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2014 IL App (3d) 130026-U

Order filed February 27, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 12th Judicial Circuit,
)	Will County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-13-0026
v.)	Circuit No. 09-CF-2662
)	
STEPHEN E. BUTLER,)	Honorable
)	Daniel J. Rozak,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE LYTTON delivered the judgment of the court.
Justices Carter and Holdridge concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court did not rely on improper factors or evidence when sentencing defendant. (2) Defendant's two convictions for possession of a defaced firearm are vacated under the one-act, one-crime doctrine.

¶ 2 Defendant, Stephen E. Butler, was convicted of two counts of possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(1)(A), (2)(B) (West 2008)), three counts of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)), and two counts of possession of a firearm with a defaced serial number (720 ILCS 5/24-5(b) (West 2008)). He was sentenced to 30 years' imprisonment for each count of possession of a controlled

substance with intent to deliver, and 10 years' imprisonment on each of the remaining counts, with all sentences to be served concurrently. On direct appeal, this court found that the trial court improperly considered its own private investigation in sentencing defendant and remanded for resentencing. *People v. Butler*, No. 3-10-0854 (2012) (unpublished order under Supreme Court Rule 23). On remand, the trial court imposed the same sentences. On appeal, defendant argues that: (1) this cause should be remanded for resentencing before a different judge because the trial court relied on improper aggravating factors and considered evidence outside the record in determining his sentences; (2) the trial court erred when it failed to issue a new written sentencing judgment and mittimus after resentencing; (3) his convictions for possession of a firearm with a defaced serial number violate the one-act, one-crime doctrine; and (4) the trial court erred by imposing extended-term sentences on his convictions for possession of a firearm with a defaced serial number. We affirm in part and vacate in part.

¶ 3

FACTS

¶ 4 In 2010, defendant was convicted by a jury of two counts of possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(1)(A), (2)(B) (West 2008)), three counts of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)), and two counts of possession of a firearm with a defaced serial number (720 ILCS 5/24-5(b) (West 2008)). The evidence at trial indicated that defendant possessed over 15 grams of heroin and over 146 grams of cocaine. Additionally, defendant, who had a prior felony conviction, was in possession of a Miroku .38-caliber revolver, an RG International .38-caliber revolver, and a Tec-9 nine-millimeter handgun, with defaced serial numbers on the latter two firearms.

¶ 5 During defendant's original sentencing hearing, the court found that the mitigating factors relating to defendant's conduct not causing serious harm did not apply because the use of drugs and the delivery of drugs caused serious harm to others. The court stated in 2009 there were

more than 200 deaths in the collar counties resulting from heroin overdoses. The court explained that pursuant to a telephone call with the coroner, it determined that more than 30 of those deaths were in Will County or people from Will County who had died elsewhere. The court reiterated that addiction was a serious harm and that it considered it an aggravating factor. Defendant was sentenced to 30 years' imprisonment for each count of possession of a controlled substance with intent to deliver, and 10 years' imprisonment on each of the remaining counts, with all sentences to be served concurrently. Defendant appealed.

¶ 6 On direct appeal, defendant argued that the case should be remanded for resentencing on his drug charges because the trial court improperly considered the serious harm to society caused by drug addiction. This court found that the trial court improperly considered its own private investigation into the number of heroin deaths in Will County when sentencing defendant and remanded the case for resentencing. *Butler*, No. 3-10-0854.

¶ 7 Pursuant to this court's remand, the trial court held another sentencing hearing on December 21, 2012. The State called Will County coroner Patrick O'Neil. O'Neil testified that he had been recording the number of heroin-related deaths in Will County since 1999. In 1999, Will County had 6 cases; in 2000, there were 5; in 2001, there were 13; in 2002, there were 9; in 2003, there were 9; in 2004, there were 11; in 2005, there were 15; in 2006, there were 10; in 2007, there were 15; in 2008, there were 17; in 2009, there were 29. Over defense counsel's objection, O'Neil further testified that in 2010, there were 26 cases; in 2011, there were 30; and in 2012, there were 49 as of December 5. O'Neil stated that heroin-related deaths were the leading cause of accidental deaths in Will County and outnumbered homicides. O'Neil also stated that in 2012, heroin-related deaths outnumbered car-crash fatalities, and he predicted that they would outnumber suicides.

