personal checks. Evans did not notice they were missing when she returned.

¶ 5 On June 5, 2008, defendant cashed one of the checks at a Chase Bank branch. He tried to cash a second check at a different branch but was rejected. Defendant "crumpled up" the second check and put it in his pocket.

¶ 6 On June 12, 2008, Chase Bank telephoned Evans. She then discovered that six sequential checks were missing from her box of unused checks. Evans went to Chase Bank's website and learned that one of the missing checks had been cashed at the Chase Bank branch. The check was made out to Duard A. Gilot for \$250 and contained a signature of her name that was not in her handwriting. Evans telephoned her landlord, her condominium association, the association's president, and the check printing company. She could not recall if she called the police at that time.

¶ 7 At some later point, while Evans was out, defendant returned to Evans's apartment to look for more checks and the second check fell from his pocket. On June 13, 2008, upon arriving at her apartment, Evans found the second check which was crumpled and laying on top of the book from her mother's memorial service. Evans realized that there had been a second entry into her home and called a locksmith. At some point that she could not remember, Evans

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also contacted the Chicago police. A police officer then came to her apartment.

¶ 8 Meanwhile, on June 26, 2008, defendant was arrested on a separate charge of burglary. He was taken into custody in jail under the name of Duard A. Gilot.

¶ 9 Detective Schaedel interviewed Evans on July 14, 2008. He then “ran the name” Duard Gilot, and retrieved a photograph. Schaedel prepared a photo array which he brought to the bank branches, but no one identified Gilot. Schaedel testified at trial that he and his partner, Detective Forrestal, tried unsuccessfully to locate Gilot for an interview in the following weeks and months. They looked up his last known address in the computer and attempted to go there several times.

¶ 10 On December 9, 2008, defendant pled guilty to the unrelated burglary charge. He was sentenced to five years imprisonment and was scheduled to be discharged to supervised release on December 26, 2010.

¶ 11 Schaedel testified that he kept checking the computer databases and “at some point” learned that defendant was incarcerated at Lawrence Correctional Center in Sumner, Illinois. On September 24, 2009, Schaedel interviewed defendant at the prison. Schaedel testified that “some time had passed,” but he could not recall how long it had been, between the time he had learned that defendant was in prison and the time he interviewed defendant. Defendant confessed to the burglary in the instant case. He was arrested on September 29, 2009. On October 26, 2009, defendant was charged by indictment with residential burglary.

¶ 12 After a bench trial, defendant was found guilty. On September 17, 2010, the court sentenced defendant to seven years in the Illinois Department of Corrections, with two years of

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mandatory supervised release. At the time, defendant had already served most of the five-year term of imprisonment for the unrelated burglary. The court ordered that defendant be given time-served credit from September 29, 2009, for a total of 355 days. Defendant is currently scheduled for discharge to supervised release on March 13, 2013. Defendant now appeals.

¶ 13

ANALYSIS

¶ 14 This case involves an alleged pre-arrest delay. Citing generally the cases of *U.S. v. Lovasco*, 431 U.S. 783, 795 (1977) and *People v. Lawson*, 67 Ill. 2d 449, 459 (1977), defendant argues the delay violated his right to due process. Defendant does not claim that any delay occurred between his arrest and indictment. He also does not claim that his right to a speedy trial was violated. Additionally, defendant has not argued that the alleged delay adversely affected his ability to prepare a defense. Instead, defendant argues only that the State's unreasonable delay in investigating and charging him deprived him of the benefit of a concurrent term and time served credit because the delay occurred while defendant was serving time on an unrelated offense.

¶ 15 The State asserts that defendant has forfeited review of his claim by failing to raise the issue in a post-sentencing motion. Generally, a sentencing issue not raised in a motion to reconsider the sentence is forfeited. *People v. Yaworski*, 2011 IL App (2d) 090785, ¶ 5. Our supreme court has stated that “to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required.” *People v. Hillier*, 237 Ill. 2d 539, 544-45 (2010)). Defendant concedes that he failed to raise this issue in a post-sentencing motion, but asserts that the pre-charging delay deprived him of the substantial right of due process and requests plain-error review.

