

2014 IL App (2d) 120970-U
No. 2-12-0970
Order filed March 5, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Du Page County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 11-CF-1310
)	
JOSE R. FOURNIER,)	Honorable
)	Kathryn E. Creswell,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in sentencing defendant to 20 years' imprisonment (on a 6-to-30 range) for unlawful possession of cannabis with the intent to deliver, and thus the sentence was not the product of plain error or ineffective assistance of counsel: despite defendant's lack of prior convictions, the State submitted proper evidence of an aggravating criminal history; the court properly rejected defendant's assertion that he led a normal life; the court did not err in characterizing defendant as the "ring leader" of his operation; and defendant showed little rehabilitative potential.

¶ 2 Defendant, Jose R. Fournier,¹ appeals from the judgment of the circuit court of Du Page County sentencing him to 20 years' imprisonment. Because the sentence, which was within the applicable statutory range, was not an abuse of discretion, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on one count of unlawful possession with the intent to deliver more than 5,000 grams of cannabis (720 ILCS 550/5(g) (West 2010)). The evidence at his jury trial established that the Drug Enforcement Administration conducted surveillance of his Darien, Illinois, residence on four days in late May and early June 2011. On three of those dates, defendant backed his vehicle out of his garage, and, a short time later, a blue Ford Fusion, with a Michigan license plate, entered the garage. The door was then closed. On the other date, a pickup truck pulled into the garage, and the driver tossed items from the truck bed into the residence. Shortly thereafter, the blue Ford Fusion drove into the garage and the door was closed.

¶ 5 On June 7, 2011, the police followed the Ford Fusion after it left defendant's house. After stopping it, the police found several bundles of suspected cannabis, which they estimated to weigh a total of 50 pounds. Defendant's fingerprints were found on a black garbage bag containing one of the bundles. Defendant and the State stipulated that two of the bundles contained a total 6,319 grams of cannabis.

¶ 6 Later that day, defendant was detained near his home. He was returned to his home, where he consented to it being searched. The search uncovered \$50,000 cash in a briefcase, in

¹ According to the presentence investigation report, defendant's real name is Ramon Torres-Magana. However, he was charged and convicted under the name of Fournier, and the parties use that name on appeal.

\$2,000 bundles. The officers found a digital scale and a heat sealer, both of which are typically used for drug packaging. They also found four cell phones in a bedroom dresser and two cell phones on defendant's person. Defendant was carrying \$2,700 in cash. Two drug ledgers containing sales information and phone numbers were also found.

¶ 7 The police interviewed defendant in his garage. He admitted that earlier that day he had sold 45 pounds of marijuana to a black female from Michigan. During the prior three weeks, he had sold her 20 pounds of marijuana on one occasion and 35 pounds of marijuana on another. He charged her approximately \$1,000 per pound.

¶ 8 Defendant identified his supplier as Jose Cervantes, who allowed him to pay for the cannabis after it was sold. Defendant earned 50 cents for each dollar's worth of cannabis he sold. Defendant typically received the cannabis from Cervantes on the same day that he sold it. Defendant was found guilty of possessing in excess of 5,000 grams of cannabis with the intent to deliver.

¶ 9 At the sentencing hearing, Ray Bradford, an investigator with the Du Page County State's Attorney's office, testified regarding his review of police reports in case No. 05-CF-1371. That case involved a pending prosecution against defendant in Du Page County for unlawful possession of cannabis (720 ILCS 550/4(d) (West 2004)) and unlawful possession of a controlled substance (720 ILCS 570/402(a)(2)(A) (West 2004)).² Defendant failed to appear on the May 23, 2006, trial date in that case and did not appear until June 2011.

¶ 10 According to Bradford, one of the officers in that case received a phone call from the Lake County, Indiana, sheriff's department stating that earlier that day they had stopped defendant. During the traffic stop, they discovered a hidden compartment in defendant's vehicle

² That case was eventually nol-prossed at the sentencing hearing in this case.

that contained approximately \$21,000 cash. Because defendant denied knowledge or ownership of the money, they seized the money but released defendant. To Bradford's knowledge, the Indiana authorities never charged defendant with a crime related to the discovery of the cash.

