

NOTICE
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2012 IL App (4th) 110193-U

Filed 5/8/12

NO. 4-11-0193

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
JOSEPH CALIENDO,)	No. 09CF330
Defendant-Appellant.)	
)	Honorable
)	Mark A. Fellheimer,
)	Judge Presiding.

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

ORDER

¶ 1 *Held:* The trial court did not err by sentencing defendant to four years in prison because (1) defendant forfeited his argument that serious harm was a factor inherent in the offense of aggravated battery of which defendant was convicted, but even if he had not, defendant's argument fails on the merits, and (2) the record supported the trial court's finding that defendant's conduct caused or threatened serious harm.

¶ 2 Following a November 2010 trial, the jury convicted defendant, Joseph Caliendo, of aggravated battery (720 ILCS 5/12-4(b)(18) (West 2008)). In January 2011, the trial court sentenced defendant to four years in prison.

¶ 3 Defendant appeals, arguing that the trial court relied on improper factors in aggravation in imposing a sentence in excess of the minimum three years' imprisonment. We disagree and affirm.

¶ 4 I. BACKGROUND

¶ 5 In December 2009, the State charged defendant with aggravated battery (720 ILCS 5/12-4(b)(18) (West 2008)), a Class 2 felony, alleging that defendant knowingly made physical contact of an insulting or provoking nature with Christopher Janey, a correctional officer. A jury trial commenced in September 2010 but resulted in a hung jury. In November 2010, the State retried defendant.

¶ 6 At defendant's November 2010 trial, correctional officer Christopher Janey testified that he was working at Pontiac Correctional Center when he walked past defendant's cell and heard someone kick the front of the cell and yell "something in Spanish." When Janey walked past the cell again, a liquid substance that smelled like urine hit Janey's shirt and the right side of his face, entering his eye, ear, mouth, and nose. The trial court admitted into evidence the shirt Janey was wearing that day. Janey testified that he was "stunned," upset, and insulted when the substance hit him.

¶ 7 Theresa Leroy Davis, a registered nurse at Pontiac Correctional Center, testified that Janey sought treatment from her following the incident because he "had something thrown on him." Davis observed that Janey's shirt and neck were wet.

¶ 8 On this evidence, the jury convicted defendant of aggravated battery.

¶ 9 At defendant's January 2011 sentencing hearing, the trial court stated that it had considered in aggravation defendant's criminal history. Specifically, the court noted that defendant had "four, if not five, prior offenses that involve either resisting a peace officer, obstructing a peace officer, or aggravated assault." The court continued as follows:

¶ 10 "A further factor in aggravation is that the defendant's
conduct caused or threatened serious harm. In this case the jury

found the defendant guilty of the offense of aggravated [battery] by throwing a liquid substance upon Christopher Janey, which was believed to contain at least some bodily fluid while Mr. Janey any [sic] was engaged in his official duties at the Illinois Department of Corrections while this Defendant was incarcerated. So throwing that type of fluid on anyone would cause serious harm."

¶ 11 Finally, the trial court stated that it had also considered the need "to deter this defendant and others from committing the same crime."

¶ 12 Based on the foregoing factors, the trial court sentenced defendant to four years in prison, one year more than the statutory minimum, and ordered defendant's sentence to run consecutively to the term defendant was already serving.

¶ 13 Later that month, defendant filed a motion to reconsider sentence. In support of his motion, defendant argued that (1) his sentence was unduly harsh in light of the evidence presented at trial and the factors in mitigation, including that defendant's criminal conduct neither harmed nor threatened serious physical harm to others, (2) his sentence was an abuse of discretion and disproportionate to the nature of the offense, and (3) the trial court erred in stating defendant caused serious bodily harm, as no bodily harm was alleged or proven.

¶ 14 Following a March 2011 hearing, the court denied defendant's motion to reconsider sentence.

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 Defendant argues that the trial court relied on improper factors in aggravation

when it sentenced defendant to four years in prison. Specifically, defendant contends that (1) the threat of serious harm is a factor inherent in the offense of aggravated battery and (2) the record does not support the finding that defendant's conduct caused or threatened to cause serious harm. We conclude that (1) defendant has forfeited review of his first contention, but, even if he had not, his argument fails on the merits because serious harm is not a factor inherent in the offense of aggravated battery of which defendant was convicted, and (2) the record supports a finding that defendant's conduct caused or threatened to cause serious harm.