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¶ 16 Rather than operating as a general savings clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court, the plain error doctrine is construed as a narrow and limited exception to the typical forfeiture rule applicable to unpreserved claims. *People v. Johnson*, 238 Ill. 2d 478, 484 (2010); *People v. Herron*, 215 Ill. 2d 167, 177 (2005). A reviewing court can consider a forfeited error where:

“(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.” *People v. Sargent*, 239 Ill. 2d 166, 189 (2010).

Citing *People v. Owens*, 377 Ill. App. 302, 304 (2007), defendant correctly notes that error as to the propriety of a sentence may be reviewed for plain error. See also *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Normally, “[i]n the sentencing context, a defendant must *** show either that (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.” *People v. Hillier*, 237 Ill. 2d at 545. Here, defendant asserts that the delay was plain error because it “deprived him of substantial rights,” but he does not claim that the evidence was closely balanced. Thus, we need only address the second prong of the plain-error doctrine.

¶ 17 A defendant bears the burden of showing plain error. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). The first step in a plain error review, however, is to determine whether any error

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occurred at all. *People v. Taylor*, 2011 IL 110067, ¶ 30. Defendant has failed to meet his burden of showing plain error. First, he has failed to establish that any error occurred at all. He does not claim that his sentence to seven years imprisonment was not within the statutory sentencing range. Having found no error, there can be no plain error.

¶ 18 Assuming *arguendo* that the alleged delay in investigating and charging him was error, defendant has failed to show that the error was plain error under the second prong of the plain-error doctrine. “Error under the second prong of plain error analysis has been equated with structural error, meaning that automatic reversal is only required where an error is deemed to be a systemic error that serves to ‘erode the integrity of the judicial process and undermine the fairness of the defendant’s trial.’ ” *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 78 (quoting *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009)). Here, even if the alleged delay in investigating and charging defendant was unreasonable, and therefore error, defendant has failed to show that it constituted a “structural” error. “Structural errors include a complete denial of counsel, denial of self-representation at trial, trial before a biased judge, denial of a public trial, racial discrimination in the selection of a grand jury, and a defective reasonable doubt instruction.” *People v. Averett*, 237 Ill. 2d 1, 13 (2010). Defendant has not shown that he had a right, let alone a constitutional right, to concurrent sentences in the first instance.

¶ 19 Also, regardless of defendant’s forfeiture, we conclude that there is no merit to his argument on appeal. There is no dispute that defendant was prosecuted within the statutory time limitation. Also, defendant does not contend that the State delayed his arrest to gain a tactical advantage or that the delay in investigating and charging him impaired his ability to defend

against the charge. Instead, defendant argues that, as a result of the State's lack of diligence in investigating this case, he will now serve more than an additional year in prison than he would have served “if the authorities had pursued his case in a timely manner.”

¶ 20 We agree with the State that the analysis addressing a defendant's due process right to a fair trial when there is preindictment delay does not apply to defendant's claim regarding a purported right to serve two separate sentences concurrently. Thus, the cases of *U.S. v. Lovasco*, 431 U.S. 783, 795 (1977) and *People v. Lawson*, 67 Ill. 2d 449, 459 (1977), cited by defendant are inapposite. See *People v. Holcomb*, 192 Ill. App. 3d 158, 168 (1989) (rejecting defendant's argument that his loss of liberty pending trial constituted actual and substantial prejudice to him).

