

NOTICE
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2012 IL App (4th) 110058-U

Filed 4/9/12

NOS. 4-11-0058, 4-11-0059 cons.

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
EUGENE EDWARDS LOUIS,)	Nos. 09CF598
Defendant-Appellant.)	10CF673
)	
)	Honorable
)	Paul G. Lawrence,
)	Judge Presiding.

JUSTICE COOK delivered the judgment of the court.
Justices Pope and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding (1) defendant forfeited his argument that the trial court failed to consider whether imprisonment would endanger his medical condition, and (2) the trial court did not abuse its discretion in sentencing defendant to a five-year prison term for retail theft or for revoking his probation on a prior retail theft offense.

¶ 2 This case presents a consolidated appeal from two criminal cases arising out of McLean County. Defendant, Eugene Edwards Louis, appeals from his probation revocation in McLean County case No. 09-CF-598 (our No. 4-11-0058) and from his five-year prison sentence in McLean County case No. 10-CF-673 (our No. 4-11-0059).

¶ 3 In September 2009, defendant pleaded guilty to retail theft in case No. 09-CF-598, and the trial court sentenced him to 30 months' drug court probation pursuant to a negotiated agreement. In August 2010, defendant tendered an open guilty plea to retail theft in case No. 10-

CF-673. At an October 2010 hearing, the trial court revoked defendant's probation with no further penalty in case No. 09-CF-598 and sentenced him to five years' imprisonment in case No. 10-CF-673. The trial court denied defendant's motion to withdraw plea or reconsider sentence in case No. 10-CF-673.

¶ 4 Defendant appealed, and we consolidated the appeals. On appeal, defendant argues that this court should either reduce his five-year prison sentence in case No. 10-CF-673 or remand for a new sentencing hearing because the trial court failed to consider (1) whether imprisonment would endanger his medical condition, or (2) whether a traumatic, life-threatening knife attack perpetrated on him triggered his criminal conduct. We disagree and affirm. Because defendant does not brief any arguments to support his appeal in case No. 09-CF-598, we dismiss that portion of the appeal.

¶ 5 I. BACKGROUND

¶ 6 In July 2009, defendant was indicted for retail theft, case No. 09-CF-598, after he took a 24-ounce can of beer from a Mobil Super Pantry without paying for it. The indictment charged the offense as a "subsequent offense," a Class 4 felony. 720 ILCS 5/16A-3(a) (West 2008). In September 2009, defendant pleaded guilty to this offense (case No. 09-CF-598). The trial court informed defendant he was eligible for an extended-term sentence of one to six years because of his prior convictions, which defendant acknowledged he understood. The court also explained, "Under the terms of your agreement, upon your plea of guilty to this offense, you would be placed upon a term of 30 months['] drug court probation, be sentenced to 180 days in the McLean County jail. All of those days, 180, would be stayed pending your compliance with the terms of the drug court probation order." Defendant stated he understood the terms. After

finding that defendant understood the nature of the proceedings, possible penalties, his legal rights, and that his guilty plea was knowingly and voluntarily entered, the trial court sentenced him to 30 months' drug court probation pursuant to the agreement.

¶ 7 In July 2010, defendant was indicted for retail theft, case No. 10-CF-673, after he took food items from an Aldi's grocery store without paying for them. The indictment also alleged defendant had previously been convicted of retail theft in case No. 09-CF-598 and listed the instant retail-theft charge as a Class 4 felony.

¶ 8 In August 2010, defendant tendered an open guilty plea to this offense (case No. 10-CF-673). Defense counsel and the State indicated defendant was pleading guilty with no agreement as to the ultimate sentence; however, the State did agree to lower his bond. The trial court addressed defendant and explained the allegations of the indictment. Defendant stated he understood that there was no agreement concerning the sentence he would receive for this offense and no promises had been made other than lowering his bond. The court informed defendant of the sentencing possibilities as follows:

"There is no required minimum sentence here. This is a Class 4 felony, which means you could receive probation or conditional discharge for up to 30 months. You could receive a county jail sentence of up to 180 days, and a maximum fine of up to \$25,000.

