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2014 IL App (3d) 120207-U

Order filed February 4, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 13th Judicial Circuit,
)	La Salle County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-12-0207
v.)	Circuit No. 10-CF-156
)	
ALEJANDRO ARTEAGA,)	Honorable
)	Chris H. Ryan,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Presiding Justice Lytton and Justice O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court committed plain error during sentencing when it (1) considered two aggravating factors that were inherent in the offense and (2) failed to consider an applicable factor in mitigation.

¶ 2 A jury found defendant, Alejandro Arteaga, guilty of two counts of delivery of a controlled substance (720 ILCS 570/401(a)(2)(A), (B) (West 2010)) and one count of possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2)(A) (West 2010)). The

court sentenced him to three concurrent sentences of 16 years' imprisonment. Defendant appeals his sentences, arguing that the trial court: (1) considered improper factors in aggravation that were inherent in defendant's offense; and (2) failed to consider an applicable factor in mitigation. We affirm in part, reverse in part and remand for resentencing.

¶ 3

FACTS

¶ 4 The State charged defendant with two counts of unlawful delivery of a controlled substance (720 ILCS 570/401(a)(2)(A), (B) (West 2010)) and one count of possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2)(A) (West 2010)).

¶ 5 The following facts were established at defendant's jury trial. On March 15, 2010, and March 23, 2010, an undercover officer with the Tri-County Drug Enforcement Narcotics Team purchased cocaine from an unwitting participant, Daniel Thorndyke. Thorndyke testified that on both occasions, defendant supplied him with the cocaine, which Thorndyke was to sell and return the proceeds to defendant. Officers applied for and received a search warrant for defendant's apartment in Peru, where they found cocaine and supplies used for packaging narcotics. The jury returned guilty verdicts on all three counts.

¶ 6 At the sentencing hearing, the State encouraged the court to consider two statutory factors in aggravation: (1) that defendant received compensation for committing the offense (730 ILCS 5/5-5-3.2(a)(2) (West 2010)); and (2) that the sentence was necessary to deter others from committing the same crime (730 ILCS 5/5-5-3.2(a)(7) (West 2010)). In addition, the State encouraged the court to consider the following discretionary factors under section 411 of the Illinois Controlled Substances Act (Act): (1) that defendant's offenses involved the delivery of a Schedule I or II substance (720 ILCS 570/411(1) (West 2010)); and (2) that defendant was a

nonuser who delivered controlled substances to a user (720 ILCS 570/411(3) (West 2010)). The State also noted that while defendant was on bond in the present case, he committed delivery of a controlled substance in another county, for which he later pled guilty.

¶ 7 The defense argued that defendant was a drug user because he used marijuana on a daily basis and used cocaine on the weekends and that defendant began selling drugs to support his personal drug habit. Defendant argued that the offense he committed while on bond should not weigh against him because whatever sentence he received in the present case was already required to be served consecutively to his sentence in that case. The defense noted that, other than the conviction received while he was on bond, defendant's prior criminal history consisted of one conviction for retail theft, for which defendant received a sentence of conditional supervision. In addition, defendant had close ties to his family and his community, including a job he had held for 13 years before committing the present offenses.

¶ 8 The trial court explained that, in fashioning defendant's sentence, it would not consider the offense committed while defendant was on bond or the separation of defendant from his family. The court further stated:

"[A]s far as the family's separation, let me just make it very clear. I didn't create this situation. The Court did not. The defendant did. Let's not—let's put it where it belongs. If he's going to have to suffer and the family suffers, let's put the blame where it belongs. It's not with the Court; it's with the defendant. I do not have much sympathy for that. I appreciate the children. I'm sorry for them. But I do not consider that as a weighting factor to minimize a

sentence given the fact that the defendant has created the problem,
not me."

