

No. 1-12-0653

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 07 CR 6257
)	
ALVIN ESTELL,)	Honorable
)	Maura Slattery-Boyle
Defendant-Appellant.)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Harris specially concurred.
Justice Pierce dissented.

ORDER

¶ 1 *Held:* Defendant's sentence must be vacated because defendant was sentenced pursuant to an enhanced sentencing range on the basis of the trial court's finding that the commission of the offense was accompanied by brutal and heinous conduct and the State did not include an allegation of brutal and heinous conduct in the indictment or a written pretrial notification and did not submit that allegation to the jury.

¶ 2 Following a jury trial, defendant Alvin Estell was found guilty of second degree murder and was sentenced to 20 years' imprisonment. On appeal, defendant contends that the trial court violated his statutory and constitutional rights when it sentenced him pursuant to an enhanced

sentencing range on the basis of the court's finding that he engaged in brutal and heinous conduct during the commission of the offense because the State had not included the allegation of brutal and heinous conduct in the indictment or a written posttrial notification and had not presented the allegation to the jury. For the reasons that follow, we vacate defendant's sentence and remand the matter for resentencing.

¶ 3

BACKGROUND

¶ 4 Defendant was charged with first degree murder in connection with the beating and subsequent death of Edward Watts and, following a trial, the jury found him guilty of second degree murder. At the sentencing hearing, the prosecutor informed the trial court that the State was seeking an extended term of 30 years' imprisonment on the basis that defendant's criminal behavior was brutal and heinous, citing trial testimony showing that defendant struck Watts in the head with a bottle and then stomped on his head multiple times after Watts had fallen to the ground. Defense counsel responded that the evidence did not establish that defendant's conduct was brutal and heinous and, in any event, the State could not seek an extended term because the allegation of brutal and heinous conduct was not included in the indictment, submitted to the jury, or proved beyond a reasonable doubt. Defense counsel also argued that the allegation of brutal and heinous conduct was not an element of first degree or second degree murder and that the imposition of an extended sentence was prohibited by the holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

¶ 5 During the sentencing hearing, defense counsel informed the court that "we are seeking a minimum term on the second degree," and the court interjected "of 15." At the close of the

prosecutor's argument in aggravation, the court asked the prosecutor, "and that is your basis in regards to brutal and heinous?" The prosecutor answered "yes." The court then asked "and that then leads to the extended term, correct?" The prosecutor again answered "yes."

¶ 6 At the conclusion of the sentencing hearing, the court sentenced defendant to 20 years' imprisonment. In doing so, the court stated:

"And the Court finds that the actions – first of all, it is – no, it is not an element of the offense nor is it required to be. This is not an Apprendi issue. This is whether or not the Court can extend the sentence based on the fact that it was brutal and heinous.

The Court based on the injuries and what was supported in the testimony in this case does find brutal and heinous. This is not an Apprendi issue. The State is not in violation. The court will proceed with sentencing.

In regards to the verdict returned by the jury of second degree, the Court will sentence Mr. Estell to 20 years Illinois Department of Corrections."

¶ 7 Following the imposition of defendant's sentence, the prosecutor asked the court "just to clarify for the record, you did indicate that you believe it was brutal and heinous and as such would be eligible for an extended term?" The court answered "correct," and further stated:

"that is the Court's ruling that this was as indicated brutal and heinous, that this was of that nature. The Court made that finding that this is eligible for the enhancement and that is why the Court on its own, even before we got there, this is based on my reading of the statute, was the conduct of Mr. Estell in this case,

the injuries and the resulting condition of Mr. Watts, that allows this enhancement and that's why the Court says – is indicating 20 years Illinois Department of Corrections."

¶ 8 On February 2, 2012, defendant filed a motion to reduce his sentence, asserting that the court was prohibited from imposing an extended sentence because the State did not amend the indictment to notify defendant that the State was seeking an extended sentence on the basis of an allegation of brutal and heinous behavior. The court denied the motion, stating:

"In this case, in the court's ruling, the court ruled that the actions of Mr. Estell, based on the facial fracture injury due to the stomping of the face, as well as the side laceration as to the testimony in regards to being hit, the 20-year sentence is the maximum. It's not even an extended term.

But the court in finding, in attempting to explain why the court found brutal and heinous to explain the maximum sentence of 20 years, so it's not even in the enhanced stage, so that this did not go into, if I had gone to 25 or 30, that would be in the enhancement range.

But what the court in its ruling felt that the evidence did support was the maximum sentence, and that's why the court in its ruling made the distinction of noting the injuries, the testimony, and noting the brutal nature in which the court found.

But the court did not, based on that, go into the enhancement range but simply went to the maximum range. And the court, in making that finding and in

discussing what the evidence showed was simply to make Mr. Estell, make the record clear as to why I was giving the maximum in the regular range, not the enhancement range.

