

No. 1-13-1100

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

---

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. 08 CR 22858
	)	
LACEY RINEY,	)	Honorable
	)	Michael Brown,
Defendant-Appellant.	)	Judge Presiding.

---

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

**O R D E R**

¶ 1 *Held:* Defendant failed to show that trial court relied upon improper factors in aggravation where the State made a single misstatement at sentencing, and the trial court never referenced the comment. Defense counsel's failure to object to State's comments did not prejudice defendant where trial court did not rely upon them.

¶ 2 Following a jury trial, defendant Lacey Riney was found guilty of being an armed habitual criminal and sentenced to 12 years in prison. This court vacated defendant's sentence and remanded for a new sentencing hearing. *People v. Riney*, 2012 IL App (1st) 100323-U. On

remand, defendant was again sentenced to a 12-year term. On appeal, defendant contends that the trial court considered improper factors in aggravation during his resentencing, arguing that the court relied on the State's false factual statements. He alternatively contends that defense counsel's failure to object to the State's comments constituted ineffective assistance of counsel. We affirm.

¶ 3 Defendant was charged with being an armed habitual criminal and unlawful use of a weapon by a felon, but the State elected to proceed to trial on only the former charge. The charges stemmed from an incident on November 19, 2008, when an off duty police officer observed defendant flash a handgun while arguing with other individuals. The officer called 911 and aided two other officers in arresting defendant after a brief foot chase.

¶ 4 At trial, Chicago police officer Peete testified that he was driving home after his shift on the afternoon of November 19, 2008. While stopped at a red light, Peete saw defendant standing in front of a grocery store on the north side of Chicago Avenue. Defendant yelled profanities and made hand gestures at two men across the street. He lifted his shirt and showed a handgun in his pants pocket. Peete drove away and called 911 to report the incident. He then got the attention of passing officers, Officers DeRosa and Fichter, and reported what he had seen. All three officers then drove to the grocery store.

¶ 5 DeRosa testified that defendant and a small group of people stood outside the grocery store. DeRosa and Fichter got out of their car and drew their guns. As they approached, defendant began to walk away. He broke into a sprint and all three officers gave chase. Eventually, defendant ran into a gangway that was blocked by a fence. He threw a silver object into the air and attempted to climb the fence, but failed. He turned, facing the officers "postured

as if to fight." The officers performed an "emergency takedown" and arrested defendant. Once handcuffed, the officers placed him in the back of their squad car. DeRosa went to the area where defendant had thrown the object; he found an unloaded, silver handgun. As they drove defendant to the police station, he cursed at the officers and stated, "You bitch police better let me go. I will fucking kill you. I will kill you both."

¶ 6 The parties stipulated that defendant had two prior felonies and the State rested. Defendant moved for a directed verdict, and the trial court denied the motion.

¶ 7 Defendant testified that on the day of his arrest he had gone to the grocery store to buy cigarettes. When he exited the store, two officers got out of their car, pointing their guns at the group of men. Defendant and most of the other men ran. He turned into a gangway. Blocked by a fence, he turned around and put up his hands. DeRosa kicked him in the chest. He was put on the ground and handcuffed. Defendant testified that he did not have a gun on him and did not yell profanities at the officer.

¶ 8 After hearing all of the evidence, and closing arguments by the parties, the jury found defendant guilty of being an armed habitual criminal. At sentencing, defendant's original presentence investigation (PSI) indicated that defendant had four felony convictions in Cook County and an active warrant in Indiana. It also incorrectly indicated that he had five convictions and an active arrest warrant in Minnesota. Defense counsel challenged the Minnesota record. The trial court addressed defendant, stating that at trial a judge learns much more about the case than they find out at a Supreme Court Rule 402 (eff. July 1, 2012) conference. The court then said, "I was told that you had four felony convictions. They didn't mention any of the convictions

about you being in North Dakota [*sic*], just the felony convictions here in Cook County." The court then sentenced defendant to 12 years' imprisonment.

