

NOTICE
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2014 IL App (4th) 120680-U
NO. 4-12-0680

FILED
January 22, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
FRANK LOUIS McSWAIN,)	No. 08CF188
Defendant-Appellant.)	
)	Honorable
)	James E. Souk,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Appleton concurred in the judgment.
Justice Steigmann specially concurred.

ORDER

¶ 1 *Held:* The appellate court affirmed where (1) defendant forfeited his argument that the trial court erred in considering an improper aggravating factor at sentencing, (2) any error did not rise to the level of plain error, and (3) defendant failed to state a claim of ineffective assistance of counsel.

¶ 2 In February 2012, defendant, Frank Louis McSwain, pleaded guilty to three counts of aggravated criminal sexual abuse. In April 2012, the trial court sentenced him to prison.

¶ 3 On appeal, defendant argues trial counsel failed to comply with Illinois Supreme Court Rule 604(d) (eff. Jul. 1, 2006) and rendered ineffective assistance of counsel. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In March 2008, a grand jury indicted defendant on two counts of criminal sexual

assault (No. 08-CF-188) (counts I and II) (720 ILCS 5/12-13(a)(4) (West 2006)), alleging he knowingly committed an act of sexual penetration with S.K., who was between 13 and 18 years old, and defendant, over the age of 17, held a position of trust, authority, or supervision in relation to S.K. In June 2010, a grand jury indicted defendant on two counts of criminal sexual assault (counts III and IV), alleging he knowingly committed an act of sexual penetration with B.M., who was between 13 and 18 years old, and defendant, over the age of 17, held a position of trust, authority, or supervision in relation to B.M.

¶ 6 While the charges in case No. 08-CF-188 were pending, a jury convicted defendant in January 2010 on five counts of child pornography in case No. 08-CF-419, based on his possession of five nude images of B.M. that she had e-mailed him. In that case, the trial court sentenced defendant to 30 months' probation. On appeal, this court vacated four of the five counts of child pornography on direct appeal and affirmed defendant's conviction and sentence in all other respects. *People v. McSwain*, 2012 IL App (4th) 100619, 964 N.E.2d 1174.

¶ 7 Between July and December 2010, the State filed three petitions to revoke probation in case No. 08-CF-419, alleging defendant failed to comply with the reporting requirements of the Sex Offender Registration Act (730 ILCS 150/1 to 12 (West 2006)). In conjunction with the third petition to revoke, the State charged defendant with one count of failure to register as a sex offender in case No. 10-CF-1165.

¶ 8 In February 2012, the State charged defendant by information with three counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(f) (West 2006)) in case No. 08-CF-188. The State alleged defendant knowingly committed an act of sexual conduct with S.K. (count V) and B.M. (counts VI and VII), when both of the victims were at least 13 years old but less than

18 years of age, and defendant was over the age of 17 and held a position of trust, authority, or supervision in relation to the victims.

¶ 9 Later in February 2012, defendant entered into an open guilty plea on the three charges of aggravated criminal sexual abuse. Defendant also pleaded guilty to failure to register in case No. 10-CF-1165 and admitted he violated his probation in case No. 08-CF-419 by committing that offense. As part of the plea agreement, the State agreed to dismiss counts I, II, III, and IV in case No. 08-CF-188, a sex-offender-registration charge in case No. 10-CF-650, the first and second petitions to revoke probation in case No. 08-CF-419, and two traffic offenses. The State also agreed to bring no additional charges relating to a third minor. The trial court found a factual basis and accepted the guilty pleas.

¶ 10 In April 2012, the trial court conducted the sentencing hearing. A.W. testified she was a junior in college and had gone to high school in Normal. She stated defendant approached her in the fall of 2006 during her senior year and asked if she wanted to help with a program for at-risk youth. She met with him on three occasions, but they did not always talk about the program. Defendant was complimentary toward her and told her she was beautiful. A.W. testified defendant lied to her about his age, saying his was in his late twenties when he was in his thirties. At one of the final meetings, defendant invited A.W. to Chicago. The meetings with defendant stopped after A.W. told him her father knew his father.