You could also receive a sentence to prison. The minimum prison sentence is one year, the maximum prison sentence, because of your prior record, is six years. And if you served a prison sentence, you would have to serve mandatory supervised release

for one year upon your release from prison. *** "

Defendant stated he understood the sentencing possibilities. The trial court also explained that during the sentencing hearing, defense counsel and the State could offer sentence recommendations, but the court was under no obligation to follow either recommendation and defendant could receive up to six years in prison. Defendant stated he understood.

¶ 9 In September 2010, the State filed a petition to revoke defendant's probation in case No. 09-CF-598 because he committed retail theft in case No. 10-CF-673, missed drug screens on seven dates, missed treatment groups on seven occasions, failed to report to probation twice, and admitted consuming alcohol.

¶ 10 In October 2010, the trial court conducted concurrent hearings on the petition to revoke defendant's probation in case No. 09-CF-598 and a sentencing hearing on the guilty plea entered in case No. 10-CF-673.

¶ 11 The trial court informed defendant that he could be sentenced to up to six years in prison for violating his probation in case No. 09-CF-598 because he was extended-term eligible. Defendant stated he understood and admitted the allegations in the petition to revoke. Following the joint recommendation of both parties, the court discharged defendant unsuccessfully from probation with no further penalty.

¶ 12 During the sentencing phase of the hearing for case No. 10-CF-673, defendant testified on his own behalf. Defendant admitted being an alcoholic and a drug addict. Defendant testified he recently participated in drug court in case No. 09-CF-598 and was doing very well—he went 11 months without drinking or doing drugs, participated in all the classes, and did all the assignments. Defendant stated he felt good for the first time in over 30 years while

participating in drug court. Defendant testified that during the eleventh month of drug court, he was attacked by a man with a knife and was stabbed 10 times. Prior to being stabbed, defendant stated he was working a steady job, earning and saving money, and looking for an apartment. After the stabbing, defendant stated he was off work for six weeks and did not know if he would be able to return to work. His orthopedic physicians were monitoring his shoulder and told him the knife had "just barely missed so many vital spots on [his] body." Defendant stated he had a lot of time on his hands because he couldn't work following the attack and he started drinking and using drugs again. In May and June of 2010, the drug court sanctioned him for his drug and alcohol use but allowed him to continue participating in drug court. Defendant was then charged with the instant retail theft offense, case No. 10-CF-673.

¶ 13 When asked his motivation for taking the items from Aldi's, defendant responded, "I was drinking. I was kind of despaired, I was at a point where I didn't care anymore about anything." During his statement in allocution, defendant apologized for his conduct and acknowledged that he had to take responsibility for his actions.

¶ 14 Defense counsel noted defendant was "very remorseful" and that he had disappointed himself, the drug court team, and members of the drug court. Counsel agreed with defendant and opined, "I do think that [defendant] is correct in that had that stabbing not occurred on that day, that he probably would have been much further along, he probably would not be where he is today." Counsel further stated, "when he was not allowed to work after the stabbing, he had a lot of time on his hands and a lot of that time led to thinking about things which led to the drinking and the drugs again." Defense counsel asked for a three-year prison sentence.

¶ 15 The State recounted that Aldi's employees observed defendant walking out of the store with \$100 worth of ribs and two bags full of items. A customer observed defendant loading up these bags with meat items. Officers later found defendant hiding behind a large trash can. The State also highlighted defendant's significant criminal history as indicated in the presentence investigation report (PSI). Specifically, the State pointed out this was defendant's eighteenth felony conviction, the majority of which were financial crimes. The State noted defendant had several opportunities to receive substance-abuse treatment beginning in the 1980s, again in the 1990s, and most recently in 2009. The State recognized "defendant was trying to fight his addiction" but that he has "committed many many crimes against our community, obviously fueled by an addiction but he's had every resource that the State has at its disposal to help him to be able to get over this addiction *** it just hasn't worked out." Last, the State noted defendant had been sentenced to four years' imprisonment for a prior retail theft conviction. In giving its sentence recommendation to the court, the State opined, "Normally the State would ask for an aggravated sentence on top of that based on the fact that obviously [defendant's] got a lengthy record. Based on the mitigation presented today the State feels that another four year sentence would be appropriate."