¶ 8 Before pronouncing its sentence, the trial court stated that it disagreed with this court's decision on appeal, noting that one of the statutory factors in aggravation was whether the sentence was necessary to deter others. The court went on to state that it typically called the coroner's office on a routine basis, not in relation to a specific case, to find out the number of heroin-related deaths so that it could determine whether a longer sentence was necessary to deter others from committing the same offense. The judge also noted that it routinely inquired into the number of heroin deaths because he was concerned that someone might "hook" his grandchildren on heroin. The court noted that in the instant case, it had heard from the coroner and referenced the increasing number of heroin-related deaths since 2010. The court stated that its original sentencing decision was reinforced by the coroner's testimony. In regard to deterrence, the court also stated that people like defendant were killing people, even if defendant did not directly kill anyone.

¶ 9 In pronouncing the sentence, the court stated that it considered this court's opinion and the factors in aggravation and mitigation. The court resentenced defendant to the original sentence of concurrent 30-year terms of imprisonment on each drug count and concurrent 10-years terms on each of the remaining counts.

¶ 10 On December 27, 2012, defendant filed a motion to reduce sentence, arguing that the trial court improperly considered the number of heroin deaths in Will County, because that harm was implicit in the crime of delivery and not directly linked to defendant's conduct. At the hearing on defendant's motion, the trial court reiterated that it should consider whether the sentence was necessary to deter others. The court explained that it must inquire into the number of heroin-related deaths to determine whether the offense was serious enough to require a harsher sentence. The court reiterated the importance of educating itself on this topic and stated that it was going to continue to talk to the coroner and consider the number of heroin-related deaths when

determining whether a harsh sentence was necessary to deter others. The trial court denied defendant's motion. Defendant appeals.

¶ 11 ANALYSIS

¶ 12 I. Sentencing

¶ 13 Defendant first argues that this case should be remanded for resentencing before a different judge because the judge at resentencing relied on improper aggravating factors and evidence outside the record when determining his sentence. Specifically, defendant contends that the trial court should not have considered: (1) the societal harm caused or threatened by his conduct, as this was inherent in the offense; (2) the conduct of other people who delivered heroin; and (3) its own private investigation. Defendant additionally argues that the trial court committed reversible error by failing to issue a written sentencing judgment and mittimus.

¶ 14 The determination and imposition of a sentence involves considerable judicial discretion, and we will not reverse a trial court's sentence unless we find that the court abused its discretion. *People v. Alexander*, 239 Ill. 2d 205 (2010). As long as the trial court does not consider incompetent evidence or improper aggravating factors, or ignore pertinent mitigating factors, it has wide latitude in sentencing a defendant to any term within the statutory range prescribed for the offense. *People v. Perkins*, 408 Ill. App. 3d 752 (2011).

¶ 15 A. Aggravating Factors

¶ 16 Defendant argues that the trial judge improperly considered: (1) the societal harm caused by his conduct because this was inherent in the offense of possession of a controlled substance with intent to deliver; and (2) the conduct of other people who delivered heroin.

¶ 17 Although a 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. *People v. Ellis*, 401 Ill. App. 3d 727 (2010). However, a trial court may consider the nature and circumstances of the

offense, including the nature and extent of each element of the crime that defendant committed. *People v. Robinson*, 391 Ill. App. 3d 822 (2009). Additionally, a sentence must be based on the culpability of defendant, not the conduct of someone other than defendant. See *People v. Ruiz*, 94 Ill. 2d 245 (1982). In determining whether the sentence was properly imposed, 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. Reed*, 376 Ill. App. 3d 121 (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 on it when imposing its sentence. *Id.*

¶ 18 Here, defendant argues that the trial court relied on a factor inherent in the offense, namely that selling heroin causes harm to society. Whether defendant's conduct caused or threatened serious harm from the use of a controlled substance is implicit in the crime of delivery; therefore, it is generally improper to consider this as a factor in aggravation. *People v. Maxwell*, 167 Ill. App. 3d 849 (1988). However, in the instant case, we do not believe the trial court's statement with regard to societal harm was error.