As factors in aggravation, the court found: (1) defendant received compensation for the offense; (2) defendant was distributing a large amount of controlled substances; (3) defendant distributed controlled substances more than once; and (4) the sentence was necessary to deter others from committing the same crime. The court declined to consider whether defendant was a user or nonuser. The court sentenced defendant to three concurrent sentences of 16 years' imprisonment. The sentencing range for two of defendant's offenses was 6 to 30 years' imprisonment, and the range for the third offense was 9 to 40 years' imprisonment.

¶ 9 Defendant appeals, arguing that the trial court abused its discretion in sentencing defendant.

¶ 10 ANALYSIS

¶ 11 A. Improper Aggravating Factors

¶ 12 Defendant claims that the court considered two factors in aggravation that were inherent in defendant's offenses: (1) that defendant received compensation for selling narcotics; and (2) the amount of narcotics defendant sold.

¶ 13 Although a trial court has broad discretion in imposing a sentence, it may not consider a factor inherent in the offense as an aggravating factor in sentencing. *People v. Phelps*, 211 Ill. 2d 1 (2004). Considering such factors results in improper "double enhancement" because the legislature will have already considered all inherent factors when determining an appropriate sentencing range for the offense. *People v. Conover*, 84 Ill. 2d 400 (1981). When a sentencing court considers an inherent aggravating factor, a reviewing court must reverse the sentence unless it can determine that consideration of the inherent factor did not affect the sentence. *People v. Heider*, 231 Ill. 2d 1 (2008).

¶ 14 The fact that a defendant received compensation is inherent in a conviction for possession with intent to deliver. *Conover*, 84 Ill. 2d 400. A sentencing court may only consider "defendant's efforts to maximize profits from a drug enterprise *** to the extent that such evidence reflects on the nature of the crime." *People v. M.I.D.*, 324 Ill. App. 3d 156, 159-60 (2001).

¶ 15 The amount of narcotics defendant sold was also inherent in his offenses. The sentencing ranges for violations of section 401 of the Illinois Controlled Substances Act vary according to the amount of the substance possessed by the offender. 720 ILCS 570/401(a)(2)(A)-(D) (West 2010). The sentencing scheme creates four separate offenses for varying weights of cocaine: 15 to 100 grams; 100 to 400 grams; 400 to 900 grams; and 900 or more grams. *Id.* A court may consider where the amount falls within the range for defendant's offense, but it may not consider the amount in general, because a general amount is inherent in the offense itself.

¶ 16 In the present case, the court engaged in the following discussion of these factors:

"[W]hile *** these charges were pending in this county, another delivery was made in another county. That tells me this: He's more of a dealer and seller than a user. That bodes aggravation of sentence. He's not supplying something to friends or other users. He's selling it. That make him (sic) more of a aggravating factor in this particular matter.

Compensation, he did receive it.

Also, I consider the amounts of the controlled substances.

That's a factor for the Court to consider. This isn't a simple little

once or twice. This is apparently a large amount that can be moved.

There were two separate occasions here, not one. So the court considers that, also."

¶ 17 The court improperly considered that defendant received compensation for his offenses. The court did not focus on "defendant's efforts to maximize profits." *M.I.D.*, 324 Ill. App. 3d at 159. Rather, the court considered the fact that defendant received compensation for narcotics, as opposed to giving them away to friends. That fact was inherent in defendant's offenses, and the court erred by considering it as an aggravating factor.

¶ 18 Likewise, the court's consideration of the amount of narcotics defendant sold was improper. Defendant's offenses already specified that he delivered between 15 and 100 grams of cocaine on one occasion, delivered between 100 and 400 grams of cocaine on another occasion, and possessed with intent to deliver between 15 and 100 grams of cocaine. The sentencing range for his offenses therefore already took into account the amount of narcotics. The court considered the amount of narcotics in general, which resulted in improper double enhancement.

¶ 19 Based on the court's comments, we believe it relied on elements of the crime as factors in aggravation. We acknowledge that "[i]t is unrealistic to suggest that the judge sentencing a convicted murderer must avoid mentioning the fact that someone has died or risk committing reversible error." *People v. Barney*, 111 Ill. App. 3d 669, 679 (1982). However, here the court not only mentioned, but relied on, improper aggravating factors. We find that the court abused its discretion by considering aggravating factors inherent in defendant's offenses.