¶ 11 E.Y. testified she met defendant while she was in high school. Defendant approached the then 17-year-old E.Y. in the hallway after he noticed her binder that contained a picture of her daughter. Defendant began counseling her on family and housing issues. He told her that she was nice, pretty, and sexy. E.Y. stated defendant once picked her up from a party

where she had been drinking. They ended up parking and having consensual sex in his car. On cross-examination, E.Y. stated she transmitted nude images of herself to defendant in an Internet chat room and asked him to come over approximately five months before the sentencing hearing, but defendant refused.

¶ 12 S.K. testified she began receiving unsolicited hall passes from defendant during her senior year in high school. They began a sexual relationship in November 2006 while she was 17. At the end of the relationship, S.K. stated she felt like she had been used. S.K. did not report the encounters until February 2008. She stated defendant was helpful in her graduating from high school.

¶ 13 B.M. testified she began a sexual relationship with defendant in the spring of 2007 while she was in high school and defendant was a faculty advisor for a dance team. During this time, B.M. sent defendant the nude photos that formed the basis of his child-pornography conviction.

¶ 14 Bloomington police officer Shawn Albert testified he handled the department's sex-offender registration. Defendant had to move due to his sex-offender status. After the move, defendant was homeless and had to report for sex-offender registration on a weekly basis.

¶ 15 Andrew McGirr, defendant's probation officer, testified defendant had a "very negative attitude" and felt he was being "unjustly treated." McGirr stated defendant reported to the probation office every two weeks for the majority of time since April 2010. Defendant expressed difficulties in finding a job as a result of his child-pornography conviction. He also complained about not being able to afford the \$30-per-week counseling fee.

¶ 16 Several friends and members of the church where defendant's father was a pastor

testified defendant was an active member of the congregation and held the position of vice president of the Brotherhood at Mount Pisgah. Witnesses testified defendant had a positive influence on them. Witnesses also testified he was a loving and dedicated father to his daughter and son.

¶ 17 In allocution, defendant apologized to his parents, S.K., and B.M. He talked about the difficulties in gaining employment because of his criminal history. He asked the trial court to not send him to prison because of the hurt it would cause his children.

¶ 18 The trial court found a number of factors in aggravation and mitigation. In mitigation, the court stated defendant's conduct neither caused nor threatened serious physical harm to another and defendant did not contemplate his conduct would cause or threaten serious physical harm. The court found defendant had no history of criminal activity before the commission of these crimes.

¶ 19 In aggravation, the trial court found "engaging in this type of conduct with young women still in high school" could have resulted in unwanted pregnancy or the transmission of disease. The court also stated defendant used his position to commit the offense as defendant "held the position of trust with these young women because of his position at Project Oz within the confines of Normal Community High School." In regard to the need to deter others, the court stated a message needed to be sent to those "who care for children in a position of trust or responsibility or authority that they had best take those responsibilities with the utmost seriousness, because consequences for crossing appropriate lines can be severe." The court commented on how defendant was leading a "double life" when he engaged in a sexual relationship with a 17-year-old high-school student at the same time when his son was conceived

with his fiancée. On the issue of remorse, the court stated it "really did not perceive a true recognition of what his offense means to the victims in this case" and most of defendant's comments centered on the pain he caused himself, his family, and friends.

¶ 20 The trial court revoked defendant's probation in case No. 08-CF-419 and resentenced him to two years in prison. In case No. 08-CF-188, the court sentenced him to concurrent terms of three years on count V, five years on count VI, and seven years on count VII. The sentence in case No. 08-CF-419 was to run concurrently with the sentences in case No. 08-CF-188. The court imposed a consecutive three-year prison term in case No. 10-CF-1165.

