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2013 IL App (3d) 120222-U

Order filed November 14, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 14th Judicial Circuit,
Plaintiff-Appellee,)	Henry County, Illinois,
)	
v.)	Appeal No. 3-12-0222
)	Circuit No. 11-CF-229
)	
JIMMY A. HOLLINS,)	Honorable
)	Charles H. Stengel,
Defendant-Appellant.)	Judge, Presiding.

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

ORDER

- ¶ 1 *Held:* (1) Trial counsel was not ineffective for failing to proceed on a motion to reconsider sentence. (2) The trial court erred in sentencing defendant to an extended term for unlawful restraint.
- ¶ 2 Defendant, Jimmy A. Hollins, was convicted of vehicular invasion (720 ILCS 5/12-11.1 (West 2010)), unlawful restraint (720 ILCS 5/10-3 (West 2010)), aggravated battery (720 ILCS 5/12-3.05(c) (West 2010)), and domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2010)). The trial court sentenced him to concurrent terms of imprisonment of 8½ years, 6 years, 5 years, and

364 days, respectively. Defendant appeals, arguing that (1) his attorney was ineffective for failing to proceed on a motion to reconsider sentence and (2) his six-year sentence for unlawful restraint is void. We reduce defendant's sentence for unlawful restraint to three years and otherwise affirm defendant's convictions and sentences.

¶ 3

FACTS

¶ 4 Defendant was charged by information with a Class 1 felony for vehicular invasion (720 ILCS 5/12-11.1 (West 2010)), a Class 4 felony for unlawful restraint (720 ILCS 5/10-3 (West 2010)), a Class 3 felony for aggravated battery (720 ILCS 5/12-3.05(c) (West 2010)), and a Class A misdemeanor for domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2010)). Evidence produced at trial established that defendant drove past a group of girls on the evening of July 17, 2011. One of the girls, Trisha Tinch, had a daughter with defendant. After seeing defendant, Trisha entered another vehicle. Defendant parked by the car Trisha was in and got out of his vehicle. He then opened the rear door of the other car and grabbed Trisha as she was getting out. The two had a physical confrontation, and defendant took Trisha to his vehicle and forced her inside.

¶ 5 At the end of the trial, defendant was found guilty of all the charges. Thereafter a sentencing hearing was held. The trial court heard evidence in mitigation, including the fact that defendant was only 19 years old and that he was a loving father to his daughter. The court also heard evidence in aggravation. The evidence included defendant's juvenile convictions for criminal trespass, retail theft, and battery. It also included evidence that defendant was sentenced for a felony as an adult for knowingly damaging school property. Defendant was on probation at the time of the current offense, and he had violated his probation on a number of previous occasions. Further, the court heard evidence that defendant had never been employed. In

sentencing defendant, the court noted that "for the last six years, [defendant had] been a thorn in the side of the probation office." The court stated that it was "incumbent" upon it "to make Kewanee sort of a safe haven from [defendant]." The trial court sentenced defendant to 8½ years for vehicular invasion to be served concurrently with an extended term of 6 years for unlawful restraint, 5 years for aggravated battery, and 364 days for domestic battery.

¶ 6 After defendant was sentenced, defense counsel filed a timely motion to reconsider sentence. Meanwhile, defendant filed a *pro se* motion for reduction of sentence and a notice of appeal. Thereafter, defense counsel withdrew his motion to reconsider sentence. On motion of the appellate defender, defendant was later allowed to file a late notice of appeal.

¶ 7 ANALYSIS

¶ 8 I

¶ 9 Defendant first argues that his sentences were excessive in light of the seriousness of his conduct and his rehabilitative potential. Defendant concedes that the issue has been forfeited since it was not raised in a posttrial motion. See *People v. Reed*, 177 Ill. 2d 389 (1997) (failure to argue an excessive sentence in a posttrial motion results in waiver of the issue). Therefore, defendant contends that trial counsel was ineffective for failing to argue that the sentences were excessive in a posttrial motion. Specifically, defendant claims that, had counsel not withdrawn the motion to reconsider sentence, there is a reasonable probability that the trial court would have reduced his sentences.

¶ 10 To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have

been different. *People v. Albanese*, 104 Ill. 2d 504 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *People v. Haynes*, 192 Ill. 2d 437 (2000). Defendant must satisfy both prongs in order to prevail on a claim of ineffective assistance of counsel; however, if the claim can be disposed of on the ground that defendant did not suffer prejudice, a court need not determine whether counsel's performance was deficient. *Id.*

¶ 11 In this case, we conclude that defendant has not established prejudice. First, defendant has not cited any additional evidence the trial court could have considered in a motion to reconsider sentence that was not before the court when it originally sentenced defendant. In imposing sentence, the court was clear in its opinion that the community needed to be protected from defendant. The court was vested with authority to make this determination. *People v. Alexander*, 239 Ill. 2d 205 (2010) (the trial court is invested with great discretion in sentencing). Given that the court would be considering the same evidence in the motion to reconsider as it did in the original sentencing, we think it unlikely that the court would have reduced defendant's sentences. For similar reasons, we think it unlikely that defendant's sentences would have been reduced on appeal if the issue had been properly preserved. See *People v. Halerewicz*, 2013 IL App (4th) 120388 (a reviewing court must afford great deference to the trial court's judgment). Therefore, we find that defendant has not shown there is a reasonable probability that his sentences would have been reduced had trial counsel proceeded on his motion to reconsider sentence.

¶ 12

II

¶ 13 Defendant next argues that the trial court erred when it sentenced him to an extended term for the offense of unlawful restraint. Specifically, defendant claims that the extended-term

sentence is void because unlawful restraint, a Class 4 felony, was not of the most serious class of which he was convicted. A sentence that is not authorized by statute is void and can be challenged at any time. *People v. Thompson*, 209 Ill. 2d 19 (2004).

¶ 14 Under Illinois law, a defendant who is convicted of multiple offenses may be sentenced to an extended-term sentence only on those offenses that are within the most serious class. *People v. Bell*, 196 Ill. 2d 343 (2001). Here, defendant was convicted of vehicular invasion, a Class 1 felony, and unlawful restraint, a Class 4 felony. Because unlawful restraint was not within the most serious class of which defendant was convicted, it was improper for the trial court to sentence him to an extended term. Thus, pursuant to our authority under Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we reduce defendant's sentence for unlawful restraint to the maximum non-extended term of three years in prison (see 730 ILCS 5/5-4.5-45(a) (West 2010) (sentence of imprisonment for a Class 4 felony is not less than one year and not more than three years)).

¶ 15

CONCLUSION

¶ 16 The judgment of the circuit court of Henry County is affirmed in part and modified in part.

¶ 17 Affirmed in part and modified in part.