¶ 11 As a result of the phone call from the Indiana authorities, officers with the Du Page County Metropolitan Enforcement Group went to defendant's home in Darien³ on that same date. Defendant consented to a search of his house.

¶ 12 Pursuant to that search, the officers found a shoe box that contained two plastic bags of cocaine that weighed 11.4 grams, a gym bag with a small amount of cocaine and cannabis inside, a storage container that held approximately 36.3 grams of cannabis, and a shirt with about 5.2 grams of cocaine in the pocket. The officers discovered \$1,500 underneath a bedroom dresser and \$511 in defendant's front pants pocket. They uncovered two containers of a powdery substance used to "cut cocaine." Lastly, they found a digital scale, a heat sealing³ machine, and two live rounds of nine-millimeter ammunition. Defendant claimed responsibility for all of the items found in his home.

¶ 13 In terms of mitigating evidence, defense counsel offered documentation of the amount of time that defendant had participated in the JUST program⁴ in Du Page County. A presentence investigation report (PSR) was also submitted.

³ This is a different residence from the one in which defendant lived at the time of his arrest in this case.

⁴ The acronym stands for "Justice, Understanding, Service, and Teaching." It is a nonprofit organization that provides jail inmates with rehabilitative support. See <http://www.justofdupage.org>.

¶ 14 The PSR indicated that defendant had no juvenile adjudications or adult criminal convictions. It showed the pending criminal case in No. 05-CF-1371. It identified two arrests in California for robbery and burglary in 1980 and 1983, respectively. It reflected a pending federal prosecution for a “[c]ocaine [c]onspiracy” in Ohio.

¶ 15 The PSR listed four aliases for defendant, as well as two dates of birth. He had illegally purchased social security numbers at least twice. There were holds on defendant by Immigration and Customs Enforcement and the United States Marshal’s Service. The PSR showed that defendant had illegally entered the United States on three occasions, including a few months before his arrest in this case.

¶ 16 Defendant had six adult children, five of whom lived in Mexico. According to him, he maintained regular telephone contact with all of his children, even while in jail. Defendant returned to Mexico around 2007 to be with his dying mother. He reentered the United States in 2011 to help care for his dying sister.

¶ 17 Defendant was self-employed as a landscaper when he was arrested in this case. His only other employment was from 2004 to 2006 in Darien.

¶ 18 According to defendant, he “hardly has any friends” and likes to be alone. He attended church before being arrested. While in jail in this case, he “[slept] and play[ed] cards.” He could not identify any future ambitions or goals.

¶ 19 He took medication for high blood pressure, diabetes, and cholesterol. He had no other known physical or mental health issues. He denied regular alcohol use or any current illicit drug use.

¶ 20 According to the PSR, defendant denied any involvement in the present offense and stated that he was being accused of something he did not do. He denied having been read his

rights or having made any statement to the police. He accused the police of lying during his trial. The PSR concluded that defendant “does not take any responsibility for the instant offense.” Defendant declined to allocute at the sentencing hearing.

¶ 21 In imposing sentence, the trial court stated that it considered the aggravating and mitigating factors. It reviewed the evidence at both trial and sentencing. It also considered “the information contained in the pre-sentence report.”

¶ 22 In response to defendant’s argument that he led a normal life, the court stated that there was nothing “normal about the [d]efendant’s life.” The court stated that the trial evidence showed that defendant “was the ring leader for moving huge amounts of cannabis from Michigan to Illinois.” The court noted that defendant had been involved in several similar incidents in late May and early June 2011.

¶ 23 The court referred to Bradford’s testimony, which indicated that defendant was “involved in some sort of similar drug activity in Indiana.” In doing so, the court rhetorically asked “who walks away from \$21,000 that’s in his vehicle[?]” The court added that that incident fit “the same pattern” of defendant having “huge amounts of cash in exchange for the delivery of huge amounts of cannabis.”