¶ 21 In May 2012, defendant filed a motion to reconsider sentence. Defense counsel also filed an attorney certificate in accord with Illinois Supreme Court Rule 604(d) (eff. Jul. 1, 2006). In June 2012, the trial court denied the motion. This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 On appeal, defendant argues trial counsel failed to comply with Illinois Supreme Court Rule 604(d) (eff. Jul. 1, 2006) and rendered constitutionally deficient representation when she failed to include in the motion to reconsider sentence the trial court's improper consideration of an element of the offense in aggravation. Rule 604(d), which addresses the procedure to be followed when a defendant, after pleading guilty, files either a motion to reconsider sentence or to withdraw his guilty plea, provides, in part, as follows:

"The defendant's attorney shall file with the trial court a certificate stating that the attorney has consulted with the defendant either by mail or in person to ascertain defendant's contentions of error in the sentence or the entry of the plea of guilty, has examined the

trial court file and report of proceedings of the plea of guilty, and has made any amendments to the motion necessary for adequate presentation of any defects in those proceedings."

"[A]ny issue not raised by the defendant in the motion to reconsider the sentence *** shall be deemed waived." Ill. S. Ct. R. 604(d) (eff. Jul. 1, 2006)

¶ 24 Defendant argues the trial court improperly considered defendant's position of trust in aggravation at sentencing when that factor was an element of the offense of aggravated criminal sexual abuse. As that issue was not raised in the motion to reconsider, defendant has forfeited his claim of error now on appeal. However, while acknowledging the forfeiture, defendant asks this court to address the issue as a matter of plain error or one of ineffective assistance of counsel.

"The plain-error doctrine is a narrow and limited exception.

[Citation.] To obtain relief under this rule, a defendant must first show that a clear or obvious error occurred. [Citation.] In the sentencing context, a defendant must then show either that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing. [Citation.] Under both prongs of the plain-error doctrine, the defendant has the burden of persuasion. [Citation.] If the defendant fails to meet his burden, the procedural default will be honored." *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184, 1187-88 (2010).

¶ 25 A defendant's claim of ineffective assistance of counsel is analyzed under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Cathey*, 2012 IL 111746, ¶ 23, 965 N.E.2d 1109. To prevail on such a claim, "a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To establish deficient performance, the defendant must show his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219-20, 808 N.E.2d 939, 953 (2004) (citing *Strickland*, 466 U.S. at 688). Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Evans*, 209 Ill. 2d at 219-20, 808 N.E.2d at 953 (citing *Strickland*, 466 U.S. at 694). A defendant must satisfy both prongs of the *Strickland* standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 317-18, 939 N.E.2d 310, 319 (2010).

¶ 26 We will begin by reviewing the issue under the plain-error doctrine. Our supreme court has found that, in a general sense, "a factor implicit in the offense for which a defendant has been convicted cannot be used as an aggravating factor in sentencing for that offense, absent a clear legislative intent to allow such use of the factor." *People v. Milka*, 211 Ill. 2d 150, 184, 810 N.E.2d 33, 52 (2004).

"Stated differently, a single factor cannot be used both as an element of an offense and as a basis for imposing 'a harsher sentence than might otherwise have been imposed.' [Citation.] Such dual use of a single factor is often referred to as a 'double

enhancement.' [Citation.] The prohibition against double enhancements is based on the assumption that, in designating the appropriate range of punishment for a criminal offense, the legislature necessarily considered the factors inherent in the offense." *People v. Phelps*, 211 Ill. 2d 1, 11-12, 809 N.E.2d 1214, 1220 (2004).

