

No. 1-13-0990

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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|--------------------------------------|---|--------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the    |
|                                      | ) | Circuit Court of   |
| Plaintiff-Appellee,                  | ) | Cook County.       |
|                                      | ) |                    |
| v.                                   | ) | No. 11 CR 1262     |
|                                      | ) |                    |
| DANIEL LOPEZ,                        | ) | Honorable          |
|                                      | ) | Jorge Luis Alonso, |
| Defendant-Appellant.                 | ) | Judge Presiding.   |

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JUSTICE LAVIN delivered the judgment of the court.  
Presiding Justice Pucinski and Justice Mason concurred in the judgment.

**O R D E R**

- ¶ 1 *Held:* Trial court did not impermissibly consider facts outside the record where it reasonably inferred that defendant was a member of a gang based upon evidence of his affiliation and his tattoos included in his presentence investigation.
- ¶ 2 Defendant Daniel Lopez pleaded guilty to robbery and was sentenced to 24 months' probation. Defendant was subsequently arrested for possession of a controlled substance. The trial court found defendant had violated his probation and resentenced him to four years' incarceration. On appeal, defendant contends that the trial court improperly relied on

extrajudicial facts regarding "gang heraldry" in sentencing defendant, thus violating his due process rights. We affirm.

¶ 3 Defendant and codefendant Jacinto Losoya, who is not a party to this appeal, were both charged with robbery and unlawful restraint. The charges arose from a confrontation between the two offenders and Louis Fung which occurred on the evening of January 5, 2011.

¶ 4 According to the factual basis stipulated to at defendant's guilty plea hearing, defendant and Losoya approached Fung, blocking his path. The men put their arms out and backed Fung up against a wall. Losoya told Fung to give him the violin he was carrying. Defendant reached into Fung's pocket and removed an iPod. The offenders fled.

¶ 5 In accordance with a negotiated plea agreement, defendant pleaded guilty to one count of robbery. The trial court admonished defendant and the State gave a factual basis to which defendant stipulated. The court then sentenced him to two years' felony probation, along with the special conditions that he obtain his GED, serve 10 days of community service in the sheriff's work alternative program ("SWAP"), and submit to DNA indexing in March 2011.

¶ 6 In March 2012, the State filed a petition for violation of probation alleging that defendant had failed to complete his SWAP condition, failed to obtain his GED, and still owed part of his fees. Defendant told the court that he was unable to attend SWAP because he was attending high school full-time and working after school. The court reinstated defendant's SWAP. Three months later, defendant had not completed his SWAP condition. At a status hearing, he presented the court with his high school diploma and explained that he had again been unable to complete his SWAP because of school. He stated that he had graduated and wanted to try to complete his SWAP. The court again reinstated SWAP.

¶ 7 On July 31, 2012, defendant was arrested but not tried for possession of a controlled substance. The State filed a second petition for violation of probation. At a probation revocation hearing, the trial court took judicial notice that defendant had been placed on two years' probation in March of 2011.

¶ 8 Chicago police officer Daniel Lopez testified that he was on patrol with two other officers on the night of July 31, 2012. As the officers drove, Officer Lopez noticed defendant walking because he had a "shag haircut," which "[m]any gang members wore." As the officers drove towards defendant, he turned back, looked in the officers' direction, and began to walk more quickly away from them. Officer Lopez stopped the car ahead of defendant. The officers got out of the car, announced they were police officers, and walked towards defendant. Defendant dropped two plastic baggies to the ground. Another officer recovered the baggies, which contained a white powder. The officers arrested defendant.

¶ 9 The parties then stipulated that if called, a forensic scientist would have testified that she tested powder from the bags and opined that they contained 0.6 gram of cocaine.

¶ 10 Defendant testified that he was walking from his home to a restaurant on July 31, 2012. He did not have any narcotics. Three officers approached him. He did not drop anything, but he saw the officers recover two baggies from the sidewalk.

¶ 11 After arguments from both parties, the trial court found defendant had violated probation.

¶ 12 At the sentencing hearing, the court and both parties acknowledged receipt of defendant's presentence investigation report ("PSI"). The PSI indicated that defendant had denied any past or present gang affiliation, but contained "Chicago Police Department Gang Member Summary Report," which indicated he was affiliated with the Latin Kings. The PSI also contained a

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criminal history report, indicating that defendant had an "L" and a "K" tattooed on his chest and an upside down pitchfork on his leg.

¶ 13 The State argued in aggravation that incarceration was appropriate given defendant's failure to take the opportunity probation afforded him.

¶ 14 In mitigation, defendant's sister testified that she had been defendant's guardian since he was 14 years old. He lived with her until he turned 18 years old and attended school regularly during that time. Defendant worked several part-time jobs and would sometimes pay for household necessities. He eventually moved from the house to avoid "gang bangers" in the area. If released, he could return to his sister's house and had a part-time job available to him.

¶ 15 Defense counsel argued in mitigation that defendant had received his high school diploma as required, and that he had been unable, but not unwilling to complete SWAP. She also argued that defendant was only 18 years old at the time of the 2011 robbery, the crime was non-violent, and that he had "avoided getting into trouble" between his original arrest for robbery in 2011 and his subsequent arrest a year and a half later. Finally, defense counsel argued that defendant's controlled substance arrest did not involve "selling or shooting or anything of that sort."

¶ 16 Defendant spoke in allocution, stating "I was trying to do my best and I did my best helping my family out." He also stated that he had a job available to him and had to help provide for his sister's two children whose father was deceased.