¶ 19 Section 5-5-3.2(a) of the Unified Code of Corrections lists factors that may be considered in aggravation in sentencing a defendant, and one of those factors is whether “the sentence is necessary to deter others from committing the same crime.” 730 ILCS 5/5-5-3.2(a)(7) (West 2008). During sentencing, the trial court's mention of the harm caused by heroin was in the context of the need to deter others from committing the same crime. The court specifically referred to the increasing number of heroin-related deaths, which it considered in determining whether a longer sentence was necessary to deter others. As such, the trial court properly considered deterrence as an aggravating factor. See *People v. Garibay*, 366 Ill. App. 3d 1103 (2006) (stating that in sentencing, the court should consider the nature of the crime, the protection of the public, deterrence, punishment, and defendant's rehabilitative potential); *People*

v. Cameron, 189 Ill. App. 3d 998 (1989) (finding that the court properly considered deterrence as the only substantial aggravating factor in sentencing defendant for possession of cocaine with intent to deliver).

¶ 20 Similarly, the trial court's reference to other people's conduct in relation to heroin overdoses was not error. The comment was made in the greater context of evaluating the nature and seriousness of the offense and the need to deter this type of conduct. Therefore, reviewing the record as a whole, it is clear that the trial court's sentence was based on proper factors and any improper reference to improper factors was insignificant. Accordingly, we find that the trial court did not abuse its discretion in sentencing defendant to a lengthy sentence.

¶ 21 **B. Private Investigation**

¶ 22 Defendant next argues that the trial court improperly considered evidence outside the record when imposing his sentence. Defendant contends that the trial court continued to consider information from the coroner that it received through a private investigation conducted during defendant's original sentencing hearing.

¶ 23 We note that defendant has failed preserve this issue for appeal by failing to raise it in the trial court. Defendant argues that the plain error doctrine permits review of this issue. However, before addressing whether defendant's claim satisfies the plain error doctrine, we must first determine whether a clear or obvious error occurred. *People v. Thompson*, 238 Ill. 2d 598 (2010).

¶ 24 A determination made by the trial judge based upon a private investigation by the court or based upon private knowledge of the court, untested by cross-examination, or any of the rules of evidence constitutes a denial of due process of law. *People v. Dameron*, 196 Ill. 2d 156 (2001). During defendant's first direct appeal, we determined that the court violated defendant's due process rights by contacting the Will County coroner and discovering how many individuals

had died of heroin overdose. However, during resentencing, the coroner's testimony relating to this information was presented by the State. As such, the trial court properly considered this information because, unlike his first sentencing hearing, defendant was not denied the opportunity to cross-examine the coroner with regard to the information.

¶ 25 Defendant takes issue with the trial court's remark upon remand that it will continue to talk to the coroner about heroin overdoses when determining the length of a sentence. Defendant suggests that the court's statement shows that it continued to rely on information outside the record in sentencing defendant. We disagree. Although the court voiced its disagreement with this court's decision on direct appeal, its statement alone does not indicate that it considered evidence outside the record in the instant case. *Cf. People v. Smith*, 176 Ill. 2d 217 (1997) (finding error where the trial court, in resentencing defendant, specifically relied on notes that it had taken concerning testimony presented at defendant's original sentencing hearing). Furthermore, the record does not indicate that the court relied on its private investigation during resentencing.

¶ 26 Since we have found no error in the trial court's sentencing determination, the plain error exception does not apply, and defendant has forfeited this issue. See *Thompson*, 238 Ill. 2d 598. Consequently, we find it unnecessary for us to address defendant's request for remand before a different judge, and further note defendant's failure to present evidence of judicial bias or prejudice during resentencing. See *People v. Buchanan*, 2013 IL App (2d) 120447 (acknowledging the authority of reviewing court to assign a case to a new judge on remand if a judge's impartiality is sufficiently questioned).