¶ 24 The court found it aggravating that defendant had illegally entered the United States three times and that he was currently here illegally. The court pointed to defendant having used several aliases and having illegally purchased social security numbers.

¶ 25 The court, noting that defendant’s children were grown, stated that there was “very little mitigation, and [that] clearly the aggravation substantially outweigh[ed] any mitigation.” The court added that the evidence “was overwhelming that [defendant] was a ring leader in moving

huge amounts of cannabis.” Thus, “based upon all the information available,” the court sentenced defendant to 20 years in prison.

¶ 26 After sentencing defendant, the court advised him of his appeal rights. In doing so, the court explained that, if he wanted to challenge his sentence on appeal, he would have to file a motion to reconsider his sentence and any issue not included in such a motion would be waived. Defendant did not file a motion to reconsider his sentence, but filed, with leave of this court, a late notice of appeal.

¶ 27

II. ANALYSIS

¶ 28 On appeal, defendant contends that the trial court abused its discretion in sentencing him to 20 years’ imprisonment. Acknowledging that he did not file a motion to reconsider his sentence, defendant asks this court to review his contentions under the plain-error doctrine. Alternatively, he asserts a claim of ineffective assistance of trial counsel based on his trial counsel’s failure to file a motion to reconsider his sentence. As to the merits of his sentencing challenge, he specifically contends that the trial court failed to sufficiently credit his mitigation evidence, particularly his lack of criminal history, mischaracterized his life as abnormal, incorrectly considered the Indiana incident as evidence of criminal conduct, and overstated his role in the instant offense. Therefore, he requests that we either reduce or vacate his sentence and remand for a new sentencing hearing.

¶ 29 We begin our analysis with defendant’s failure to file a motion to reconsider his sentence. By failing to do so, he forfeited any challenge to his sentence on appeal. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Nonetheless, we may consider a defendant’s forfeited sentencing contentions under the plain-error doctrine. *Hillier*, 237 Ill. 2d at 545. To obtain plain-error relief, however, a defendant must first establish a clear or obvious error. *Hillier*, 237 Ill. 2d at

545. Absent any reversible error, there can be no plain error. *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010).

¶ 30 A trial court's sentence is given great deference, because that court was in a better position than the reviewing court to assess the circumstances of the case and weigh the aggravating and mitigating factors. *People v. Streit*, 142 Ill. 2d 13, 18-20 (1991). Trial courts have broad discretion in sentencing, and a sentence within the applicable statutory range may not be disturbed on appeal absent an abuse of discretion. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). Such an abuse of discretion occurs when the sentence greatly varies with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *Alexander*, 239 Ill. 2d at 212.

¶ 31 In this case, defendant's sentence fell within the applicable statutory range of 6 to 30 years in prison. See 720 ILCS 550/5(g) (West 2010); 730 ILCS 5/5-4.5-25(a) (West 2010). Therefore, we give the trial court's sentencing decision great deference and consider only whether it was an abuse of discretion. See *People v. Null*, 2013 IL App (2d) 110189, ¶ 55.

¶ 32 All sentences should reflect the seriousness of the crime and the objective of returning the defendant to useful citizenship. *Null*, 2013 IL App (2d) 110189, ¶ 56. Careful consideration must be given to all mitigating and aggravating factors, along with the need for deterrence and the potential for rehabilitation. *Null*, 2013 IL App (2d) 110189, ¶ 56. Even though a reviewing court might weigh the sentencing factors differently than the trial court, that does not warrant altering the sentence. *Null*, 2013 IL App (2d) 110189, ¶ 56.

¶ 33 Where the record shows that the trial court acknowledged the PSR, there is a presumption that it considered both the mitigation evidence contained therein and the rehabilitative potential of the defendant. *People v. Colbert*, 2013 IL App (1st) 112935, ¶ 25. Similarly, where

mitigating evidence is before the trial court, it is presumed that the trial court considered it, absent some indication to the contrary, other than the sentence itself. *People v. Benford*, 349 Ill. App. 3d 721, 735 (2004). Moreover, there is generally a rebuttable presumption that a sentence is proper, and a defendant has the burden to affirmatively demonstrate that an error occurred. *People v. Burdine*, 362 Ill. App. 3d 19, 26 (2005).

