

No. 1-12-1461

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).

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. 07 CR 8611
)	
JAMES BECKLEY,)	Honorable
)	William J. Kunkle,
Defendant-Appellant.)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justices Hoffman and Cunningham concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err when it referenced defendant's conduct before sentencing him for aggravated battery. Defendant's \$200 DNA analysis fee and \$5 court system fee are vacated.

¶ 2 After a jury trial, James Beckley was convicted of aggravated battery based on great bodily harm and sentenced to five years in prison. On appeal, defendant asserts the trial court (1) improperly considered his conduct in sentencing because defendant's conduct is inherent in the offense of aggravated battery; and (2) incorrectly assessed a DNA analysis fee and a court system fee. We vacate defendant's DNA analysis fee and court system fee but otherwise affirm.

1-12-1461

¶ 3 The evidence at trial established that defendant engaged in a fight with Kent Dowden at the Family Lounge at 6946 South Racine Avenue at about 2:15 a.m. on January 18, 2007. Defendant testified that the fight ensued after he observed Dowden attempt to sexually assault his girlfriend at the time, Shaquita Holmes. Both defendant and Holmes testified that Dowden initiated the fight by punching defendant. Dowden suffered various injuries, including a broken eye socket, a dislocated shoulder, fractured ribs, and a broken ankle. A jury found defendant guilty of aggravated battery based on great bodily harm.

¶ 4 Defendant's presentence investigation report (PSI) revealed that defendant was convicted of unlawful use of a weapon by a felon in 2004 and manufacture or delivery of a controlled substance in 2000. He received probation for a possession of a controlled substance conviction in 2000 that was terminated "unsatisfactory."

¶ 5 At the sentencing hearing, the State explained that defendant was eligible for an extended term based on both the 2004 and 2000 felony convictions. The State agreed with the court's assertion that the sentencing range on the extended term was 2 to 10 years.

¶ 6 In mitigation, defendant emphasized that he did not initially intend to hurt Dowden, and that he was provoked upon observing Dowden attempt to sexually assault Holmes. Defendant also submitted to the court seven letters written on his behalf that detailed his positive involvement in his community, gainful employment, role as a father and caregiver, and his multiple health issues including chronic asthma, sleep apnea, and use of a prosthetic leg.

¶ 7 In sentencing defendant, the court noted that it considered in detail the request for probation, the PSI, each letter submitted on behalf of defendant, defendant's prior criminal history, and defendant's "conduct in more recent times." The court stated "my initial reaction would be to sentence the defendant to the maximum of 10 years based on the conduct and the jury's verdict and his background. Without derogating the seriousness of this offense and the effect that it caused, I'm not going to sentence the defendant to the maximum, however, I'm not going to give him probation

1-12-1461

either.” The court sentenced defendant to five years in prison, and assessed a \$200 DNA fee and a \$5 court system fee.

¶ 8 On appeal, defendant asserts the trial court explicitly relied on his “conduct and the jury’s verdict” as evidence in aggravation where his conduct was inherent in the offense of aggravated battery. He maintains the court’s consideration of these factors subjected him to an improper double enhancement.

¶ 9 Initially, we note defendant 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). In order to prevail under the plain error doctrine, the defendant must show that (1) the evidence presented at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). However, before we can determine whether an error actually fits under either category, we must first determine whether an error actually occurred. *People v. Crosby*, 231 Ill. 2d 262, 273 (2008).

¶ 10 Improper double enhancement occurs when a single factor is considered both as an element of the offense and to elevate the severity of the offense itself. *People v. Phelps*, 211 Ill. 2d 1, 14 (2004). 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, 730 (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, 268 (1986). 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, 746 (1998). In determining the correctness of a statement, the reviewing court should not focus on a few words or statements of the trial court, but should look to the record as a whole when determining the correctness of a sentence. *People v. Reed*, 376 Ill. App. 3d 121, 128 (2007). Thus, to obtain a

1-12-1461

remand for resentencing, a defendant must show that the trial court not only mentioned an improper factor but actually relied upon it in fashioning its sentence. *Id.*

¶ 11 Defendant was convicted of aggravated battery based on great bodily harm, which is a Class 3 felony (720 ILCS 5/12-4(a), (e)(1) (West 2006)) with a sentencing range of two to five years in prison (730 ILCS 5/5-8-1(a)(6) (West 2006)). However, based on his prior felony convictions (730 ILCS 5/5-5-3.2 (b)(1) (West 2006)), defendant was eligible for an extended-term sentence of 5 to 10 years (730 ILCS 5/5-8-2(a)(5) (West 2006)). Accordingly, the court imposed the minimum extended-term sentence of five years.

¶ 12 Moreover, contrary to defendant's position, the record demonstrates that the trial court did not consider defendant's "conduct and the jury's verdict" as an aggravating factor when sentencing defendant to five years in prison. Reviewing the court's statement in context, instead of highlighting a few words as defendant does, the court's reference to defendant's conduct and the jury's verdict was among many other matters mentioned by the court. Reviewing the record as a whole, it is clear that the trial court also placed considerable weight on defendant's criminal history as an aggravating factor. This information was detailed in the PSI and presented at the sentencing hearing. Additionally, the court considered the letters submitted on behalf of defendant and "defendant's conduct in more recent times" as factors in mitigation. The trial court further explained that it initially intended to impose the maximum 10-year sentence but instead imposed a 5-year sentence. Accordingly, the record shows the court considered all relevant factors in sentencing defendant, and he was not subjected to an improper double enhancement. The court did not err by merely referencing defendant's conduct and the jury's verdict in its pronouncement. Therefore, we need not consider whether the sentencing was plain error for the purpose of determining whether the defendant waived the issue.

¶ 13 In the alternative, defendant contends that his counsel was ineffective for failing to make a timely objection to alert the court to the improper double enhancement. To establish a claim of ineffective assistance of counsel, the defendant must show "counsel's performance fell below

1-12-1461

minimal professional standards and a reasonable probability exists that the sentence was affected by the poor performance.” *People v. Steidl*, 177 Ill. 2d 239, 257 (1997). Here, defense counsel’s decision not to object to the court’s mentioning of defendant’s conduct and the jury’s verdict was reasonable trial strategy since the court only made a brief reference to these factors, and did not apparently consider them to fashion its sentence. Furthermore, defendant cannot establish prejudice where the trial court expressly reduced its sentence from the 10-year maximum to the 5-year minimum extended term. There is no reasonable possibility that defense counsel’s failure to object affected defendant’s sentencing.

¶ 14 The parties correctly agree that two fees must be vacated. First, we vacate the \$200 DNA analysis fee because defendant was already registered in the DNA database due to his prior conviction. 730 ILCS 5/5-4-3(j) (West 2010); *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). Second, we vacate the \$5 court system fee because that fee applies when a person violates the vehicle code or similar municipal ordinances. 55 ILCS 5/5-1101(a) (West 2010); see, e.g., *People v. Williams*, 394 Ill. App. 3d 480, 483 (2009).

¶ 15 Therefore, we affirm defendant’s conviction and sentence and modify the order for fines, fees, and costs as stated.

¶ 16 Affirmed as modified.