2015 IL App (1st) 130549-U

FIFTH DIVISION
February 6, 2015

No. 1-13-0549

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 2841
	)	
COREY THOMAS,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justices Gordon and Reyes concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's sentences for possession of a controlled substance and felony possession or use of a weapon were not excessive; counsel did not provide ineffective assistance of counsel at sentencing hearing.

¶ 2 Following a bench trial, defendant was found guilty of possession of a controlled substance and unlawful use or possession of a weapon by a felon, and sentenced to concurrent, respective terms of 3 and 5 ½ years' imprisonment, to be served consecutively to a one-year term of imprisonment imposed in an unrelated case. On appeal, defendant contends that his sentences

are excessive. In the alternative, he contends that counsel rendered ineffective assistance in failing to present mitigation on his behalf at the sentencing hearing.

¶ 3 Defendant was charged with possession of a controlled substance with intent to deliver, and unlawful use or possession of a weapon by a felon in relation to events that transpired on the morning of January 16, 2011. Defendant was convicted of the lesser included charge of possession of a controlled substance and unlawful use or possession of a weapon by a felon on evidence that on January 16, 2011, police responded to defendant's neighbor, Todd Montgomery's, report that gunshots had been fired into the apartment he shared with his fiancé Emilio Gregory, and at his car. At trial, Montgomery testified that after he discovered the bullet holes on the morning of the incident, he encountered defendant in their building's stairwell. At that time, defendant stated, "I'm going to teach these fags a lesson *** You mother fuckers took my shoes." Montgomery asked defendant if he had been the one who fired gunshots into his home, and defendant stated "[H]ell yeah, and I'm going to keep doing it. *** I'm going to show you all how you make some shit shake around here." During this exchange, Montgomery saw defendant holding a black gun. In the course of their investigation, police examined the damage that occurred to Montgomery's home and car, and found a gun and narcotics in the apartment in which they were told defendant lived with his girlfriend. Defendant voluntarily informed police that all of the recovered items belonged to him.

¶ 4 A presentence investigation report (PSI) was prepared in this case, which reflected that as a juvenile, defendant was sentenced to five years' probation for burglary and assault, and that his probation was terminated unsatisfactorily. The PSI further reflected that as an adult, defendant was convicted in 2003 of a drug-related offense for which he received 18 months' probation

which was terminated unsatisfactorily, as well as was convicted of criminal trespass to land, for which he received 6 months' supervision. In 2004, defendant was convicted of a drug-related offense for which he was initially sentenced to boot camp, but was then sentenced to 4 years' imprisonment, and in 2011 defendant received 2 days in Cook County jail for drinking alcohol on the public way.

¶ 5 On the date of the sentencing hearing, the parties first took part in a Supreme Court Rule 402 (eff. July 1, 2012) conference in relation to a charge of aggravated driving while under the influence (DUI) in Case No. 11 CR 17328, which offense took place while defendant was on bond in the case at bar. Following that conference, defendant pled guilty to the DUI charge in exchange for a one-year term of imprisonment, to be served consecutively to the sentence imposed in the case at bar. Immediately thereafter, the sentencing hearing in this case took place. After the trial court summarized the offenses at issue, along with the applicable sentencing ranges, it asked the parties if they wished to add anything to defendant's presentence investigation report (PSI). The State and defense counsel both indicated that they did not wish to do so. The trial court then asked defendant if he wished to speak in allocution, and defendant declined to do so. The trial court then sentenced defendant to a 3-year term of imprisonment for possession of a controlled substance, and a concurrent 5 ½-year term of imprisonment for unlawful use or possession of a weapon by a felon, which terms were to be served consecutively to the one-year term imposed upon defendant for his DUI conviction in Case No. 11 CR 17328.

¶ 6 On appeal, defendant first argues that his sentences are excessive because they do not reflect his lack of prior violent convictions, track record of support for his children, strong work history, and history of drug and alcohol abuse. Defendant points out that his PSI reflects that

neither of his two prior felony convictions was for a violent crime, that he was gainfully employed from January 2010 through December 2011, that he provided financial support to his children on a monthly basis, and that he has suffered from a serious alcohol and drug problem since age 11. The State argues, and we agree, that defendant has waived this issue because he failed to file a motion to reconsider sentence. *People v. Reed*, 177 Ill. 2d 389, 393-95 (1997). Although defendant acknowledges that he failed to file such a motion, he maintains that we may review the issue under the second prong of the plain error doctrine because an excessive sentence affects his substantial rights.

¶ 7 The plain error doctrine is a narrow exception to the general rule of procedural default which allows a reviewing court to consider unpreserved claims of error where defendant shows that the evidence is closely balanced, or the error is so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). Under both prongs, defendant bears the burden of persuasion, and he must first show that a clear and obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). If a defendant fails to sustain his burden, we will honor his procedural default. *Id.* Where defendant fails to present an argument on how either of the two prongs of plain error is satisfied in a particular case, he forfeits plain error review. *Id.* at 545-46.

¶ 8 Here, defendant merely argues in a conclusory fashion that an excessive sentence affects his substantial rights and is reviewable under the second prong of plain error. That argument consists primarily of a single sentence, which includes citations to two cases, *People v. Kibayasi*, 2013 IL App (1st) 112291, ¶54 and *People v. Owens*, 377 Ill. App. 3d 302, 304 (2007), which do not deal with excessive sentences, but rather, with sentencing errors dealing with the

consideration of aggravating factors inherent in the offense and with double enhancements. Aside from this sentence, the remainder of his argument consists solely of a single citation to the general principle of plain error review. We find this insufficient to sustain his burden of persuasion under the plain error doctrine, and we therefore honor his procedural default of this claim. *Id.* With that said, even if we were to undertake a plain error review of defendant's claim, we must first find that a clear and obvious error occurred (*Hillier*, 237 Ill. 2d at 545), and here we find none.