So the motion to reduce sentence is denied. It was the maximum of the range. It's not an enhanced range, thoroughly legal."

¶ 9

ANALYSIS

¶ 10 Defendant contends that the court erred by sentencing him to an extended sentence of 20 years' imprisonment because the court was barred from doing so by the State's failure to comply with the charging requirements of section 111-3(c-5) of the Code of Criminal Procedure (725 ILCS 5/111-3(c-5) (West 2010)). Section 111-3(c-5) provides that an alleged fact other than the fact of a prior conviction that is not an element of the offense, but is used to increase the range of penalties for the offense beyond the statutory maximum, "must be included in the charging instrument or otherwise provided to the defendant through a written notification before trial, submitted to a trier of fact as an aggravating factor, and proved beyond a reasonable doubt." *Id.* "Failure to prove the fact beyond a reasonable doubt is not a bar to a conviction for commission of the offense, but is a bar to increasing, based on that fact, the range of penalties for the offense beyond the statutory maximum that could otherwise be imposed for that offense." *Id.* There is no dispute that the State failed to comply with the requirements in section 111-3(c-5) when it sought an extended term of 30 years' imprisonment on the basis of the allegation that defendant's criminal conduct was brutal and heinous because that allegation was not included in the indictment or a written pretrial notification and was not submitted to the jury as an aggravating

factor and, therefore, the trial court was barred from increasing the range of penalties defendant faced beyond the statutory maximum on the basis of that allegation.

¶ 11 The State maintains that defendant's sentence is nonetheless valid because the 20-year sentence falls within the normal sentencing range for second degree murder. Second degree murder is a class 1 felony (720 ILCS 5/9-2(d) (West 2006)), and carries a sentencing range of 4 to 20 years' imprisonment (730 ILCS 5/5-8-1(a)(1.5) (West 2006)). A defendant convicted of second degree murder may be subject to an enhanced sentencing range of 15 to 30 years if the commission of the offense was accompanied by "exceptionally brutal or heinous behavior indicative of wanton cruelty." 730 ILCS 5/5-5-3.2(b)(2) (West 2006). Thus, defendant's 20-year sentence constitutes the maximum sentence under the normal sentencing range for second degree murder. However, a sentence that is imposed under the wrong sentencing range must be vacated due to the court's reliance on the wrong sentencing range even if the sentence that is imposed fits within the correct sentencing range. *People v. Owens*, 377 Ill. App. 3d 302, 305-06 (2007). As such, defendant's 20-year sentence must be vacated even though it falls within the sentencing range for second degree murder if the court relied on the wrong sentencing range in sentencing defendant.

¶ 12 At the sentencing hearing, the prosecutor argued that defendant could be sentenced under an enhanced sentencing range because the commission of the offense was accompanied by brutal and heinous conduct and informed the court that the State was seeking a maximum sentence of 30 years' imprisonment. When defense counsel stated that the defense was seeking a minimum sentence, the court interjected that the minimum sentence was a 15-year term. At the close of the

prosecutor's argument in aggravation, the court clarified that the prosecutor's position was that defendant would be subject to an enhanced sentencing range if the court made a finding of brutal and heinous conduct. While imposing defendant's sentence, the court explained that the issue before it was whether it could impose an extended sentence based on a finding that defendant's conduct was brutal and heinous. Following the imposition of defendant's sentence, the court further clarified that defendant was eligible for an extended term based on the court's finding that his conduct was brutal and heinous and that defendant's 20-year sentence was based upon that finding. At no point during the sentencing hearing did the court indicate that it disagreed with the prosecutor's claim that defendant was subject to an enhanced sentencing range as a result of the court's finding that he engaged in brutal and heinous conduct or state that it was imposing a maximum sentence. Thus, we determine that the court's comments during the sentencing hearing establish that the court sentenced defendant pursuant to the enhanced sentencing range of 15 to 30 years' imprisonment.

¶ 13 As to the court's stated reasons for denying defendant's motion to reduce his sentence, those statements do not clearly indicate whether the court denied the motion because it sentenced defendant pursuant to the normal sentencing range for second degree murder or whether it denied the motion because the sentence ultimately fell within that range. While the court stated that its comments at the sentencing hearing were intended to explain the reason it imposed a maximum sentence, the court at other times indicated that the sentence was valid because, unlike a sentence of 25 or 30 years' imprisonment, defendant's 20-year sentence fell within the normal sentencing range for second degree murder. As the relevant inquiry is whether defendant was sentenced

pursuant to an enhanced sentencing range, and not whether the sentence that was imposed fell within the normal sentencing range, that distinction is important. Given the clarity with which the court indicated that it was sentencing defendant pursuant to an enhanced sentencing range in its comments during the sentencing hearing, the court's subsequent statements during its denial of defendant's motion to reduce his sentence do not alter our determination that defendant was sentenced pursuant to an enhanced sentencing range.