Our supreme court has indicated this rule should not be applied rigidly. *People v. Saldivar*, 113 Ill. 2d 256, 268, 497 N.E.2d 1138, 1142-43 (1986). "A reasoned judgment as to the proper penalty to be imposed must therefore be based upon the particular circumstances of each individual case." *Saldivar*, 113 Ill. 2d at 268, 497 N.E.2d at 1143. Moreover, "[s]uch a judgment depends upon many *relevant* factors, including the defendant's demeanor, habits, age, mentality, credibility, general moral character, and social environment." (Emphasis in original.) *Saldivar*, 113 Ill. 2d at 268, 497 N.E.2d at 1143.

¶ 27 In the case *sub judice*, the State charged defendant with three counts of aggravated criminal sexual abuse under section 12-16(f) of the Criminal Code of 1961 (720 ILCS 5/12-16(f) (West 2006)), which set forth the elements of the offense as follows:

"The accused commits aggravated criminal sexual abuse if he or she commits an act of sexual conduct with a victim who was at least 13 years of age but under 18 years of age when the act was committed and the accused was 17 years of age or over and held a position of trust, authority or supervision in relation to the victim."

Aggravated criminal sexual abuse is a Class 2 felony. 720 ILCS 5/12-16(g) (West 2006). A Class 2 felony has a sentencing range of three to seven years in prison. 730 ILCS 5/5-8-1(a)(5) (West 2006).

¶ 28 At sentencing, the trial court considered the statutory factors in mitigation. 730 ILCS 5/5-5-3.1 (West 2006). The court also considered the statutory factors in aggravation. 730 ILCS 5/5-5-3.2 (West 2006). Some of the aggravating factors considered included the effect of defendant's conduct on the victims, the fact that defendant had engaged in additional uncharged sexual contact with E.Y. and B.M. while they were under 18, the fact the sexual acts involved penetration, and the court's belief defendant was not sufficiently remorseful for his conduct.

¶ 29 According to one enumerated aggravating factor, a court may impose a term of imprisonment or impose a more severe sentence if "the defendant, by the duties of his office or by his position, was obliged to prevent the particular offense committed or to bring the offenders committing it to justice." 730 ILCS 5/5-5-3.2(a)(4) (West 2006). Another aggravating factor to consider is when "the defendant utilized his professional reputation or position in the community to commit the offense, or to afford him an easier means of committing it." 730 ILCS 5/5-5-3.2(a)(6) (West 2006).

¶ 30 In considering the aggravating factors, the trial court stated, in part, as follows:
"The factors in aggravation that I might comment on briefly, the defendant of course did not receive compensation for committing the offense. He doesn't have a history of prior delinquency or criminal activity before '06. The defendant by the duties of his office or by his position was obliged to prevent the particular

offense committed or to bring the offender committing it to justice, and there is the corresponding one that says he utilized his professional reputation or position in the community to commit the offense or to afford him an easier means of committing it. And the court would note that that almost goes without saying since the offense involved here as [defense counsel] has noted is an offense because the defendant held the position of trust with these young women because of his position at Project Oz within the confines of Normal Community High School."

Another factor to consider is the need to deter others from committing the same crime. 730 ILCS 5/5-5-3.2(a)(7) (West 2006). In considering this factor, the court stated as follows:

"The sentence is necessary to deter others from committing the same crime. Our children are precious to all of us and of course as they grow up they are not always in our care and we send them certain places in our community where we entrust them to others and we expect them to be safe and we expect those to whom we have entrusted them to keep them safe. Where there is a deviation from that conduct, certainly a sentence needs to be imposed that will in fact send a message to all those others, the many many in our community who care for children in a position of trust or responsibility or authority that they had best take those

responsibilities with the utmost seriousness, because consequences for crossing appropriate lines can be severe."

