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2012 IL App (3d) 100597-U

Order filed February 23, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellee,	)	Will County, Illinois,
	)	
v.	)	Appeal No. 3-10-0597
	)	Circuit No. 09-CF-2201
	)	
THOMAS P. LENAHAN,	)	Honorable
	)	Daniel J. Rozak,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE O'BRIEN delivered the judgment of the court.  
Justices Holdridge and Lytton concurred in the judgment.

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**ORDER**

- ¶ 1 *Held:* The trial court erred in considering factors inherent in the offense as aggravating factors in sentencing; however, this error was not reversible.
- ¶ 2 Defendant, Thomas P. Lenahan, pled guilty to unlawful possession of a controlled substance with intent to deliver, pursuant to an open plea agreement. 720 ILCS 570/401(c)(1) (West 2008). The trial court sentenced defendant to six years' imprisonment. On appeal, defendant argues that the trial court considered two improper factors, which were inherent in the

offense, when it sentenced defendant. We affirm.

¶ 3

### FACTS

¶ 4 On October 8, 2009, defendant was charged by indictment with unlawful possession of a controlled substance with intent to deliver. 720 ILCS 570/401(c)(1) (West 2008). The State alleged that defendant knowingly possessed with the intent to deliver 1 or more but less than 15 grams of a substance containing heroin.

¶ 5 On January 13, 2010, a hearing was held on the terms of defendant's plea agreement. The parties informed the trial court that defendant intended to plead guilty, and that the State would recommend a sentence of 48 months' probation. The State's factual basis for the plea stated that on September 22, 2009, police were executing a search at a residence when a vehicle arrived. John T. Jacobsen, a codefendant, was the driver, and defendant was the passenger. Police looked into the car and saw three clear plastic bags containing an off-white powder, later determined to be heroin, in the center console of the vehicle. Jacobsen and defendant told the police that defendant gave the three bags to Jacobsen in exchange for Jacobsen driving defendant to Cicero, Illinois, where defendant planned to purchase heroin. Seven other packets containing heroin were also found near the passenger seat of the vehicle. Defendant admitted to selling heroin.

¶ 6 After the court advised defendant that the plea agreement was not an agreement for a sentence, defendant pled guilty, and the trial court accepted defendant's plea. The parties waived preparation of a presentence investigation report (PSI), and scheduled a sentencing hearing for February 18, 2010.

¶ 7 On February 18, 2010, the State recommended a sentence of 48 months' probation. The State claimed that defendant had no prior convictions. Defense counsel submitted no evidence in

mitigation. In response to a question by the court, defense counsel stated that defendant acknowledged he had a problem with heroin. Thereafter, the trial court ordered the preparation of a PSI report, because based on the offense, he was unsure if probation would be appropriate.

¶ 8 On May 3, 2010, a sentencing hearing was held, and the PSI report was presented to the court. The report showed that in December 2003, defendant was adjudicated delinquent for criminal defacement of property and knowingly damaging property. Defendant's prior adult record consisted of four ordinance violations from 2002 through 2008 for providing false identification to a minor, two counts of possessing cannabis, and consumption of liquor by a minor.

¶ 9 In aggravation, the State called John Roberts, a retired Chicago police captain. Roberts testified that defendant sold heroin to his heroin addicted son, Billy. In September 2009, Roberts telephoned defendant, and told him to stop selling heroin to Billy. Approximately one week later, Billy died of a heroin overdose at the age of 19.

¶ 10 In mitigation, defense counsel called defendant's mother, Susan Mangrum. Mangrum testified that defendant was a high school graduate, but was addicted to heroin. Defense counsel admitted into evidence a heroism award defendant received while in Boy Scouts, which recognized defendant for saving a two-year-old girl from drowning. Counsel also stated that defendant attended 18 drug education classes while he was incarcerated.

¶ 11 The trial court took the matter under advisement, and sentencing continued on May 4, 2010. The trial court reviewed the statutory mitigating factors and found that none were present. Specifically, the court found that the factors relating to defendant's cause or contemplation of serious physical harm to another were not present. The trial court emphasized the high risk of

death and addiction after the first use of heroin, and furthermore, that defendant was an addict and should have known the repercussion of delivering such a drug. However, the court noted that defendant had some drug treatment classes, and also that he took responsibility for his actions.

¶ 12 As to the factors in aggravation, the trial court found that defendant's conduct caused or threatened serious physical harm because, as the court previously stated in mitigation, there was a threat of harm to anyone defendant was willing to sell or convey heroin to. The court found that defendant received compensation for committing the offense. In determining this, the court noted that compensation was present, to an extent, because defendant was motivated by profit and a need to support his own addiction. The court found that defendant had a history of prior delinquency and criminal activity. The court found that the sentence was necessary to deter others. In finding this, the court stated that defendant's imprisonment was necessary for the protection of the public; furthermore, a sentence of probation would deprecate the seriousness of defendant's conduct and would be inconsistent with the ends of justice. After reviewing the factors in mitigation and aggravation, defendant was sentenced to six years' imprisonment.

¶ 13 Defendant filed a motion to withdraw plea or reconsider sentence, arguing that his sentence was excessive. Defendant later filed an amended motion to withdraw plea or reconsider sentence. In this motion, defendant again argued that his sentence was excessive, and also added that the trial court improperly sentenced defendant to prison instead of probation due to the trial judge's personal belief that persons convicted of this offense should not be sentenced to probation. Following a hearing, the trial court denied both motions. Defendant appeals.