¶ 16 In fashioning its sentence, the trial court took into consideration defendant's testimony, his statement in allocution, the recommendation of counsel, the PSI, and "the factors in mitigation and aggravation as set forth in Illinois Compiled Statutes." In mitigation, the trial court specifically stated:

"[T]here is some evidence that the defendant does have a mental health history as well as the other problems that we've talked about

here today. He certainly does have an alcohol history, he was placed on TASC in an earlier case and that TASC probation was revoked and he received a DOC sentence. And of course he was recently placed on drug court which is probably or is the most intensive form of probation that we have available to use today. He completed residential treatment, then they removed the SCRAM device and he had a positive BAC and it was a cocaine positive and then he did residential treatment again, but then after completing it and being discharged he was discharged from outpatient treatment for noncompliance."

The court also noted defendant's conduct did not threaten or cause harm to anyone, acknowledged defendant's addiction contributed to many of his offenses, and observed defendant was a very likeable person who showed remorse.

¶ 17 In aggravation, the trial court referred to defendant's PSI, which showed a considerable criminal history. The retail-theft offense at issue here (case No. 10-CF-673) was defendant's eighteenth felony conviction. Defendant also had 11 misdemeanor convictions, 2 convictions for driving under the influence, and 10 traffic convictions. The court specifically noted:

"[T]his is [defendant's] eighteenth felony offense and at least ten of those are either retail theft or theft, almost I think nine out of those ten are retail theft. I mean he is a thief and has been a thief for many many years starting back in 1992, that's just what he does.

He's received a four year sentence to DOC, he was placed on parole back in '98. In 2000 received another four year sentence and this time did violate parole. An[d] then in '07 he was placed on probation and that was revoked and he was sent to prison. And then of course in '09 he received the drug court sentence. Once again, you know, he's been given breaks all along in order to help him with his problems and unfortunately he hasn't been able to overcome them.

*** And of course somewhat aggravating of course is that this offense did occur while he was on drug court probation which as I mentioned earlier is the most stringent form of probation that we have.

Since he's already received a four year sentence, the court feels that it would not be appropriate again to receive the same sentence. The court will impose instead of the maximum sentence of six years, the court will impose a five year sentence [of imprisonment]."

¶ 18 In November 2010, defense counsel filed a motion to withdraw plea or reconsider sentence in case No. 10-CF-673, asserting that defendant "had not fully considered the ramifications of his plea" and the five-year sentence was excessive. In December 2010, defendant filed a *pro se* motion to "withdraw plea or reduction of sentence" that alleged ineffective assistance of

counsel. During a December 22, 2010, hearing on the matter, counsel corrected the record so that case No. 09-CF-598 was also included in the motion to withdraw plea or reconsider sentence. The trial court also addressed defendant regarding his *pro se* motion. The hearing was continued to December 28, 2010. On that date, the trial court found defendant's ineffective-assistance claims were without merit.

¶ 19 Also during the December 28, 2010, hearing, defendant indicated he no longer wished to withdraw his plea of guilty in case No. 10-CF-673 or his admission in case No. 09-CF-598, but he did wish to proceed on the motion to reconsider his sentence. Defendant then testified that he experienced severe trauma as a result of the stabbing incident, which ultimately resulted in his commission of the retail theft at Aldi's. He stated that on the day of the retail theft, he had been drinking and was depressed. When he went into Aldi's, he "kind of blacked out," and the next thing he knew he was walking out the door. Defense counsel reiterated "that had it not been for the stabbing incident that he suffered, he probably would not be in [prison] right now. He would probably still be in drug court living a drug free, alcohol free life because he was doing so well for so long." The trial court denied the motion, commenting that it had considered many factors in mitigation and in aggravation, and nothing new had been presented to reconsider.

¶ 20 These appeals followed. We granted defendant's motion to consolidate his appeal.

¶ 21 II. ANALYSIS

¶ 22 On appeal, defendant argues the trial court erred in sentencing him to a five-year prison term because it did not consider (1) whether imprisonment would endanger his medical condition, and (2) whether a traumatic, life-threatening knife attack perpetrated on him, which resulted in injury and depression, triggered his criminal conduct, and, thus, constituted "substan-

tial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense." 730 ILCS 5/5-5-3.1(a)(4), (a)(12) (West 2010). In response, the State asserts (1) defendant's arguments are forfeited because he failed to object to them at the sentencing hearing or preserve them in his posttrial motion, (2) plain error does not apply, and (3) on the merits, the court did not abuse its discretion in sentencing defendant. We note that defendant does not brief any arguments to support his appeal in his probation revocation case, No. 09-CF-598. Thus, we address his arguments only with regard to case No. 10-CF-673.