¶ 18 A. Serious Harm Was Not a Factor Inherent in the Offense

¶ 19 Defendant first contends that the trial court improperly considered, as a factor in aggravation, the "serious harm" caused or threatened by defendant, as serious harm is a factor inherent in the offense of which defendant was convicted.

¶ 20 Initially, we note that defendant failed to raise this argument in his motion to reconsider sentence. To preserve an issue for appellate review, a defendant must raise the issue by filing a written postsentencing motion in the trial court. *People v. Reed*, 177 Ill. 2d 389, 394, 686 N.E.2d 584, 586 (1997) (referencing 730 ILCS 5/5-8-1(c) (West 1994), now 730 ILCS 5/5-4.5-50(d) (West 2008), incorporating amendments of Pub. Act 95-1052, § 5 (eff. July 1, 2009) (2008 Ill. Laws at 4204, 4212-13)) (2008 Ill. Laws 4204, 4212-12.). Such a motion allows the trial court to review the precise claim of error and either (1) correct its mistake or (2) explain its reasons for imposing the sentence it did. *People v. Ahlers*, 402 Ill. App. 3d 726, 732, 931 N.E.2d 1249, 1254 (2010).

¶ 21 Here, defendant did not argue in his motion to reconsider sentence that serious harm was a factor inherent in the offense of which defendant was convicted. Accordingly, we

find that defendant has forfeited this argument.

¶ 22 Even if defendant had not forfeited this argument, however, we find that it still fails on the merits.

¶ 23 A trial court has broad discretionary powers in imposing a sentence, and absent an abuse of discretion, the sentence may not be altered on review. *People v. Stacey*, 193 Ill. 2d 203, 209-210, 737 N.E.2d 626, 629 (2000). Generally, a factor implicit in the offense of which the defendant has been convicted cannot be considered as an aggravating factor in sentencing for that offense. *People v. Phelps*, 211 Ill. 2d 1, 11, 809 N.E.2d 1214, 1220 (2004).

¶ 24 In this case, the jury convicted defendant of aggravated battery under section 12-4(b)(18) of the Criminal Code of 1961 (720 ILCS 5/12-4(b)(18) (West 2008)), an offense punishable by a nonextended term of imprisonment of three to seven years. 720 ILCS 5/12-4(e)(2) (West 2008); 730 ILCS 5/5-4.5-35 (West 2008).

¶ 25 Section 12-4(b)(18) states, in pertinent part, as follows:

¶ 26 "In committing a battery, a person commits aggravated battery if he or she knows the individual harmed to be an officer or employee of the State of Illinois." 720 ILCS 5/12-4(b)(18) (West 2008).

¶ 27 Thus, defendant's aggravated battery conviction was not based on causing or threatening serious harm, as defendant asserts. Instead, defendant's conviction was based on committing a battery to a correctional officer who was employed by the State of Illinois.

Accordingly, the trial court did not err in considering the serious harm caused or threatened by defendant as an aggravating factor at sentencing. See *People v. Strickland*, 283 Ill. App. 3d 319, 668 N.E.2d 1201 (trial court was entitled to consider, as an aggravating factor at sentencing, the

serious harm caused or threatened by defendant's use of a knife where defendant was convicted of aggravated battery based on defendant's battery against a correctional institution employee).

¶ 28 C. The Court Did Not Err by Finding Defendant Caused or Threatened Serious Harm

¶ 29 Defendant next contends that the record does not support the trial court's finding that defendant's conduct caused or threatened to cause serious harm. We disagree.

¶ 30 The evidence presented at defendant's trial established that defendant threw urine on the face and neck of Janey, thereby placing Janey at risk of ingesting the substance. As the trial court pointed out, "throwing that type of fluid on anyone would cause serious harm." Our review of the record supports the court's finding that defendant's conduct caused or threatened serious harm.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, 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.

¶ 33 Affirmed.