

No. 1-11-2931

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 CR 16190
)	
MALCOLM REED,)	Honorable
)	Thomas J. Hennelly,
Defendant-Appellant.)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Rochford and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 **Held:** Defendant's sentence is affirmed where the trial court did not abuse its discretion in applying an extended-term sentence and relied upon proper factors in issuing its decision.

¶ 2 Following a bench trial, defendant Malcolm Reed was found guilty of delivery of a controlled substance and sentenced to an extended term of eight years of imprisonment. On appeal, defendant argues: (1) the trial court abused its discretion in imposing an extended-term sentence of eight years; and (2) he is entitled to a new sentencing hearing before a different judge because the trial court improperly relied on its personal knowledge of the previous judges

who sentenced defendant. For the following reasons, we affirm.

¶ 3

BACKGROUND

¶ 4 The evidence at trial established that at approximately 8 a.m. on August 19, 2010, Chicago police officer Marcus Myles (Officer Myles) was conducting an undercover narcotics investigation with three other officers. Officer Myles drove to the corner of Huron Street and Long Avenue in Chicago where the officer observed defendant, then approached him, and asked if he had any "blow," the street term for heroin. Defendant replied, "yes but I have to take you to go get it." Defendant then entered the passenger side of Officer Myles' vehicle and directed him to 5225 West Ferdinand Avenue where they met a minor, Terrell M. (Terrell). Defendant informed Terrell they "needed two bags," to which Terrell responded by directing them to the nearby alley. Officer Myles then tendered defendant two ten-dollar bills with prerecorded serial numbers, and requested "two dimes," or two ten-dollar bags of heroin. Defendant subsequently gave the money to Terrell who, in exchange, handed defendant two clear ziplock bags containing a white powder substance. Defendant, in turn, gave the bags to the officer. This substance would later test positive as heroin.

¶ 5 After the exchange, Officer Myles, still operating undercover, drove defendant to Laramie Avenue where defendant exited the vehicle. Shortly thereafter, Officer Myles radioed three other Chicago police officers who apprehended Terrell and defendant. Officer Myles shortly thereafter arrived and positively identified both of them. While the other officers were able to recover the prerecorded ten dollar bills from Terrell, no additional contraband was discovered on defendant. At the close of evidence, the trial court found defendant guilty of delivery of a controlled substance.

¶ 6 At sentencing, the parties agreed defendant was eligible for extended-term sentencing. In aggravation, the State noted defendant has an extensive criminal history dating back to 1989, with nine prior felony convictions, including numerous drug convictions, as well as theft,

burglaries, violations of orders of protection, and unlawful use of a weapon (U UW) convictions. The State noted that when released from prison, on each occasion, defendant would commit another criminal offense, demonstrating a complete disregard for the law. The State recommended a sentence of 11 years' imprisonment.

¶ 7 In mitigation, defense counsel noted that defendant is 41 years of age and has suffered from a chronic heroin addiction from the age of 18. Counsel also noted defendant was unaffiliated with any gangs, was a nonviolent offender, and had been an active participant in the Gateway drug treatment program during his incarceration. Counsel further noted defendant suffered "family trauma" while growing up, eventually needing to be raised by his grandmother due to the childhood abuse he suffered from his mother and the death of his brother at an early age. In light of these factors, counsel requested the minimum sentence of three years' imprisonment.

¶ 8 Defendant spoke in allocution insisting that he does not deal narcotics, but that the officers "rush[ed] to get a case," promising to supply him with more drugs in return for his assistance. Defendant admitted that he has "been through a lot" and that his drug addiction has driven him to his current situation. Defendant, however, expressed his desire to rehabilitate and offered his inmate photo identification card as proof of the "bad shape" he was in at the time of his arrest and to denote the subsequent progress he has made since that time. Defendant thus requested the trial court continue the sentencing hearing so he could complete the Gateway program. Defendant also requested Treatment Alternatives for Safe Communities (TASC), noting that he had been approved for the program.

¶ 9 The trial court responded that it would not give him TASC based on his record, to which defendant replied, "my record says I'm an addict. I just need an opportunity." The trial court observed that defendant has had plenty of opportunities to avail himself of drug treatment in the penitentiary, and denied defendant's request for a continuance to complete the program. The trial

court noted that due to an overcrowding problem at the jail, it would take another 90 days for him to complete the program, and that drug treatment is available at the Illinois Department of Corrections. Defendant, in further allocution, stated that he has obtained his GED, and is father to five children, and requested leniency because he "deserve[s] it." Defendant again denied selling drugs and urged this was a pivotal moment in his life.

