2014 IL App (2d) 120892-U
No. 2-12-0892
Order filed January 27, 2014

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 09-CF-2228
INOCENCIO FERNANDEZ,	)	Honorable John J. Kinsella,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Jorgensen and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: 1) The trial court improperly sentenced defendant to an extended term of imprisonment for driving while license revoked where defendant was also convicted of aggravated driving under the influence of alcohol because the offenses at issue were part of a single course of conduct and the aggravated DUI offense, a Class X felony, was a more serious offense than aggravated DWLR, a Class 4 felony; and 2) trial court did not considered improper factors in aggravation during defendant's sentencing hearing where the trial court mentioned defendant's prior arrests for DUI, did not consider them in aggravation, and considered proper factors such as defendant's denial that he had a problem with alcohol, and that he committed the offenses while he had open liquor in the vehicle and young children in the car. Affirmed and sentence modified.

¶ 2 Defendant, Inocencio Fernandez, appeals his sentences for driving while license revoked and aggravated driving under the influence of alcohol. Defendant raises two issues. The first is whether his sentence for driving while license revoked must be reduced from five years' imprisonment to three years because an extended term sentence may only be imposed on the most serious class offense. The second is whether he is entitled to a new sentencing hearing because the trial court considered improper factors in aggravation during his sentencing hearing. We affirm in part and modify in part.

¶ 3 I. BACKGROUND

¶ 4 In September 2009 defendant was charged with numerous offenses, including four counts of aggravated driving under the influence (DUI) of alcohol. Two of these counts alleged, in part, that the alcohol concentration in defendant's blood or breath was 0.08 in violation of section 11-501(a)(2) of the Illinois Vehicle Code (Code) (625 ILCS 5/11–501(a)(2) (West 2008)). The third count of aggravated DUI alleged that defendant committed the offense five previous times, in violation of sections 11-501(a)(2) and 11-501(d)(2)(E) of the Code (625 ILCS 5/11-501(a)(2), 11-501(d)(2)(E) (West 2008)). The fourth count of aggravated DUI alleged that defendant had committed the offense five previous times and had committed the offense while transporting a person under the age of 16 years old in violation of sections 11-501(a)(2) and 11-501(d)(2)(E) of the Code. The State also charged defendant with driving while his license was revoked (DWLR) (625 ILCS 5/6-303(a), (d-3) (West 2008)), two counts of improper lane usage (625 ILCS 5/11-709 (West 2008)), transportation of alcoholic liquor in a motor vehicle (625 ILCS 5/11-502(a) (West 2008)), three counts of endangering the life of a child (720 ILCS 5/12-21.6 (West 2008)), and failure to secure a child under the age of eight years in an appropriate child restraint system (625 ILCS 25/4 (West 2008)).

¶ 5 Prior to trial, defendant filed a motion *in limine* to bar the introduction of his breath test result. Defendant's motions alleged that the breath test machine was not certified as accurate in accordance with section 1286.230 of title 20 of the Illinois Administrative Code (20 Ill. Adm. Code 1286.230, at 33 Ill. Reg. 8529 (June 4, 2009)), because it was not checked and certified within 62 days, as required by the regulation. The trial court granted defendant's motion *in limine*. The State filed timely certificates of impairment and notices of appeal. This court affirmed the trial court's decision barring the admission of defendant's breath test result. *People v. Clairmont*, 2011 IL App (2d) 100924. Subsequently, the State *nolle prossed* the two aggravated DUI counts that alleged that the alcohol concentration in defendant's blood or breath was 0.08 in violation of section 11-501(a)(2) of the Code.

¶ 6 The trial court found defendant guilty of two counts of aggravated DUI counts: (1) this was defendant's sixth DUI offense in violation of sections 11-501(a)(2) and 11-501(d)(2)(E) of the Code; and (2) this was defendant's sixth DUI offense and he committed the offense while transporting a person under the age of 16 years old in violation of sections 11-501(a)(2) and 11-501(d)(2)(E) of the Code. The trial court also found defendant guilty of DWLR in violation of sections 6-303(a) and 6-303(d-3) of the Code, improper lane usage, and transporting open liquor.

¶ 7 On August 9, 2012, the trial court denied defendant's motion for a new trial and proceeded to sentencing. The trial court merged the two aggravated DUI convictions, sentenced defendant on the first aggravated DUI conviction only (it was defendant's sixth DUI offense), and, citing the first aggravated DUI conviction as a Class X felony, sentenced defendant to eight years' imprisonment followed by three years of mandatory supervised release. The trial court imposed a five year extended term sentence of imprisonment for the DWLR conviction followed

by one year of mandatory supervised release to run concurrent with the eight year term for aggravated DUI. On the remaining charges, the trial court imposed costs only.

