**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).

2012 IL App (3d) 100854-U

Order filed June 8, 2012

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IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court |
| | ) | of the 12th Judicial Circuit, |
| | ) | Will County, Illinois, |
| Plaintiff-Appellee, | ) | |
| | ) | Appeal No. 3-10-0854 |
| v. | ) | Circuit No. 09-CF-2662 |
| | ) | |
| STEPHEN E. BUTLER, | ) | Honorable |
| | ) | Daniel J. Rozak, |
| Defendant-Appellant. | ) | Judge, Presiding. |

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JUSTICE O'BRIEN delivered the judgment of the court.
Justices Wright and McDade concurred in the judgment.

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**ORDER**

¶ 1 *Held:* The trial court committed reversible error by investigating the number of heroin deaths in Will County prior to defendant's sentencing and considering that information in setting defendant's sentence.

¶ 2 After a jury trial, defendant, Stephen E. Butler, was convicted of two counts of possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(1)(A), (2)(B) (West 2008)), three counts of unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)), and two counts of defacing identification marks of firearms (720 ILCS 5/24-5(b) (West 2008)). He

was sentenced to 30 years' imprisonment for each count of possession of a controlled substance with intent to deliver, and 10 years' imprisonment on each of the remaining counts. The sentences were to be served concurrently. On appeal, defendant argues that his case should be remanded for resentencing on the drug charges because the trial court considered an improper aggravating factor. We reverse and remand.

¶ 3 FACTS

¶ 4 Defendant represented himself at trial and sentencing. The evidence at trial established that, at the time of his arrest, defendant possessed over 15 grams of heroin and over 146 grams of cocaine.

¶ 5 At sentencing, the State argued in aggravation that defendant had a criminal history. The State also argued that the amount of heroin defendant was intending to sell was particularly dangerous, stating:

> "If you remember the testimony from the trial, ATF agent that testified that on prior occasions he purchased firearm from [defendant]. That's how he got to know [defendant] and his criminal activities. If you recall the amount–one of the substances that was possessed with the intent to deliver was heroin. You recall the amount of that heroin in grams, and please recall that the agent who testified, testified that the general rule is an individual dose of heroin would be in the neighborhood of a tenth of a gram, so that's ten doses for every gram. That's more than a hundred people could have used or fallen victim to that heroin."

¶ 6 Defendant did not make any arguments in mitigation. The matter reconvened on October 27, 2010, for the trial court's sentencing decision. The court began by considering the first two

factors in mitigation: (1) whether defendant's criminal conduct neither caused nor threatened serious harm to another; and (2) defendant did not contemplate that it would do so. The court found that:

> "[t]he use of drugs, delivery of drugs does cause serious harm to others so does the delivery made and the person that uses them, I think. That is especially so with the heroin. I have been over this before in my courtroom, but I will repeat it for the purposes of the record here. I don't have the figures for 2010 yet because 2010 isn't complete but in 2009, the last year that I have complete figures for, there were more than 200 deaths in the collar county area that were direct results of heroin overdoses to, I believe, probably one of the most deadly drugs on the market right now. One use and you are dead and a lot of times that's exactly what happens and if you are not dead, one use and you are probably the victim and one of the future uses will most likely kill you. *I called the coroner regarding last year's results here in Will county.* More than 30 of those were in Will County or people from Will County or who died elsewhere so it's a tremendous problem not only in the State of Illinois but here in Will county. The doses that I see defendant had here were enough to kill a hundred people[.]" (Emphasis added.)

¶ 7 When considering the factors in aggravation, the trial court considered whether defendant's conduct caused or threatened serious harm. The court stated, "I've covered that in mitigating–in the mitigating factors. Again, certainly addiction's [*sic*] a serious harm, and I think that does apply as an aggravating factor." Defendant was sentenced to 30 years' imprisonment on each count of possession of a controlled substance with intent to deliver. No motion to reconsider sentence was filed. Defendant appealed.

¶ 8 ANALYSIS

¶ 9 On appeal, defendant argues that his case should be remanded for resentencing because the trial court considered an improper aggravating factor. We review for an abuse of discretion. *People v. Abraham*, 257 Ill. App. 3d 587 (1993).

¶ 10 As an initial matter, both the State and defendant agree that the issue was forfeited because defendant failed to preserve the issue in a written motion to reconsider sentence. *People v. Enoch*, 122 Ill. 2d 176 (1988). However, the waiver rule is relaxed where the basis of the objection is the trial court's conduct. *People v. Rowjee*, 308 Ill. App. 3d 179 (1999). Here, because defendant raises a challenge to the trial court's consideration of an improper aggravating factor, the reluctance of defendant to challenge the trial court is understandable. *People v. Atwood*, 193 Ill. App. 3d 580 (1990). Therefore, we do not consider this issue waived for purposes of appeal.

¶ 11 In general, the trial court has broad discretion when imposing a sentence, and the court's sentencing decision is entitled to great deference. *People v. Stacey*, 193 Ill. 2d 203 (2000). A trial court abuses its discretion when it considers an improper factor in aggravation at sentencing, but remand is not necessary if the improper factor did not lead to a more severe sentence. *People v. Cotton*, 393 Ill. App. 3d 237 (2009). Defendant contends that the trial court improperly considered an aggravating factor because the court noted that addiction was a "serious harm." Defendant argues that such harm was "implicit in the crime of delivery[,]" (*People v. Maxwell*, 167 Ill. App. 3d 849, 852 (1988)), and that the legislature already considered the widespread societal harm when fixing the sentencing range for the offense.

¶ 12 We note that when considering the application of the aggravating factors at sentencing,

the trial court stated that it had "covered that" in its consideration of the mitigating factors. Upon reviewing the court's evaluation of the mitigating factors, we find that the court committed reversible error by engaging in its own private investigation and relying on facts outside the record. Specifically, when discussing the harm caused by heroin, the trial court relied upon figures from 2009 which indicated that there were over 200 deaths from heroin in the collar counties. In addition, the trial court admitted to calling the coroner of Will County regarding last year's results, and learned that approximately 30 of those 200 deaths involved Will County residents.

¶ 13 " 'A determination made by the trial judge based upon a private investigation by the court or based upon private knowledge of the court, untested by cross-examination, or any of the rules of evidence constitutes a denial of due process of law.' " *People v. Dameron*, 196 Ill. 2d 156, 171-72 (2001) (quoting *People v. Wallenberg*, 24 Ill. 2d 350, 354 (1962)). In *Dameron*, our supreme court held that the trial court violated defendant's due process rights at sentencing by considering a social science book and a death penalty case over which his father had presided. *Dameron*, 196 Ill. 2d 156. Similarly, the court in the instant case violated defendant's due process rights by contacting the Will County coroner, discovering how many individuals had died of a heroin overdose within the last year, and then punishing defendant accordingly. Defendant was denied his opportunity to cross-examine the coroner with regard to the information, and as such his case must be remanded for resentencing.

¶ 14 ANALYSIS

¶ 15 For the foregoing reasons, the judgment of the circuit court of Will County is reversed, and the cause is remanded for further proceedings.

¶ 16 Reversed and remanded.