¶ 10 In announcing its sentencing determination, the trial court stated that it considered the evidence presented at trial, the pre-sentence investigation (PSI) report, the statutory sentencing factors, and the evidence offered in mitigation and aggravation. The trial court further noted that it considered the financial impact of incarceration, the arguments of counsel, the sentencing alternatives, and defendant's statement in allocution. The trial court acknowledged defendant's personal troubles, but averred that there comes a time in everyone's life when they have to take responsibility and move on. Then, after reviewing the PSI report which included defendant's extensive criminal history, the trial court recounted defendant's criminal background, the sentences he received, and the various opportunities afforded to him for rehabilitation.

¶ 11 Defendant's first conviction occurred in 1988 for theft,¹ for which he received one year of conditional discharge. The trial court suggested that defendant "should have taken to heart an opportunity to straighten out his life" at that time. Subsequently in 1990, however, defendant was sentenced to 30 months' probation for possession of a controlled substance, which was terminated unsatisfactorily. Roughly one year later, defendant received another four years of probation for burglary. After defendant violated the terms of this probation, he was ultimately sentenced to three years' imprisonment.

¶ 12 The trial court continued, noting that in 1996 defendant appeared before "one of the most fair-minded *** judges [who] was always the type of judge that would give somebody a second

¹ The State had previously argued incorrectly that defendant's criminal history began in 1989. The trial court corrected this discrepancy while announcing its sentencing determination.

chance," and defendant was sentenced to five years of imprisonment. Then, in 1999, defendant was placed on 30 months' probation for a drug charge and, in the same year, received additional probation and a one-year conditional discharge for reckless conduct. In 2003, defendant received another four years' imprisonment for possession of a controlled substance and, in 2004, defendant was sentenced to an additional four years' imprisonment on a weapons charge, which the trial court noted "[was] bridging the gap between narcotics to something a lot more serious." The trial court stated that defendant was subsequently sentenced to two years' imprisonment in 2006 for possession of a controlled substance, by "another fair judge who tries to give people a second chance." According to the trial court, defendant then received another one year sentence for the same offense one year later from "another fair and open-minded judge who's not a harsh sentencer either." Finally, the trial court concluded by noting defendant's three-year prison sentence for the manufacturing and distribution of a look-alike substance.

¶ 13 Ultimately, the trial court explained that defendant's criminal record reflected that he had been given opportunities for rehabilitation but failed to take advantage of them.² The trial court determined that the minimum sentence of three years' imprisonment would not be appropriate and that "compassion" required a denial of the State's request for an 11-year sentence. In the end, the trial court sentenced defendant to 8-years' imprisonment, finding that term appropriate "based on the criminal record."

¶ 14

ANALYSIS

¶ 15

I. Abuse of Discretion

¶ 16 Defendant first contends the trial court abused its discretion by sentencing him to an

² The PSI report also reflected that defendant was convicted of attempted possession of a controlled substance in 1998 and sentenced to one day in prison; convicted of assault and violation of an order of protection in 2001 and sentenced to 24 days' imprisonment; convicted of attempted assault and violation of an order of protection in 2001 and sentenced to 24 days' imprisonment; and convicted of U UW in 2006 and sentenced to six days' imprisonment.

extended eight-year term. Defendant admits he was eligible for an extended-term sentence under the statute, but maintains the sentence imposed does not consider the mitigating evidence presented at the sentencing hearing and does not serve the objective of restoring him to useful citizenship. He requests this court to either reduce his sentence to a "normal-range term more proportionate to the nature of the offense," or, in the alternative, remand for a new sentencing hearing.

¶ 17 Defendant acknowledges his failure to preserve this issue for review, but maintains that we should consider it as plain error. The plain error doctrine is a narrow and limited exception to the general waiver rule allowing a reviewing court to consider a forfeited issue that affects substantial rights. *People v. Herron*, 215 Ill. 2d 167, 177-79 (2005). In the context of a sentencing hearing, we will review an error that is not properly preserved as plain error where the evidence is closely balanced or the error is so fundamental that it may have deprived defendant of a fair sentencing hearing. *People v. Thomas*, 178 Ill. 2d 215, 251 (1997). The burden of persuasion remains with defendant under both prongs of the plain-error test, and the first step is to determine whether any error occurred. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). For the reasons that follow, we find there was no error to preclude defendant's forfeiture of this issue.