¶ 34 In this case, keeping in mind that we consider the contentions in light of the plain-error doctrine, we first address defendant's argument that the trial court did not adequately credit the mitigation evidence, particularly his lack of any criminal convictions. Although the trial court properly did not rely on the mere facts of defendant's arrests for robbery and burglary and the prosecution in Ohio (see *People v. Johnson*, 347 Ill. App. 3d 570, 575 (2004)), it was entitled to consider any evidence of criminal conduct for which no prosecution or conviction ensued, provided that such evidence was both relevant and reliable (see *Null*, 2013 IL App (2d) 110189, ¶ 56).

¶ 35 It was undisputed that defendant had entered this country illegally three times and was present here illegally when he was arrested in this case. He had also used several aliases and had illegally purchased social security numbers. Additionally, the State submitted evidence underlying the pending criminal case for drug possession. All of this was aggravating evidence of defendant's criminal history.

¶ 36 There was also evidence that defendant had been involved in criminal conduct in Indiana. Defendant, however, posits that the court improperly considered that as evidence of his having committed a drug offense in Indiana. Although he contends that there was "no proof of any criminal activity in Indiana," there was in fact circumstantial evidence to support such a conclusion. Defendant was driving a vehicle with a hidden compartment. In that compartment

was \$21,000 cash. Defendant disclaimed any interest in, and walked away from, a significant amount of money. As the court intimated, that was highly suspicious. Combined with that evidence was the trial evidence that established that defendant regularly sold large amounts of cannabis for substantial sums of cash. Thus, it was reasonable for the court to have inferred that defendant was in Indiana for the purpose of dealing drugs. Defendant's denial of any knowledge or ownership of the cash, and the lack of any charges by the Indiana authorities, did not detract from that conclusion.

¶ 37 Defendant further maintains that, because the trial court considered case No. 05-CF-1371 in aggravation, its reliance on the "drug activity in Indiana" was duplicative. In so arguing, he essentially contends that the Indiana incident was directly related to the offense charged in case No. 05-CF-1371.

¶ 38 There was no direct relationship, however, between the \$21,000 found in defendant's vehicle in Indiana and the charges brought in Illinois. The only apparent connection between the two was that the Indiana authorities provided the information to the police here, which in turn led to the prosecution in case No. 05-CF-1371. Moreover, the evidence was sufficient to show that defendant engaged in a similar, but distinct, drug deal in Indiana. The trial court was not wrong in attributing a separate instance of criminal conduct to defendant based on the incident in Indiana. Thus, the court's consideration of the Indiana incident in aggravation did not duplicate the weight it gave the aggravating evidence from case No. 05-CF-1371. Further, even if the \$21,000 was viewed as part of the drug crimes for which defendant was charged in case No. 05-CF-1371, it was not improper for the trial court to have considered it. The Indiana conduct certainly was relevant to show, for sentencing purposes, the extent of defendant's criminal

activity. See *Null*, 2013 IL App (2d) 110189, ¶ 56. Thus, the court did not abuse its discretion in relying on the Indiana incident as relevant evidence of criminal activity by defendant.

¶ 30 Defendant's criminal history was not minimal, notwithstanding the absence of any convictions, and could not be considered compelling evidence in mitigation. Rather, his criminal history reasonably could be considered as aggravating. We will not substitute our judgment for that of the trial court as to how much weight to give that evidence. See *Streit*, 145 Ill. 2d at 19. The trial court did not abuse its discretion in considering defendant's criminal history when it imposed the sentence.

¶ 40 Defendant next contends that the trial court incorrectly disagreed with his argument in mitigation that he had led "a relatively normal life." He points to the court's comment that he lived anything but a normal life. In arguing otherwise, he relies on the fact that he had two relationships with women that lasted a total of 30 years, that he fathered six children from those relationships, that he maintains regular contact with those adult children, that he purchased the social security numbers so he could obtain work, and that he traveled to Mexico to be with his dying mother and returned here to care for his dying sister.