¶ 8 II. ANALYSIS

¶ 9 Defendant argues that his sentence for DWLR must be reduced to three years because an extended term sentence may only be imposed on the most serious class offense. When a defendant is convicted of multiple offenses that are part of a single course of conduct, he may be sentenced to an extended-term sentence only for those offenses that are within the most serious class. *People v. Smith*, 345 Ill. App. 3d 179, 190 (2004). Aggravated DWLR is a Class 4 felony. 625 ILCS 5/6-303(d-3) (West 2008). A Class 4 felony is generally punishable by a term of not less than one and not more than three years' imprisonment. 730 ILCS 5/5–8–1(a)(7) (West 2008). The aggravated DUI count defendant for which defendant was sentenced is a Class X felony. 625 ILCS 5/11-501(a)(2), 11-501(d)(2)(E) (West 2008). A Class X felony is generally punishable by a term of not less than six and not more than thirty years' imprisonment. 730 ILCS 5/5-4.525(a) (West 2008). The trial court sentenced defendant to an extended-term sentence of six years' imprisonment on the aggravated DWLR conviction.

¶ 10 The State confesses error regarding the trial court's sentencing defendant to an extended term for the aggravated DWLR conviction. We accept the State's confession of error. The offenses at issue were part of a single course of conduct. Further, the aggravated DUI offense, a Class X felony, is a more serious offense than aggravated DWLR, a Class 4 felony. Therefore, we reduce defendant's extended-term sentence for aggravated DWLR to the maximum allowable term of three years' imprisonment, as we are authorized to do under Illinois Supreme Court Rule 615(b)(4) (eff. Aug. 27, 1999).

¶ 11 Next, defendant argues on appeal that he is entitled to a new sentencing hearing because the trial court considered improper factors in aggravation during his sentencing hearing. Defendant has forfeited this issue on appeal because he did not object to the court's consideration of the alleged improper factors at his sentencing hearing, nor did he file a written motion to reconsider the sentence imposed. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Defendant urges this court to review the issue for plain error.

¶ 12 Forfeited sentencing issues may be reviewed for plain error. *Hillier*, 237 Ill. 2d at 544. As with trial errors, a defendant must show that the evidence at the sentencing hearing was closely balanced or the error was so egregious as to deny a defendant a fair sentencing hearing. *Id*. at 544. Under either prong of the plain-error doctrine, a defendant must first show that a clear or obvious error occurred. *Id*. at 545.

¶ 13 Defendant argues that the trial court considered defendant's "bare arrests" as evidence in aggravation where there was no testimony to substantiate the conduct allegedly leading to the arrests. A trial court's sentencing decision is entitled to great deference, and we may not disturb a defendant's sentence unless the trial court abused its discretion. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). The trial court is granted such deference because it has a superior opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). An abuse of discretion occurs when the trial court's ruling is arbitrary, fanciful, unreasonable or where no reasonable person would take the view adopted by the trial court. *People v. Sutherland*, 223 Ill. 2d 187, 272-73 (2006).

¶ 14 However, the consideration of an improper factor can be an independent basis for reversal. *People v. Robinson*, 391 Ill. App. 3d 822, 843 (2009). "Bare arrests and pending

charges may not be utilized in aggravation of a sentence." *People v. Johnson*, 347 Ill. App. 3d 570, 575 (2004). Conversely, criminal conduct unrelated to the offense of which the defendant has been convicted may be considered at sentencing. *Id*. While arrests not resulting in convictions normally may not be considered in determining the appropriate length of a sentence to be imposed, a court may consider evidence of criminal conduct for which no prosecution or conviction ensued, provided that evidence is both relevant and reliable. *People v. Gomez*, 247 Ill. App. 3d 68, 73-74 (1993). Absent evidence of reliability, however, the trial court's consideration of a mere arrest is prejudicial error unless the record demonstrates that the weight placed on the improper factor by the court was insignificant. *People v. Williams*, 272 Ill. App. 3d at 868, 879 (1995). In determining the correctness of a trial court's statement during sentencing, the reviewing court should not focus on a few words or statements, 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 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*.

¶ 15 Defendant contends that the trial court improperly considered his prior DUI arrests and DWLR arrests in aggravation. Before announcing defendant's sentences the trial court stated:

> "[Y]ou take a step back and look at the entire history of the defendant, it's very aggravating. I count that this was his ninth DUI arrest, three of which were not prosecuted in Cook County, and obviously have to be viewed only as arrests and not any more than aggravation in that sense; but I think it's important to note that in contrast with the defendant's essential denial that alcohol is a problem, when held up against that

comment or that statement, it sound very much aggravating for the defendant not to even acknowledge that he has a problem.