¶ 18 We review the trial court's sentencing determination in this case for an abuse of discretion. *People v. Frey*, 126 Ill. App. 3d 484, 487 (1984). A court abuses its discretion where the ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court. *People v. Hall*, 195 Ill. 2d 1, 20 (2000).

¶ 19 Defendant was convicted of delivery of a controlled substance, a Class 2 felony. 720 ILCS 570/401(d) (West 2010). A trial court may impose an extended-term sentence when defendant has previously been convicted of a similar class felony or higher within the prior 10 years, excluding time spent in custody. 730 ILCS 5/5-5-3.2(b)(1) (2010); see *People v. Smith*,

199 Ill. App. 3d 839, 857-58 (1990). Defendant admits that, after excluding the time he spent in custody, he qualifies for an extended-term sentence under the statute based on his 1991 conviction for burglary and 1990 conviction for possession with intent to deliver. Nevertheless, defendant argues the court was not required to impose the extended-term sentence and abused its discretion in doing so. In particular, defendant contends the trial court's imposition of an extended term was an abuse of discretion in light of his "family trauma," the non-violent nature of his criminal history, and the fact he did not initiate the offense for which he was convicted in this case. He further contends his sentence runs contrary to the spirit of the extended-term statute because his qualifying conviction occurred 20 years ago, and that he is not the "incorrigible recidivist" the statute targets. According to defendant, the trial court failed to consider these mitigating factors.

¶ 20 We presume that a trial court based its sentencing determination on proper legal reasoning and considered the mitigation evidence before it. *People v. Snowden*, 2011 IL App (1st) 092117, ¶ 34. Defendant has failed to persuade us that this presumption should be overcome in this case. Indeed, the record expressly reveals the court weighed the mitigating evidence against defendant's criminal background and properly determined that defendant's recidivism weighed in favor of the imposition of an extended term sentence. See *People v. Hunzicker*, 308 Ill. App. 3d 961, 966 (1999). Moreover, defendant's heroin dependency does not necessarily lead to the conclusion that he is entitled to lenient treatment, especially where he was given multiple opportunities to change his life over 20 years, but failed to do so. See *People v. Whealon*, 185 Ill. App. 3d 570, 573 (1989).

¶ 21 Defendant nevertheless argues the court failed to consider the fact that an extended prison sentence would thwart his chance at rehabilitation. Although a trial court is required in imposing a sentence to consider the defendant's potential for rehabilitation, the court is not required to give greater weight to this factor than to the seriousness of the offense. *People v.*

McGee, 222 Ill. App. 3d 92, 98 (1991). In this case, the trial court considered that defendant had been given several opportunities at rehabilitation during his 20-year criminal history, all of which he never took advantage. Defendant's PSI report reveals 15 prior convictions—half of which involved drugs—collectively demonstrating a resistance to correction. See *People v. Robinson*, 89 Ill. 2d 469, 476 (1982) (interpreting section 5-5-3.2(b)(1) of the Code of Criminal Procedure of 1963 stating, "The aim of recidivist statutes is to impose harsher sentences on offenders whose repeated convictions have shown their resistance to correction."); *People v. Garcia*, 241 Ill. 2d 416, 421-22 (2011) (construing section 5-5-3.2(b)(1) of the Code of Criminal Procedure of 1963, "to exclude, or toll, time lapsed during a defendant's wrongful delay of criminal proceedings when that defendant otherwise qualifies for an extended-term sentence."). Moreover, even considering defendant's extensive criminal history, the trial court still refused to incarcerate him for the entire 11 years requested by the State. We thus find that the eight-year extended sentence imposed by the court was not an abuse of discretion.

¶ 22 Defendant alternatively argues in passing he was denied effective assistance of trial counsel for failing to raise this challenge to his extended term sentence. However, as we have found no error, counsel cannot be deemed ineffective for failing to raise this issue below. *People v. Toney*, 2011 IL App (1st) 090933, ¶30; see also *People v. Dat Tan Ngo*, 388 Ill. App. 3d 1048, 1059 (2008) (concluding because there was no error, the court need not address the defendant's claim that counsel was ineffective).