¶ 21 In *Holcomb*, the court stated:

“The prejudice required by *Lawson* and *Lovasco* to establish a fourteenth amendment claim, however, is a showing that a defendant was denied an opportunity of a fair trial, such as an impairment of defendant's ability to prepare a defense. The prejudice in *Lovasco*, for example, was a loss of a significant witness, while that in issue in *Lawson* was defendant's assertions of his inability to remember the events at the time of the alleged violation. Defendant here has not set forth any similar facts from which to find that the delay denied him a fair trial or hampered his ability to receive a fair trial.” *Id.*

¶ 22 Citing *Smith v. Hooey*, 393 U.S. 374 (1969), defendant contends that the “delay which deprives a defendant of the benefits of concurrent sentencing is constitutionally cognizable prejudice.” As the *Smith v. Hooey* Court stated: “[T]he possibility that the defendant already in

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prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed.” *Smith v. Hooey*, 393 U.S. at 378.

Although there is no Illinois case on point, we find instructive the California Supreme Court's analysis in *People v. Lowe*, 154 P.3d 358 (Cal., 2007). As the *Lowe* court explained:

“[I]n *Smith* loss of the opportunity to serve concurrent sentences was not the only circumstance but one of several mentioned by the high court in explaining why the state prosecutor in that case could not refuse to prosecute the defendant while he was serving his federal sentence. Consequently, *Smith* cannot be said to hold that an unjustified delay in bringing a defendant to trial violates the defendant's speedy trial right under the federal Constitution when, as here, the only prejudice alleged by the defendant is the loss of the opportunity to serve the sentence on the pending charge concurrently with the sentence in another case.

The federal courts have in those situations uniformly rejected defense claims of prejudice. [Citations.]” *Lowe*, 154 P.3d at 362.

Therefore, the *Lowe* court held: “Consistent with these decisions construing the *federal* Constitution's right to a speedy trial, we reject defendant's contention that under the *California* Constitution's speedy trial right, a pending criminal charge must be dismissed solely because the delay in bringing the defendant to trial has cost the defendant the chance to serve the sentence on that charge concurrently with the sentence in another case.” *Id.* (Emphasis in original).

¶ 23 Moreover, as defendant acknowledges, the statement in *Smith v. Hooey* was made in the context of the Court's speedy trial analysis. Defendant here has not claimed that his right to a

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speedy trial was violated. Again, we find instructive a case from another jurisdiction. The Hawaii Supreme Court case of *State v. Higa*, 74 P.3d 6, 7 (Hawaii, 2003) involved the issue of whether charges should have been dismissed for preindictment delay. Relying in part on *Smith v. Hooey*, the lower court had granted the defendant's motion to dismiss the indictment in which she had alleged violation of her constitutional right to due process under both the federal and state constitutions. *Id.* at 8. The State appealed arguing that the “circuit court erred by ruling that lost opportunities for concurrent sentencing, parole, and loss of parental rights constituted actual substantial prejudice.” *Id.* at 11. The Hawaii Supreme Court agreed, and found *Smith v. Hooey* inapposite because it “involved the right to speedy trial, which attaches upon indictment or accusation and involves slightly different considerations.” *Id.* The *Higa* court further noted: “In the context of due process, lost opportunities for concurrent sentencing, parole, and loss of parental rights, as asserted in this case, did not affect [the defendant's] ability to present an effective defense.” We believe the reasoning applies to the instant case involving pre-arrest delay.

¶ 24 As the State correctly notes, “it is well established that a defendant does not have a constitutional right to be arrested once an alleged violation of the law has occurred.” See *Hoffa v. U.S.*, 385 U.S. 293, 310 (1966) (“There is no constitutional right to be arrested.”); *People v. Lawson*, 67 Ill. 2d 449, 457–59 (1977) (same). “[P]re-arrest delay raises no constitutional concerns unless the defendant can clearly show that the delay caused actual and substantial prejudice to defendant's ability to present a defense.” (Emphasis added.) *People v. Shepherd*, 242 Ill. App. 3d 24, 29-30 (1993) (citing *People v. Lawson*, 67 Ill. 2d 449, 457–59 (1977)). We

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conclude that defendant has failed to establish that the State's delay in arresting him was a violation of his due process rights.

¶ 25

CONCLUSION

¶ 26 In accordance with the foregoing, we affirm the sentence imposed by the circuit court of Cook County.

¶ 27 Affirmed.