¶ 9 The trial court is presumed to have considered all relevant factors, including any mitigating evidence, absent a contrary showing in the record. *People v. Franks*, 292 Ill. App. 3d 776, 779 (1997). Defendant contends that such a contrary showing exists in the record here because the trial court imposed his sentence without any discussion of the relevant factors, and had an inaccurate understanding of his background, as reflected by the court's query of whether he had served two sentences of incarceration, when the PSI reflected that he had only served one. However, the trial court is not required to recite and assign a value to each mitigating factor. *People v. Meeks*, 81 Ill. 2d 524, 534 (1980). Further, we find that the trial court's question regarding whether defendant had been incarcerated twice was a minor error and was insufficient to rebut the presumption that the court considered all of the relevant factors. This is particularly so where defendant corrected the trial court, and the trial court did not change its sentencing decision, but rather, stated that given defendant's prior incarceration, as well as the boot camp and probation he had received for prior offenses, it was clear that defendant should "change his ways."

¶ 10 Moreover, where the sentence imposed by the court falls within the statutory range for the offense of which defendant is convicted, it may not be disturbed unless it constitutes an abuse of discretion. *People v. Gutierrez*, 402 Ill. App. 3d 866, 900 (2010). Here, defendant was subject to a sentencing range of 3 to 14 years' imprisonment for unlawful use or possession of a weapon by a felon (720 ILCS 5/24-1.1(e) (West 2010)), and 1 to 3 years' imprisonment for possession of a controlled substance (730 ILCS 5/5-4.5-45 (West 2010)), and was sentenced to 5 ½-year and 3-year terms of imprisonment, respectively. Defendant does not contest that his sentences are within the applicable statutory range for each offense, and we find no abuse of discretion in either sentence.

¶ 11 In the alternative, defendant argues that trial counsel rendered ineffective assistance in failing to present mitigation on his behalf or to argue for the minimum sentence. In general, to establish a claim of ineffective assistance of counsel defendant must show that counsel's performance was deficient, and that he suffered prejudice as a result thereof. *People v. Givens*, 237 Ill. 2d 311, 331 (2010), citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To succeed on a claim of ineffective assistance of counsel, both prongs of *Strickland* must be satisfied, and, if such a claim can be disposed of on the ground that defendant did not suffer prejudice, the court need not consider whether counsel's performance was deficient. *People v. Flores*, 153 Ill. 2d 264, 283-84 (1992).

¶ 12 Defendant, however, argues that he need not show that he suffered any prejudice due to counsel's alleged errors because in this case the applicable standard is not *Strickland*, but rather, the standard set forth in *United States v. Cronic*, 466 U.S. 648 (1984).

¶ 13 In *Cronic*, the Supreme Court identified three circumstances that are so likely to prejudice the defendant that the adversary process is presumptively unreliable, including, as relied upon by defendant in this case, where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. *Id.* at 658-59. In *Bell v. Cone*, 535 U.S. 685, 697-98 (2002), the Supreme Court rejected the defendant's contention that *Cronic* governed the analysis of defense counsel's performance during his sentencing hearing, finding, *inter alia*, that the failure to present mitigating evidence and waiving closing argument at sentencing was the type of conduct it had held subject to the *Strickland* standard. Defendant correctly points out that in reaching its decision, the court in *Bell* also relied upon the fact that the defendant argued that counsel failed to oppose the prosecution at specific points, and not throughout the proceeding as a whole. *Id.* at 697. However, we note that during the lengthy sentencing hearing in *Bell*, the prosecution presented witnesses and extensive aggravating evidence in support of a death sentence. *Id.* at 690-92. Here, in contrast, the State presented no aggravating evidence or witnesses, made no opening or closing remarks, and did not request a specific sentence against defendant. In turn, because the State made essentially no argument at sentencing, defense counsel had nothing to which to respond or to subject to meaningful adversarial testing. We thus find that pursuant to *Bell*, the *Strickland* standard applies to defendant's claim.

¶ 14 We also observe that our supreme court has held that defense counsel cannot be faulted for failing to introduce mitigation evidence that was already contained in defendant's PSI, and such conduct does not constitute deficient performance. *People v. Griffin*, 178 Ill. 2d 65, 87 (1997). Moreover, even if we were to assume that counsel's failure to present mitigating evidence constituted deficient performance, we find that defendant suffered no prejudice

therefrom where the record does not rebut the presumption that the trial court considered all of the mitigating evidence that was included in defendant's PSI. *Franks*, 292 Ill. App. 3d at 779. To the contrary, the record here shows that all of the mitigating evidence upon which defendant relies, his lack of prior violent convictions, his track record of support for his children, his work history, and his history of drug and alcohol abuse, was reflected in his PSI, and that the trial court read the PSI, including all of these factors, prior to rendering its sentencing decision. Further, defendant's claim that counsel was ineffective for failing to argue for the minimum sentence also fails given that his prejudice argument in relation thereto is based on pure speculation as to what sentence he may have received had defense counsel done so. See *People v. Palmer*, 162 Ill. 2d 465, 481 (1994) (proof of prejudice cannot rest on mere conjecture or speculation).

¶ 15 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 16 Affirmed.