¶ 27 C. Written Sentencing Judgment

¶ 28 Defendant also argues that the trial court committed reversible error when it failed to enter a written sentencing judgment or mittimus following resentencing.

¶ 29 The oral pronouncement of the judge is the judgment of the court, while the written order of commitment is merely evidence of that judgment. *People v. Lewis*, 379 Ill. App. 3d 829 (2008). The mittimus is a document directed to a sheriff, warden, the Department of Corrections, or other executive officer detailing a prisoner's sentence, which is often simply a copy of the judge's signed judgment or order. 735 ILCS 5/2-1801(a) (West 2008); *People v. Wright*, 337 Ill. App. 3d 759 (2003).

¶ 30 Here, it is clear from the record that the trial court originally sentenced defendant to concurrent 30-year terms of imprisonment on each drug count and concurrent 10-year terms on each of the remaining counts. Defendant also received 446 days of presentence custody credit. A written judgment was entered to that effect. Upon resentencing, the trial court orally resentedenced defendant to the same term of imprisonment and credit he had previously received. Thus, it was unnecessary for the trial court to issue a new sentencing order. Consequently, we find it unnecessary to remand for the issuance of a written judgment.

¶ 31 II. One-Act, One-Crime

¶ 32 Lastly, defendant argues that his two convictions for possession of a defaced firearm should be vacated under one-act, one-crime principles because they were based on the same physical act that supported his convictions for unlawful possession of a weapon by a felon.

¶ 33 Defendant admits that he did not raise this issue before the trial court, but requests that we review the issue for plain error. Under the plain error doctrine, a reviewing court may consider errors when either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant; or (2) the error is so serious that it denied defendant a fair trial and challenged the integrity of the judicial process. *Thompson*, 238 Ill. 2d 598. Our supreme court has held that a violation of the one-act, one-crime rule affects the integrity of the judicial process, and thus satisfies the second prong of the plain error doctrine.

People v. Nunez, 236 Ill. 2d 488 (2010). Therefore, we will review *de novo* whether any of defendant's multiple convictions must be vacated under the one-act, one-crime doctrine. *Id.*

¶ 34 Under the one-act, one-crime doctrine, a defendant may not be convicted of multiple offenses based on precisely the same physical act. *People v. Miller*, 238 Ill. 2d 161 (2010); *People v. King*, 66 Ill. 2d 551 (1977). When multiple convictions are carved from the same act, a reviewing court must vacate the less serious offense, which is determined by comparing the relevant punishments for the offenses. *People v. Artis*, 232 Ill. 2d 156 (2009).

¶ 35 The State concedes, and we agree, that the trial court erred in convicting and sentencing defendant for two counts of possessing a defaced firearm. Defendant's convictions for possession of a defaced firearm and two of the three convictions for unlawful possession of a weapon by a felon were based on the same physical act, *i.e.*, possessing an RG International .38-caliber revolver and a Tec-9 nine-millimeter handgun. See 720 ILCS 5/24-1.1(a), (e) (West 2008) (providing that for unlawful possession of a weapon by a felon, possession of each firearm constitutes a single and separate violation); 720 ILCS 5/24-5(b) (West 2008) (possession of a defaced firearm). A defendant may only be convicted and sentenced on the most serious offense where multiple charges arise out of the same act, *Artis*, 232 Ill. 2d 156. Thus, we affirm defendant's convictions for unlawful possession of a weapon by a felon (Class 2 felony) and vacate defendant's two convictions for possession of a defaced firearm (Class 3 felony). Having vacated defendant's convictions for possession of a defaced firearm, we need not address his alternative argument that his extended-term sentences for these offenses were improper.

¶ 36

CONCLUSION

¶ 37 The judgment of the circuit court of Will County is affirmed in part and vacated in part.

¶ 38 Affirmed in part and vacated in part.