¶ 14

#### ANALYSIS

¶ 15 On appeal, defendant argues that his sentence should be vacated because the trial court considered two improper aggravating factors at sentencing. Specifically, defendant contends that the trial court improperly considered that his conduct caused or threatened serious physical harm and that he had an expectation of compensation. Defendant argues that both factors were inherent elements of the offense of possession of a controlled substance with intent to deliver.

¶ 16 Defendant acknowledges that he failed to preserve this issue for review by not raising it in his postsentencing motion. However, a sentencing court's reliance upon an improper factor in sentencing will be reviewed under the plain error doctrine if the evidence is closely balanced, or if the error is of such magnitude that defendant is denied a fair sentencing hearing. *People v. Kopczyk*, 312 Ill. App. 3d 843 (2000). Under both prongs of the plain error doctrine, defendant bears the burden of persuasion. *People v. Herron*, 215 Ill. 2d 167 (2005). Before addressing whether defendant's claim satisfies the plain error doctrine, defendant must first show that a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539 (2010).

¶ 17 A sentence imposed by a trial court is entitled to great deference, and when the sentence is within the statutory range, it will not be reversed unless the trial court has abused its discretion. *People v. Bosley*, 233 Ill. App. 3d 132 (1992). A trial court may not consider a factor implicit in the offense as a basis for imposing a harsher sentence than might otherwise have been imposed; however, it may consider the nature and circumstances of the offense, including the nature and extent of each element of the crime defendant committed. *People v. Phelps*, 211 Ill. 2d 1 (2004); *People v. Robinson*, 391 Ill. App. 3d 822 (2009). However, even if the trial court relied on an improper factor in aggravation, it will not necessarily require remand where it can be determined from the record that the weight placed upon the improper factor was insignificant and did not

lead to a greater sentence. *People v. Beals*, 162 Ill. 2d 497 (1994). Furthermore, a reviewing court should not focus on a few words or statements of the trial court, but should look to the record as a whole when determining the correctness of a sentence. *People v. Reed*, 376 Ill. App. 3d 121 (2007).

¶ 18 In this instant case, we find that it was improper for the trial court to consider that defendant's conduct threatened serious physical harm or that defendant received compensation for committing the offense because both factors are inherent in the offense of possession with intent to deliver. See *Phelps*, 211 Ill. 2d 1. Threat of harm to society from the use of controlled substances is implicit in the crime of delivery; therefore, it was improper to consider as an aggravating factor. *People v. Maxwell*, 167 Ill. App. 3d 849 (1988). Likewise, receiving compensation is also inherent in most drug transactions, making it improper for a sentencing court to consider the fact that a defendant has been compensated as a factor in aggravation. *People v. M.I.D.*, 324 Ill. App. 3d 156 (2001).

¶ 19 Having found that the trial court committed error by considering factors inherent in the offense in aggravation, we turn to whether either prong of the plain error doctrine has been implicated. See *People v. Sargent*, 239 Ill. 2d 189 (2010). Defendant asserts that this issue should be reviewed under the second prong of the plain error doctrine because it affected his fundamental right to liberty. However, defendant only briefly addressed this issue, and failed to meet his burden of persuasion to establish that the error in this case was of such magnitude that he was denied a fair sentencing hearing. See *Kopczick*, 312 Ill. App. 3d 843.

¶ 20 We further conclude that any weight that the trial court placed on either the threat of harm or compensation was insignificant, and did not result in a greater sentence. See *Beals*, 162 Ill. 2d

497. The trial court's comments regarding threat of harm as an aggravating factor focused primarily on the need to deter this type of conduct. A trial court may properly consider the need for deterrence as a factor in the imposition of a sentence. *People v. Cameron*, 189 Ill. App. 3d 998 (1989). The trial court's review of compensation as an aggravating factor shows that it only briefly addressed this factor in aggravation. Moreover, a factor that is implicit in a crime, such as the amount of profit derived from a criminal enterprise, may relate to proper sentencing considerations, including the extent and nature of defendant's involvement, defendant's underlying motivation for committing the offense, the likelihood of defendant's commission of similar offenses in the future, and the need to deter others from committing similar crimes. *M.I.D.*, 324 Ill. App. 3d 156. Here, the court referenced compensation in relation to defendant's need to support his own addiction, but focused on the need to deter others from committing this offense.

¶ 21 Moreover, the sentencing range in this case was 4 to 15 years' imprisonment, or probation not to exceed 4 years. 720 ILCS 570/401(c)(1); 730 ILCS 5/5-4.5-30, 5-6-1(a) (West 2008). At sentencing, in addition to threat of harm and compensation as sentencing factors, the trial court properly considered in aggravation that defendant had a history of criminal activity, that his imprisonment was necessary for the protection of the public, and that probation would deprecate the seriousness of defendant's conduct. By contrast, the court found no statutory factors in mitigation present. In this regard, the properly considered aggravating factors were sufficient to support defendant's six-year sentence, such that the use of improper aggravating factors did not lead to a greater sentence for defendant. See *Beals*, 162 Ill. 2d 497.

¶ 22

CONCLUSION

¶ 23 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 24 Affirmed.