¶ 31 In this case, it is clear the trial court considered defendant's position of trust as an aggravating factor and that factor was an element of the charged offense. However, arguably the trial court was merely noting defendant's abhorrent conduct due to the *degree* of trust and authority defendant held over his victims. As this court has noted, "although a particular factor might be inherent in a particular crime, the degree to which it is present might differ from occurrence to occurrence." *People v. O'Toole*, 226 Ill. App. 3d 974, 992, 590 N.E.2d 950, 962 (1992). In *People v. Goyer*, 265 Ill. App. 3d 160, 169, 638 N.E.2d 390, 396 (1994), this court rejected the defendant's argument that the trial court violated the inherent-factor rule, explaining as follows: " 'the gravity of the offense and surrounding circumstances are primary matters to consider.' [Citation.] Thus, the court may reflect upon the nature of the offense, including the circumstances and extent of each element as committed." In *Goyer*, this court approved of the remarks of the trial court at sentencing, noting that the court "did not rely upon the bare elements of the offense, but instead considered the degree to which [the] defendant's conduct threatened serious harm to many others and the potential extent of that harm." *Goyer*, 265 Ill. App. 3d at 170, 638 N.E.2d at 397.

¶ 32 Moreover, even if the trial court erred in considering defendant's position of trust as an aggravating factor, we find the error does not rise to the level of plain error. A review of the record reveals the evidence was not closely balanced and the court's error was not so egregious as to deny a fair sentencing hearing.

¶ 33 In *People v. Bourke*, 96 Ill. 2d 327, 332, 449 N.E.2d 1338, 1340 (1983), our

supreme court set forth the circumstances under which a reviewing court must remand for resentencing when a trial court considers an improper aggravating factor in imposing sentence, stating as follows:

"Reliance on an improper factor in aggravation does not always necessitate remandment for resentencing. Where the reviewing court is unable to determine the weight given to an improperly considered factor, the cause must be remanded for resentencing. [Citations.] However, where it can be determined from the record that the weight placed on the improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence, remandment is not required."

¶ 34 In this case, defendant faced sentencing in three separate cases for five separate felonies. In asking the trial court to impose consecutive sentences in case No. 08-CF-188, the State sought a sentence of 36 years in prison. The court imposed sentences of three years, five years, and seven years to be served concurrently in case No. 08-CF-188 and concurrently with a two-year sentence in case No. 08-CF-419. The court also sentenced defendant to three years in case No. 10-CF-1165 to be served consecutively to the other sentences. Thus, defendant in essence received a 10-year sentence, which was less than one-third of the sentence the State requested.

"Another element which courts examine in determining the significance placed upon an improperly considered aggravating factor is the actual length of the sentence imposed. Where the

sentence is substantially below the maximum sentence permissible, the court is less likely to remand for resentencing. However, where the penalty imposed is near the maximum, the court is more likely to find that reliance was placed upon the improper aggravating factor." *People v. Pierce*, 223 Ill. App. 3d 423, 442, 585 N.E.2d 255, 269 (1991).

¶ 35 A review of the record indicates the trial court felt defendant a poor candidate for probation. The court found defendant's performance on probation was "not good," with the main shortcoming being "the commission of a felony while on felony probation." At the hearing on the motion to reconsider, the court recalled making "a rather lengthy and thorough record at the time as to the reasons why the court believed that [defendant] was no longer an appropriate candidate for probation."

¶ 36 The trial court also noted the "extensive mitigation" presented in favor of defendant and found there was a side to defendant "that has some very positive things about it." The court stated it considered "the rather remarkable mitigation that is presented here by the many people that love and support [defendant] and that will figure strongly in the court's sentence, which will not be certainly anywhere in the area of what is recommended by the State." Considering the record as whole, the court's entire comments at sentencing, and the sentences imposed, we find any weight placed on any improperly considered aggravating factors was so insignificant that it did not lead to a greater sentence. As the error did not rise to the level of plain error, defendant's forfeiture must be honored. Moreover, as we find the result of the proceeding would not have been different had defense counsel raised the issue in the motion to

reconsider, defendant's claim of ineffective assistance of counsel fails. See *Evans*, 209 Ill. 2d at 219-20, 808 N.E.2d at 953 (citing *Strickland*, 466 U.S. at 694).