¶ 23 II. Personal Knowledge of Previous Judges

¶ 24 Defendant next contends the trial court in imposing the sentence improperly relied on its personal knowledge of the judges who had previously sentenced him and used this knowledge to speculate as to "what must have occurred to warrant the prior sentences imposed." Defendant asserts this error led to an excessively harsh sentence in his case. We review the consideration of an improper factor in sentencing for an abuse of discretion. *People v. Cotton*, 393 Ill. App. 3d

237, 264-65 (2009).

¶ 25 As a threshold matter, we note that defendant did not object at the sentencing hearing, nor did he file a post-sentencing motion and, thus, defendant failed to preserve this issue for review. Defendant nevertheless contends because the trial court's conduct is at issue, forfeiture does not apply. Additionally, defendant argues even if forfeiture does apply, we should review the issue under the plain error doctrine. We need not address either of these arguments against forfeiture because defendant's ultimate contention of error fails on the merits.

¶ 26 Defendant's argument is based on the trial court's passing references and comments regarding the sentencing proclivities of certain judges as it reviewed defendant's background. Defendant maintains that these comments demonstrate the trial court improperly considered evidence outside the record. We do not agree.

¶ 27 The complained-of comments must be viewed within their context. See *People v. Walker*, 2012 IL App (1st) 083655, ¶32 (comments of the sentencing court cannot be viewed in isolation); *People v. Estrella*, 170 Ill. App. 3d 292, 297-98 (1988) (in determining whether a sentence is improperly imposed, a reviewing court should consider the record as a whole). In this case, context reveals the complained-of remarks were made as a response to defendant's plea for leniency and illustrated the missed opportunities for rehabilitation provided to defendant in the past, his potential for rehabilitation, and his need for drug treatment. As discussed, a defendant's lack of rehabilitative potential is a proper factor to consider in sentencing. *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). Contrary to defendant's assertion, the record does not demonstrate the court based its sentence on the relative fairness of the previous judges. Therefore, we do not find the trial court abused its discretion.

¶ 28 In reaching this result, we find *People v. Dameron*, 196 Ill. 2d 156 (2001), cited by defendant, factually inapposite. In *Dameron*, the trial judge imposed the death penalty, and in doing so, relied on two outside sources: a social science book and a transcript of sentencing

comments made by the judge's father in a 1966 murder trial. *Id.* at 171. The judge spoke at length about social science statistics, recalled his own father's anguish over imposing a death sentence, and compared the brutality of the 1966 murder case to that of the defendant's case, ultimately aligning himself with his father in imposing the death penalty. *Id.* at 176-78. The Illinois Supreme Court reversed defendant's death sentence and remanded for resentencing, noting the judge erroneously sought alternative avenues of information in his effort to reach the correct result. *Id.* at 179.

¶ 29 Unlike *Dameron*, this is not a death penalty case and the trial court did not independently acquire outside sources to consider in making its sentencing determination. The trial court reviewed defendant's history of criminality, commented on the terms imposed by other judges who gave him opportunities for redemption, and noted defendant failed to take advantage of those opportunities. The trial court did not align itself with the prior judges, compare defendant's case to other cases, and then enter a sentence based on what it believed the prior judges would have imposed against him. Accordingly, we do not find *Dameron* controls here.

¶ 30 We also find defendant's reliance on *People v. Fern*, 189 Ill. 2d 48 (1999), misplaced. In *Fern*, the supreme court found it improper to compare the sentences of different defendants convicted of the same offense. *Id.* at 56. Defendant concedes the trial court here did not conduct a cross-case comparison of sentences, but maintains the trial court "speculated into the minds of the judges who previously sentenced [defendant]," which was similar to the analysis condemned in *Fern*. First, we note defendant's claim that the trial court "speculated into the minds of *** judges" itself amounts to nothing more than mere speculation. As the record and above discussion reveals the trial court limited itself to consideration of proper sentencing factors. Second, the decision in *Fern* solely dealt with the dangers of attempting to compare similar cases of separate defendants because "[n]o two cases are ever truly 'the same.'" *Id.* at 57 (quoting *People v. Terneus*, 239 Ill. App. 3d 669, 677 (1992)). Accordingly, we find no reason to extend

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Fern to the facts of this case.

¶ 31

CONCLUSION

¶ 32 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 33 Affirmed.