¶ 20 B. Failure to Consider Factor in Mitigation

¶ 21 Defendant claims that the trial court failed to consider a relevant mitigating factor: that imprisonment would impose a hardship on defendant's dependents. 730 ILCS 5/5-5-3.1(a)(11) (West 2010).

¶ 22 Section 5-5-3.1 of the Unified Code of Corrections lists factors in mitigation that "shall be accorded weight" in favor of minimizing a defendant's sentence. 730 ILCS 5/5-5-3.1(a) (West 2010). If the trial court imposes a sentence of imprisonment, the factors "shall be considered as factors in mitigation of the term imposed." 730 ILCS 5/5-5-3.1(b) (West 2010). One statutory factor in mitigation is whether "[t]he imprisonment of the defendant would entail excessive hardship to his dependents." 730 ILCS 5/5-5-3.1(a)(11) (West 2010). The weight to be accorded factors in mitigation is within the discretion of the trial court (*People v. Gross*, 265 Ill. App. 3d 74 (1994)), but the court must consider each factor to some degree (*People v. Meeks*, 75 Ill. App. 3d 357 (1979)). A court cannot ignore pertinent mitigating factors. *People v. Burnette*, 325 Ill. App. 3d 792 (2001).

¶ 23 When mitigating evidence is before the trial court, it is assumed that the court considered it, unless the record indicates otherwise. *People v. McDonald*, 322 Ill. App. 3d 244 (2001). Defendant argues that the court's statements at the sentencing hearing establish that the court failed to consider this factor in mitigation.

¶ 24 As to the effect of imprisonment on defendant's dependents, the court stated, "I do not have much sympathy for that. I appreciate the children. I'm sorry for them. But I do not consider that as a weighting factor to minimize a sentence given the fact that the defendant has created the problem, not me." As its comments make clear, the court considered the factor but determined that it should not be given weight. The court therefore exercised its discretion in determining how much weight to place on this factor in mitigation; no error occurred.

¶ 25

C. Plain Error

¶ 26 Defendant failed to raise the claim of improper aggravating factors in a postsentencing motion; therefore, the claim is procedurally defaulted. Defendant concedes as much, but argues that the procedural default may be forgiven under either prong of our plain error doctrine.

¶ 27 Under the plain error doctrine, we will review a procedurally defaulted sentencing error if the error was clear and obvious and either: (1) the evidence at the sentencing hearing was closely balanced; or (2) the error denied defendant a fair sentencing hearing. *People v. Hillier*, 237 Ill. 2d 539 (2010). Errors may be considered together to determine whether they collectively amount to plain error. *People v. McMurtry*, 279 Ill. App. 3d 865 (1996). The burden of persuasion with respect to plain error rests with defendant. *People v. Lewis*, 234 Ill. 2d 32 (2009). The errors in the present case qualify as clear and obvious because they involved clear violations of established Illinois case law.

¶ 28 The closely-balanced prong allows a reviewing court to consider unpreserved error when "the evidence is close, regardless of the seriousness of the error." *People v. Herron*, 215 Ill. 2d 167, 187 (2005). The closely-balanced prong is concerned with prejudicial errors, *i.e.*, those where "the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against [defendant]." *Id.* In the trial context, closely balanced means that the errors might have affected the verdict. In the sentencing context, closely balanced means that the errors might have affected the length of the defendant's sentence.

¶ 29 We find that the evidence at sentencing was closely balanced such that the court's sentencing errors may have affected the length of defendant's sentence. Out of the four aggravating factors found by the court, two were considered in error. Under those

circumstances, the court's errors may have affected the sentence it imposed. As a result, we find the court's errors reversible under the first prong of plain error, and we remand for resentencing.

¶ 30

CONCLUSION

¶ 31 The decision of the circuit court of La Salle County is affirmed in part and reversed in part, and the cause is remanded for further proceedings.

¶ 32 Affirmed in part and reversed in part; cause remanded.