¶ 37

III. CONCLUSION

¶ 38 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 39 Affirmed.

¶ 40 JUSTICE STEIGMANN, specially concurring.

¶ 41 Although I fully agree with the majority decision in this case, I specially concur to point out an additional argument the State could have made in response to defendant's claim that the trial court improperly considered defendant's position of trust as an aggravating factor at sentencing when that factor was an element of the offense of aggravated criminal sexual abuse. (I will hereinafter refer to this as the inherent-factor rule.) Given that four victims testified at defendant's sentencing hearing about how he had violated his position of trust regarding them but only two of those victims were named in charges to which the defendant had pleaded guilty, the State could have argued in this case that the inherent-factor rule, as a matter of law, could not have been violated.

¶ 42 In February 2012, defendant entered an open guilty plea to three counts of aggravated criminal sexual abuse against victims S.K. and B.M. The State charged defendant with knowingly committing an act of sexual conduct with the victims at a time when he held a position of trust, authority, or supervision in relation to them.

¶ 43 At the April 2012 sentencing hearing, both S.K. and B.M. testified about defendant's criminal conduct that occurred when they were students at Normal Community High School and he was employed there as a counselor. S.K. said she first encountered defendant during her senior year in high school after she began receiving unsolicited hall passes to his office. A few months later she began a sexual relationship with him, and those encounters took place in his home. One year later, when it appeared that defendant was losing interest in her, S.K. felt angry and used because she had expected something more out of the relationship.

¶ 44 B.M. met defendant when he was the faculty advisor for a dance team on which

she participated. He also counseled her about her personal problems. Shortly thereafter, the defendant and B.M. began a year-long sexual relationship, during which B.M. and defendant would have sex approximately twice a month at his home or in his car.

¶ 45 Two other girls, A.W. and E.Y., also testified at sentencing about defendant's approaching them in high school and engaging in similar, improper conduct with them. A.W. testified that during her senior year, defendant asked if she wanted to help him with a program for at-risk youth. She met with defendant three times in his office, but the last two meetings focused on her physical appearance, which defendant complimented. Ultimately, A.W. resisted defendant's attempts at seduction, including his invitation to meet in Chicago. Defendant stopped his efforts to seduce A.W. when she told him that their fathers knew each other.

¶ 46 Defendant's similar compliments to E.Y. and offers to help her were more successful. Defendant first approached E.Y. in a school hallway and soon began counseling her about housing and family issues. E.Y. testified that defendant told her she was nice, pretty, and sexy. After defendant picked her up at a party where she had been drinking, they had consensual sex in his car.

¶ 47 E.Y. also testified that she began attending a church where defendant's father was the pastor. After the charges in this case were filed, defendant referred E.Y. to certain Bible passages and told her she was a powerful person who could keep him from going to prison.

¶ 48 At the sentencing hearing, the trial court noted defendant (1) used his position in the community to commit the offense or to afford him an easier means of committing it, and (2) held a position of trust with the victims in this case because of his position within the confines of the high school. Based upon the court's remarks, defendant argues that the court violated the

inherent-factor rule, resulting in plain error. In my judgment, this argument is clearly wrong as a matter of law.

¶ 49 Four victims testified at defendant's sentencing hearing regarding his improper conduct at Normal Community High School. As earlier noted, only two of those victims were named in the charges to which defendant had pleaded guilty. Thus, regarding victims A.W. and E.Y., defendant's misconduct toward them and his abuse of his position of trust could properly be considered as an aggravating factor and could not be an element of the charged offense because *there was no charged offense involving A.W. or E.Y.*

¶ 50 Defendant's argument takes the inherent-factor rule to a place it has never been before—namely, that a court may not consider as an aggravating factor elements of the charged offense even when (1) that factor involves other victims whose evidence is before the court solely for aggravation at sentencing and (2) the defendant has not been charged with any offense regarding those other victims. There is no precedent for such a contention, and I strongly disagree with it.