¶ 17 The trial court then sentenced defendant to four years' incarceration and explained:

"Regarding the allegations of the case, I have heard a factual basis in the past, I heard from [defense counsel] today, there is nothing about the allegations that leads me to

believe that it's not a robbery, based upon the stipulation that I heard and the reports that I reviewed. It was a robbery of a young man who was on his way to violin practice, and he was intimidated and outnumbered, and the violin was taken from him, and the defendant reached into his pocket and grabbed an I-Pod from him, a serious offense. He was given a chance at probation, he failed at probation. Two violations of probations were filed, this one was proven.

¶ 18           So despite the fact that he's still probationable, I do not believe that probation is the appropriate sentence at this point. I think that it would deprecate the serious nature of the offense. Mr. Lopez is also in a gang despite his denials, the tattoos that he has show that he's in a gang. He's got upside down pitchforks, an L and a K on his chest. And based on this violation of probation, which was proved, and the serious nature of the underlying case, I believe that a sentence in the penitentiary is the appropriate sentence."

¶ 19   Defendant filed a motion to reconsider his sentence, which did not allege that the trial court relied on personal knowledge. The trial court denied the motion. Defendant appeals.

¶ 20   Defendant contends that the circuit court violated his right to due process by considering extrajudicial information when sentencing him. He notes that the court, in rendering its opinion, determined that defendant was in a gang based upon his tattoos. He argues that because the record contains no evidence regarding the meaning of his tattoos, the court must have relied upon personal knowledge or outside investigation in making its determination.

¶ 21   The State responds that defendant has forfeited the issue by failing to object at the sentencing hearing and failing to include his claim in his post-sentencing motion. Alternatively,

the State argues that the trial court acted within its discretion in sentencing defendant, focusing on the nature of the crime, defendant's conduct on probation, and his character and credibility.

¶ 22 Before reaching the merits of defendant's claim, we must first determine whether he has forfeited the issue. In order to preserve a sentencing issue for appeal, a defendant must raise an objection at the sentencing hearing and subsequently in a written post-sentencing motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). However, reviewing courts relax forfeiture rules when an error stems from the conduct of the trial court. *People v. Dameron*, 196 Ill. 2d 156, 171 (2001). A defendant need not interrupt the court and object that it is improperly relying on its personal knowledge. See *id.* Therefore, we address defendant's claim on the merits.

¶ 23 When determining whether a trial court improperly relied upon personal knowledge, the reviewing court applies a *de novo* standard of review. *Id.* A trial court's determination based upon its own personal knowledge constitutes a denial of due process of law. *Id.* at 171-72. However, such improper reliance does not require remand where it can be determined from the record that the court's reliance did not significantly affect a defendant's sentence. See *People v. Johnson*, 347 Ill. App. 3d 570, 576 (2004). A sentencing court may draw reasonable inferences from the evidence presented. *People v. Johnson*, 149 Ill. 2d 118, 155 (1992).

¶ 24 Defendant's PSI contained both his denial of gang affiliation and a police document stating that he was affiliated with the Latin Kings. The PSI also indicated that defendant had an "L" and a "K" tattooed on his chest and a pitchfork on his leg. There was no evidence produced indicating that the tattoos indicated gang membership. However, where the PSI indicated that defendant was affiliated with the Latin Kings, the determination that defendant's "L" and "K" tattoos corroborated that affiliation was a reasonable inference. The recognition of a group's

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initials does not require prior personal knowledge. Similarly, the pitchfork is well enough known as a symbol that the trial court reasonably inferred defendant's gang membership from the tattoo, particularly in conjunction with the reference to his affiliation with the Latin Kings and the "L" and "K" tattoos identified in the PSI. Thus, we find the trial court's determination was not based on personal knowledge, but on reasonable inference.

¶ 25 Defendant cites *People v. Davenport*, 301 Ill. App. 3d 143 (1998), to support the contention that the knowledge of "gang heraldry" is necessarily "specialized, technical knowledge" requiring explanation by expert testimony. However, the question before the *Davenport* reviewing court was not whether gang testimony was required; rather, the court focused on whether a purported expert's testimony was relevant and prejudicial. *Id.* at 50. While there may be cases where relevant gang-related issues are so complex and technical they require expert testimony, this is not such a case. The recognition that defendant's chest bears the tattooed initials of a gang is not so complex as to require expert testimony.

¶ 26 Defendant argues that his case is analogous to *Dameron*, where the Illinois Supreme Court reversed a defendant's death sentence after the trial court relied on its personal investigation and prior knowledge. *Dameron*, 196 Ill. 2d at 179. At the sentencing hearing in *Dameron*, the trial court relied extensively upon a sociology book and upon comments made in a previous murder case. *Id.* at 171-79. The court's comments on the improper sources "comprise[d] nearly half of his total sentencing comments." *Id.* at 179. The present case is distinguishable, as the trial court did not clearly reference any personal investigation of extrajudicial sources and its reference to the tattoos was fleeting.

¶ 27 Defendant also argues that the PSI's reference to defendant's gang affiliation is suspect and that consideration of the alleged affiliation is improper where there was no evidence that the crime was gang-related, relying on *People v. Zapata*, 347 Ill. App. 3d 956 (2004). A defendant may not challenge the contents of a PSI for the first time on review. *People v. Stewart*, 365 Ill. App. 3d 744, 748 (2006). Defendant accepted a copy of the PSI and did not object to it at the sentencing hearing. Thus, defendant has forfeited any claim that the inclusion of the gang summary report was improper. Furthermore, *Zapata* is inapposite. In that case, the trial court's "distaste for gang violence was the dominant factor in the determination of defendant's sentence." *Id.* at 966. The present trial court did not exhibit a personal distaste for gang violence, but rather focused on defendant's denial of gang membership despite tattoos indicating otherwise. Furthermore, as already discussed, the trial court's reliance was not the dominant factor in determining defendant's sentence.

¶ 28 For the foregoing reasons, we find the trial court did not improperly rely on prior personal knowledge. Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.