¶ 41 Based on defendant's history and lifestyle at the time of his arrest, the trial court's remark was accurate. Although certain aspects of defendant's life might be characterized as normal, he simply did not lead what most people would describe as a "normal life." He had illegally entered the United States three times, obtained social security cards illegally, had used several aliases, and had been convicted of significant cannabis distribution in this case. Defendant's attempt to characterize his life as normal was at best a stretch. The trial court did not abuse its discretion in disagreeing with defendant's argument in that regard.

¶ 42 Defendant next challenges the trial court's description of him as the "ring leader" of the cannabis distribution operation. That contention lacks merit, however, as the evidence at trial showed that defendant was running a significant cannabis distribution operation from his home in Darien. It certainly appeared that he was the leader of that particular operation. That conclusion is not vitiated by the fact that he obtained his cannabis from another individual. Nor was there any evidence that he was merely a "middleman" of some larger operation as he contends. Even if he was, that would not preclude him from being the leader of his own operation. The trial court did not abuse its discretion in characterizing defendant as the ring leader.

¶ 43 Moreover, even if the trial court mischaracterized defendant as the ring leader, the error was of no consequence. The evidence showed that defendant was the distributor of substantial amounts of cannabis. It was entirely proper for the court to give that fact significant weight, regardless of what moniker it attached to it. See *People v. Jones*, 376 Ill. App. 3d 372, 394 (2007) (when deciding whether a sentence is excessive, we do not focus on isolated words or statements by the trial court but, rather, consider the record as a whole).

¶ 44 We note that, in addition to the aggravating evidence and minimal mitigating evidence, defendant's background, words, and actions demonstrated little rehabilitative potential. He had repeatedly entered the United States illegally, had illegally obtained social security numbers and used several aliases, had a limited work record, and had recently been involved in the distribution of significant amounts of cannabis. Additionally, he was unwilling to acknowledge his involvement in the instant offense, notwithstanding his conviction, and went so far as to state that he had been falsely accused and that the police had lied at trial. Further, he did not identify any future ambitions or goals. He also declined the opportunity for an allocution at sentencing.

Although the trial court did not expressly mention it, the lack of rehabilitative potential justified, in part, the lengthier prison sentence.

¶ 45 Defendant's sentence did not vary greatly from the spirit and purpose of the law, nor was it manifestly disproportionate to the nature of his offense. See *Alexander*, 239 Ill. 2d at 212. Moreover, because we can identify no clear or obvious sentencing error, defendant is not entitled to any plain-error relief. See *Hillier*, 237 Ill. 2d at 545.

¶ 46 That leaves defendant's contention that his trial counsel was ineffective for failing to seek reconsideration of his sentence. To analyze whether trial counsel was ineffective for failing to file a motion to reconsider a sentence, a court applies the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Price*, 2011 IL App (4th) 100311, ¶ 34. To obtain relief under *Strickland*, a defendant must show that: (1) his counsel's performance failed to meet an objective standard of competence; and (2) his counsel's deficient performance resulted in prejudice. *People v. Evans*, 186 Ill. 2d 83, 93 (1999). When a case is more easily decided under the prejudice prong, the court should do so. *Price*, 2011 IL App (4th) 100311, ¶ 35 (citing *Strickland*, 466 U.S. at 697). If a defendant's sentence is not excessive, there is no prejudice that results from trial counsel's failure to file a motion to reconsider. *Price*, 2011 IL App (4th) 100311, ¶ 36.

¶ 47 In this case, we have already determined that the trial court did not abuse its discretion in sentencing defendant to 20 years in prison. Therefore, because his sentence was not excessive, defendant was not prejudiced by counsel's failure to file a motion to reconsider his sentence. Thus, his claim based on ineffective assistance of counsel fails.

¶ 48 III. CONCLUSION

¶ 49 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 50 Affirmed.