¶ 14 In addition, a remand for resentencing is necessary when a reviewing court is unable to determine the weight the trial court gave to an improperly considered sentencing factor (*People v. Bourke*, 96 Ill. 2d 327, 332 (1983)) and when a reviewing court is unable to determine whether the trial court's mistaken belief that the defendant was subject to a more severe sentencing range ultimately affected the sentence that was imposed (*People v. Carmichael*, 343 Ill. App. 3d 855, 862 (2003)). Thus, to the extent it may be unclear whether the trial court sentenced defendant pursuant to an enhanced sentencing range or the normal sentencing range, we believe a remand for resentencing is appropriate.

¶ 15 As such, defendant's sentence must be vacated because he was sentenced pursuant to an enhanced sentencing range and the State did not include an allegation that defendant's conduct was brutal and heinous in the indictment or a written pretrial notification and did not submit that allegation to the jury. Having concluded that defendant's sentence must be vacated on that basis, we need not consider defendant's additional claim that his sentence violated his constitutional rights pursuant to the holding in *Apprendi* or the State's response that any such error was harmless.

¶ 16 Further, defendant contends, and the State agrees, that the mittimus incorrectly reflects that defendant was convicted of two counts of second degree murder and should be corrected to reflect that he was convicted of only one count of second degree murder. The mittimus must be amended to conform with the judgment when it does not accurately reflect the defendant's conviction. *People v. Pryor*, 372 Ill. App. 3d 422, 438 (2007). As such, we direct the clerk of the circuit court to amend the mittimus so that it accurately reflects that defendant was convicted of a single count of second degree murder.

¶ 17 **CONCLUSION**

¶ 18 Accordingly, we vacate defendant's sentence and remand the matter for resentencing and a corrected mittimus.

¶ 19 Vacated and remanded; mittimus corrected.

¶ 20 PRESIDING JUSTICE HARRIS, specially concurring.

¶ 21 I specially concur with the majority holding that this case be remanded for resentencing as the record supports defendant's claim that the trial court sentenced him pursuant to an enhanced sentence based on brutal and heinous conduct not part of the indictment and not submitted to the jury.

¶ 22 However, at the hearing on the motion to reduce sentence, the trial court stated its intention not to enhance the sentence when sentencing defendant to the maximum in the regular range. It is important to note that assuming other sufficient facts in aggravation were shown, that would be sufficient for this court to affirm. However, here the prosecutor was consistent throughout the proceedings in urging that the State was seeking an extended imprisonment based

on brutal and heinous behavior, and the trial court's explaining it imposed the maximum sentence of 20 years as a result of finding that a brutal and heinous crime was committed. This renders the sentence violative of due process and I therefore join in remanding for re-sentencing.

¶ 23 JUSTICE PIERCE, dissenting.

¶ 24 There is simply no acceptable reason this issue should have arisen but for the careless and improper argument made by the prosecutor as it relates to seeking an enhanced sentence in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and section 111-3(c-5) of the Code of Criminal Procedure (725 ILCS 5/111-3(c-5) (West 2010)). It is readily understandable that the majority finds that a remand for resentencing is required based on its analysis of the sentencing hearing, however, I would defer to and accept the experienced trial judge's explanation and clarification of her remarks and sentence made at the hearing on defendant's timely filed motion to reduce sentence. I respectfully dissent.

¶ 25 It is not realistic to expect trial judges to speak with precision and unmistakable clarity at all times such that they should not be allowed to clarify and explain what they meant at an earlier time. Judges are human; they get distracted and misspeak. That is why we usually require the offended party to bring the alleged error to the court's attention so that any confusion or misunderstanding can be dealt with and explained by the court, otherwise a forfeiture may be declared. *People v. Vernon*, 285 Ill. App. 3d 302, 304 (1996) (purpose of motion to reconsider sentence is to review the appropriateness of the sentence imposed and to correct any errors).

¶ 26 Here, the trial judge specifically stated two times at sentencing "[T]his is not an *Apprendi* issue," clearly indicating that the court was well aware of the *Apprendi* ruling, its application and

its inapplicability to the sentencing decision the court was about to impose. The brutal and heinous finding, not the prosecution's improper request, was the reason the court imposed the maximum sentence of 20 years. In my view, the court's finding that the acts leading to defendant's conviction were brutal and heinous were clearly supported by the record and, as further explained and articulated by the trial court in denying the motion to reduce sentence, was the basis for the imposition of the maximum allowable sentence for attempted murder. If any error occurred, it was harmless. *People v. McCain*, 248 Ill. App. 3d 844 (1993).

¶ 27 The prosecutor's conduct in requesting an extended term in the manner in which it did is inexcusable and has resulted in an unnecessary expenditure of judicial, defense and prosecution resources. If the prosecutor thought it appropriate to seek an extended term it should have followed long-standing, well-known procedures prior to trial. I respectfully dissent.