¶ 23 A. Forfeiture

¶ 24 Initially, the State asserts that defendant has forfeited his arguments because he failed to mention the mitigating factors he now asserts at the sentencing hearing and the issues were not raised in his posttrial motion. See *People v. Thompson*, 375 Ill. App. 3d 488, 492, 874 N.E.2d 572, 575-76 (2007) ("Under Rule 604(d), any issue not raised in a motion to withdraw a guilty plea or to reconsider a sentence after a guilty plea is forfeited."). Defendant contends the issues were properly raised because the arguments made by defense counsel at sentencing and during the hearing to reconsider were sufficient to warrant review of whether the trial court erred in failing to consider certain factors in arriving at its sentencing determination.

¶ 25 At defendant's sentencing hearing, both defendant and his counsel emphasized their belief that had defendant not been stabbed, he would not have returned to using drugs and alcohol and would not have committed the retail theft in case No. 10-CF-673. The motion to withdraw plea or reconsider sentence included a claim that, "based on all of the facts and circumstances presented at the sentencing hearing, the sentence was excessive." During the hearing on this motion, defendant and his counsel again asserted that but for the stabbing,

defendant would not have committed the theft from Aldi's. We agree with defendant that this issue has not been forfeited.

¶ 26 On the other hand, we agree with the State that "the record does not contain, and defendant does not cite to[,] any evidence offered of a medical condition of defendant which would be endangered by his imprisonment." In his reply brief, defendant argues that he "testified about these matters himself, and his appellate brief extensively cites the record confirming this." Contrary to defendant's assertion, no mention was made during sentencing or the posttrial hearing regarding how a sentence of imprisonment would endanger defendant's medical condition. The only mention of any medical condition, which defendant expressly points to in his reply brief, is that he was stabbed 10 times causing him to be off work for 6 weeks, that his shoulder was being monitored by an orthopedic surgeon, that he suffered severe injuries that barely missed vital areas of his body, and that doctors told him he suffered a near-death experience. However, no evidence in the record suggests any present, ongoing, or future medical issues would result from defendant's confinement, or further, that any such argument or statement was ever made to that effect. As such, this issue has been forfeited.

¶ 27 B. Plain-Error

¶ 28 Defendant next argues that even if the "sentencing court's failure to consider applicable mitigating factors was not specifically preserved for review, this question affects [defendant's] fundamental right to liberty" such that this issue may be reviewed for plain error.

¶ 29 The plain-error doctrine set forth in Supreme Court Rule 615(a) (Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)) provides a narrow exception to the general rule of procedural default. *People v. Walker*, 232 Ill. 2d 113, 124, 902 N.E.2d 691, 697 (2009). The plain-error doctrine

permits a reviewing court to consider unpreserved error under the following two scenarios:

"(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, 940 N.E.2d 1045, 1058 (2010).

We begin our analysis by determining whether any error occurred at all. *Sargent*, 239 Ill. 2d at 189, 940 N.E.2d at 1059. If error did occur, this court then considers whether either of the two prongs of the plain-error doctrine has been satisfied. *Sargent*, 239 Ill. 2d at 189-90, 940 N.E.2d at 1059. Under both prongs, the defendant bears the burden of persuasion. *Sargent*, 239 Ill. 2d at 190, 940 N.E.2d at 1059.

¶ 30 The only issue applicable to our error analysis is whether the trial court committed error by not specifically stating for the record what weight, if any, it placed on the statutory mitigating factor of whether imprisonment would endanger defendant's medical condition. We hold that the court did not commit error.

¶ 31 First, the fact that the trial court did not specifically state that it had considered what impact, if any, incarceration would have on defendant's medical condition does not mean the court did not properly consider the factor in sentencing defendant. A trial court is not required to specifically recite and assign a value to every statutory factor it considers when

imposing a sentence. *People v. McDonald*, 322 Ill. App. 3d 244, 251, 749 N.E.2d 1066, 1072 (2001).

