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2012 IL App (3d) 100610-U

Order filed May 8, 2012

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 10th Judicial Circuit,
	)	Peoria County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-10-0610
v.	)	Circuit No. 09-CF-1160
	)	
TIMOTHY L. BYNUM,	)	Honorable
	)	Glenn H. Collier,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err when it discussed the harm cocaine causes to the community when it sentenced defendant. Defendant's $200 DNA analysis fee is vacated.

¶ 2 Defendant, Timothy L. Bynum, was convicted of unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2008)) and was sentenced to 10 years' imprisonment. Defendant appeals his sentence, arguing: (1) the trial court improperly relied on a factor in sentencing that was inherent in the offense; and (2) his $200 deoxyribonucleic acid (DNA) fee

should be vacated because he was registered in the DNA database at the time of sentencing. We vacate defendant's DNA analysis fee and otherwise affirm.

¶ 3 FACTS

¶ 4 On October 20, 2009, defendant was indicted on one count of unlawful delivery of a controlled substance (cocaine) (720 ILCS 570/401(d)(i) (West 2008)). The cause proceeded to a jury trial where defendant was found guilty. Following the verdict, the trial court ordered a pre-sentence investigation report (PSI). The first page of the PSI indicated defendant's DNA was registered.

¶ 5 At the sentencing hearing, the trial court noted it had considered the evidence it heard at trial, the PSI, counsels' arguments, defendant's statement, and the evidence in aggravation. The court specifically mentioned defendant's past criminal record, which the court found was "certainly extensive, containing ten felony convictions." It noted that defendant's crime took place near a school, which could be seen in an undercover video of the offense. The trial court stated that cocaine is a highly toxic substance that is harmful to communities, and particularly harmful to areas where there are schools. Defendant was sentenced to 10 years' imprisonment and ordered to pay a $200 DNA assessment fee. Defendant appeals.

¶ 6 ANALYSIS

¶ 7 Defendant first argues the cause should be remanded for a new sentencing hearing because the trial court, while sentencing defendant, relied on a factor inherent in the offense. Specifically, defendant contends the court improperly relied on the fact that cocaine causes harm to the community, because that factor is inherent in the offense.

¶ 8 Initially, we note defendant had failed to preserve this issue for appeal; therefore, the

issue was forfeited and cannot be considered on appeal unless it was plain error. Ill S. Ct. R. 615(a) (eff. Aug. 27, 1999). The plain error doctrine bypasses forfeiture principles and allows a reviewing court to consider unpreserved error when: (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167 (2005). However, before we can determine whether an error fits under either of the above categories, we must first determine whether an error actually occurred. *People v. Cosby*, 231 Ill. 2d 262 (2008).

¶ 9 Although a trial court has broad discretion when imposing a sentence, it may not consider a factor implicit in the offense as an aggravating factor in sentencing. *People v. Ellis*, 401 Ill. App. 3d 727 (2010). However, the trial court may consider the nature and circumstances of the offense, including the nature and extent of each element of the offense committed by the defendant. *People v. Saldivar*, 113 Ill. 2d 256 (1986). Further, the trial court is not required to refrain from any mention of the factors which constitute elements of an offense, and a mere reference to the existence of such a factor is not reversible error. *People v. Jones*, 299 Ill. App. 3d 739 (1998). We will not reverse a sentence imposed by a trial court unless it is clearly evident the sentence was improperly imposed. *Ellis*, 401 Ill. App. 3d 727.

¶ 10 Here, defendant argues the trial court relied on a factor inherent in the offense, namely that cocaine causes harm to the community, when it sentenced defendant. We do not believe the trial court's statement was error. Following the trial court's discussion of the toxic nature of cocaine, it went on to state defendant sold the substance near a school. The offense in this case did not include delivery of a controlled substance near a school as an element. Therefore, the trial court's mention of the harm caused by cocaine was in the context of a proper comment on

the nature and extent of the harm due to the defendant's proximity to a school.

¶ 11 Further, we note that in pronouncing its sentence, the trial court did not appear to rely heavily upon its statement that cocaine causes harm to the community. At sentencing, the court stated it considered the PSI, counsels' arguments, defendant's statement, and the evidence in aggravation. The court then specifically cited defendant's past criminal record, which the trial court noted was "certainly extensive, containing ten felony convictions." Defendant's record was in fact egregious, and it provided ample support for the sentence imposed in this case. Thus, we do not believe the trial court relied on a factor inherent in the offense or that it is clearly evident that the sentence was improperly imposed.

¶ 12 Defendant next argues his DNA analysis fee should be vacated because his DNA was registered at the time of sentencing. Section 5-4-3 of the Unified Code of Corrections mandates that all individuals convicted of an offense that is classified as a felony under Illinois law after January 1, 1998, submit to the taking, analyzing, and indexing of their DNA, and the payment of an analysis fee. 730 ILCS 5/5-4-3(a), (j) (West 2010). However, a defendant is only required to submit to and pay for the DNA assessment when he is not currently registered in the DNA database. *People v. Marshall*, 242 Ill. 2d 285 (2011). Here, as in *Marshall*, the PSI indicated that defendant's DNA was currently registered in the DNA database. Therefore, we vacate the $200 DNA analysis fee assessed by the trial court.

¶ 13 CONCLUSION

¶ 14 The DNA fee assessed against defendant is vacated, and the judgment of the circuit court of Peoria County is otherwise affirmed.

¶ 15 Affirmed in part and vacated in part.