Someone who is arrested for DUI nine times, drinking and driving, even though over a span of–it's about 15, 16 years, that's extremely unusual and certainly indicates a serious and long-standing alcohol abuse problem, and that fact that he's been convicted and sentenced, one case to the penitentiary before this, for DUI, and then I [count] eight convictions for driving on revoked or suspended license, a couple of other arrests for the same offense, for which he was not prosecuted, I count a total of 26 arrests. * * * [H]e does deny what I think appears obvious to me, which is he has a serious alcohol abuse problem and is an alcoholic, and he should not be drinking, and it is the drinking that brings him here. * * *

I do find it extremely aggravating that the defendant was operating a motor vehicle with open liquor and little kids in the car. I can't think of a more potentially disastrous circumstance than a drunk, with eight prior arrests and five prior convictions, driving down the street drinking, with little kids in the car."

¶ 16 Regarding defendant's prior DUI arrests, the trial court expressly stated that he viewed them only as arrests. Further, the trial court considered defendant's statement to the court in which he failed to acknowledge that he had a problem with alcohol as an indication that defendant had a "serious and long-standing alcohol abuse problem." Although the trial court mentioned defendant's prior arrests it was as an indication of defendant's denial of his drinking problem. A reviewing court should not focus on a few words or statements made by the trial court but must consider the record as a whole. *People v. Sims*, 403 Ill. App. 3d 9, 24 (2010). Further, the trial court's mention of defendant's 26 arrests in this case does not equate to reliance

on arrests without convictions. See *Gomez*, 247 Ill. App. 3d at 74 (rather than demonstrating reliance on the defendant's prior arrests, the record indicated that the court merely mentioned them while considering his criminal history).

¶ 17 Defendant cites *People v. Cross*, 100 Ill. App. 3d 83 (1981), to support his argument. In *Cross*,the trial court imposed the maximum sentence upon the defendant for arson. *Id*. at 91. Before sentencing the defendant, the trial court noted that, during a prior trial, the jury had found the defendant guilty only of battery, not of murder, but that the battery victim had died. *Id*. The trial court stated: "For the record, the court will simply note that the victim of the battery died and will not take into account the charges which were not proved." *Id*. The appellate court vacated and remanded the defendant's arson sentence for a new sentencing hearing, reasoning that the trial court's comments were ambiguous and uncertain and it was impossible to determine what weight the court had given the battery victim's death. *Id*. at 91-92. In contrast, in this case, it is not impossible to determine what weight the trial court gave defendant's prior arrests because the trial court expressly stated that the arrests "obviously [had] to viewed only as arrests." There is nothing ambiguous or uncertain about the trial court's comment. Further, unlike the trial court in *Cross*, the trial court in this case sentenced defendant to only two years over the statutory minimum for a Class X aggravated DUI. Thus, *Cross* is distinguishable from the case at bar.

¶ 18 Defendant also argues that the trial court considered a factor inherent in the offense of aggravated DUI in imposing the sentence for aggravated DUI. 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 the 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. *Id*. at 12.

¶ 19 In this case, defendant was found guilty on two counts of aggravated DUI: (1) DUI while license revoked, having committed the offense a five or more previous times; and (2) DUI while license revoked, having committed the offense five or more previous times while transporting a person under the age of 16 years. Defendant argues that he was subject to a double enhancement because the trial court found it "extremely aggravating that the defendant was operating a motor vehicle with open liquor and little kids in the car." However, defendant acknowledges that the second aggravated DUI conviction merged into the first aggravated DUI conviction. Defendant was sentenced only the first aggravated DUI conviction, a Class X felony. Thus, the facts the trial court considered at issue were not an element of the offense for which he was sentenced. Accordingly, there was no double-enhancement. Therefore, we need not consider whether the sentencing was plain error for the purpose of determining whether the defendant forfeited the issue.

¶ 20 Defendant cites *People v. Abdelhadi*, 2012 IL App (2d) 111053, to support his argument. In *Abdelhadi*, this court held that the trial court considered an improper factor in sentencing. *Id*., ¶¶ 12-19. We reasoned that in announcing defendant's sentence, the trial court "mirrored" the elements of the offense that the State argued in aggravation and that the trial court actually relied on the improper factors rather than merely mentioning them. *Id*. Thus, we reversed the defendant's sentence and remanded the case for a new sentencing hearing. *Id*., ¶ 19. In this case, the State did not argue the elements of the offense as factors in aggravation. Further, the trial court did not rely on such factors. Rather, the trial court considered proper factors: that defendant's history indicated that he had a problem with alcohol; that he failed to acknowledge

his problem; and that "defendant was operating a motor vehicle with open liquor and little kids in the car." Thus, this case is distinguishable from *Abdelhadi*.

¶ 21 III. CONCLUSION

¶ 22 For the reasons stated, we reduce defendant's sentence to three years' imprisonment for aggravated driving while license revoked and affirm the judgment in all other respects.

¶ 23 Affirmed in part and sentence modified in part.