¶ 32 Second, as mentioned previously, the record belies any claim that incarceration of defendant would affect any medical condition because no record evidence shows a medical condition. Defendant testified he had been stabbed and that his injuries had been severe, but nothing indicates any continuing medical condition associated with the stabbing or any other medical problems. In fact, the PSI indicates that defendant reported being in "good" physical health, and although he was stabbed 10 times on the back of his shoulder in May 2010, he reported that his "shoulder is fine now."

¶ 33 Since the trial court did not commit error, defendant's claim that his "medical condition" would be adversely affected because of imprisonment does not warrant plain-error review. Because defendant did not properly preserve this issue for appeal, it is forfeited.

¶ 34 C. Sentencing

¶ 35 Having already determined that defendant has forfeited his claim that the trial court failed to consider the effect imprisonment would have on his medical condition, we address only whether the court erred in sentencing defendant because it failed to consider whether the stabbing incident constituted "substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense." 730 ILCS 5/5-5-3.1(a)(4) (West 2010). We hold that the court did not err.

¶ 36 A trial court has broad discretionary powers in determining an appropriate sentence for a defendant because the trial court is better able to assess the credibility of witnesses and to weigh evidence presented during the sentencing hearing. *People v. Jones*, 168 Ill. 2d 367,

373, 659 N.E.2d 1306, 1308 (1995) (citing *People v. Younger*, 112 Ill. 2d 422, 427, 494 N.E.2d 145, 147 (1986)). Where the sentence imposed by the trial court falls within the statutory range permissible for the offense, a reviewing court will disturb the sentence only if the trial court abused its discretion. *Jones*, 168 Ill. 2d at 373-74, 659 N.E.2d at 1308. An abuse of discretion exists where the sentence imposed is "greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense." *People v. Fern*, 189 Ill. 2d 48, 54, 723 N.E.2d 207, 211 (1999).

¶ 37 In the case *sub judice*, because of his prior convictions, defendant was extended-term eligible and faced a minimum sentence of one year in prison and a maximum sentence of six years in prison in both cases. 730 ILCS 5/5-5-3.2(b)(1) (West 2008). The fact that the trial court did not specifically mention whether it considered the stabbing incident in mitigation does not mean the court did not properly consider the statutory factors in fashioning defendant's sentence. During sentencing, the trial court specifically stated it had considered defendant's testimony, his statement in allocution, the recommendation of counsel and "the factors in mitigation and aggravation as set forth in Illinois Compiled Statutes." Defendant's testimony and statement in allocution, as well as defense counsel's statements, expressed the belief that, had it not been for the stabbing incident, defendant would not have committed this crime. The State also acknowledged that defendant was doing well in drug court until some point after the stabbing, but it pointed out the drug court has done everything it can to help defendant.

¶ 38 The trial court noted this was defendant's eighteenth felony conviction, the majority of which were retail-theft or theft convictions, and he had previously violated parole. The court stated defendant had "been given breaks all along in order to help him with his

problems." Further, the court reiterated that defendant was on drug court probation when he committed the instant offense.

¶ 39 The trial court determined, based on the aforementioned factors, that a five-year prison sentence in case No. 10-CF-673 and revocation of probation in case No. 09-CF-598 was appropriate. Contrary to defendant's argument, and as we previously mentioned, a trial court is not under a mandatory requirement to recite all the statutory factors it considered when imposing sentence. *McDonald*, 322 Ill. App. 3d at 251, 749 N.E.2d at 1072. It is presumed that a trial court considered all relevant mitigating and aggravating factors in fashioning a sentence, and that presumption will not be overcome absent explicit evidence from the record that the trial court failed to consider mitigating factors. *People v. Flores*, 404 Ill. App. 3d 155, 158, 935 N.E.2d 1151, 1155 (2010). Such evidence is not present here. We conclude that the trial court was no more impressed than we are with defendant's argument that the stabbing altercation constituted grounds that would excuse or justify the theft of \$100 worth of ribs and two other bags of meat items and, thus, simply chose not to specifically cite this factor. Further, defendant's sentence reflects his lengthy criminal record, many offenses of which are retail theft or theft crimes. Defendant's sentence fell within the statutory range permissible, and the trial court did not abuse its discretion in sentencing defendant.

¶ 40 III. CONCLUSION

¶ 41 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 42 No. 4-11-0058, Dismissed.

¶ 43

No. 4-11-0059, Affirmed.