¶ 9 On direct appeal, defendant argued, *inter alia*, that he was entitled to a new sentencing hearing based on the errors in the PSI. This court, in an unpublished order, remanded the case for a new sentencing hearing, stating:

"We cannot determine from the record before us whether the judge considered defendant's out-of-state convictions in crafting the sentence imposed. The court mentioned the out of state convictions in the context of discussing the cursory amount of information revealed in a pretrial conference and how a judge who conducts a trial hears all of the evidence and finds 'out a lot more about a case.' " *Riney*, 2012 IL App (1st) 100323-U, ¶ 50.

¶ 10 On remand, the trial court ordered a new PSI. The new PSI did not contain the Minnesota convictions. The State asked for the same 12-year sentence, noting that defendant had changed his answers to drug and alcohol questions in the new PSI. The State also argued that defendant's conduct threatened serious harm, he had a history of criminal behavior, and such a sentence was required for deterrence purposes. In its arguments, the State made two comments relevant to defendant's appeal: (1) "As your Honor remembers, there was evidence elicited during this trial of threats made by the defendant to the police officers following him being taken into custody"; and (2) "This is a weapons conviction, your Honor, involving a fully-loaded five Colt .32-caliber, semi-automatic handgun being in the possession of a four-time convicted felon." Defense counsel argued that defendant had a hard childhood, but had obtained his GED while incarcerated and sought to take college credit while still in the Department of Corrections.

Defendant spoke in allocution, telling the court that he had changed a "little bit" during his five years of incarceration and apologized for his "mistake."

¶ 11 The trial court stated:

"Very well, I have considered the facts and circumstances of this case. I have considered the statutory aggravating and mitigating factors. I have considered the presentence investigation as amended. I have considered the parties' argument and defendant's words and [am] ready to fashion appropriate sentence based on all those factors."

It then resentenced the defendant to 12 years' imprisonment. Defendant filed a motion to reconsider sentence, which the trial court denied. Defendant appeals.

¶ 12 Defendant contends that the trial court improperly considered in aggravation incorrect claims by the State that the gun was "fully-loaded" and that he threatened police officers.

Defendant notes that the State's witnesses testified that the recovered handgun had been unloaded, yet at resentencing the State referenced the handgun as being "fully-loaded." He also notes that defendant was handcuffed in the back of a squad car when he said he would kill the police officers. While the State argued at the second sentencing hearing that he threatened serious harm, defendant argues that his comments were "a toothless expression of frustration or anger." Finally, defendant asserts that the trial court's statement that he considered the "parties' arguments" shows that it improperly considered the State's erroneous claims.

¶ 13 The State responds that defendant has forfeited this issue by failing to object at the sentencing hearing and failing to raise the issue in a postsentencing motion. Alternatively, the State argues that defendant's 12-year sentence was supported by defendant's history, his actions

preceding the arrest, and his attempts to resist arrest. It further argues that any reliance by the trial court on erroneous information was *de minimis* to the sentence imposed.

¶ 14 To preserve a sentencing issue, a defendant must contemporaneously object and include the issue in a post-sentencing motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Defendant concedes that he failed to object at the sentencing hearing and to include this claim in a post-sentencing motion; however, he urges this court to forgo applying the forfeiture rule, because the error stems from judicial conduct. See *People v. Saldivar*, 113 Ill. 2d 256, 266 (1986); *People v. Davis*, 185 Ill. 2d 317, 343 (1998); and *People v. Dameron*, 196 Ill. 2d 156, 171 (2001). The application of forfeiture is less rigid when the conduct of judges is at issue. *Id.* The rule is loosened because defendants should not be required to interrupt the judge during pronouncement of sentence and point out that he or she was wrong. *Saldivar*, 113 Ill. 2d at 266. In the present case, however, defendant's objections arise from comments made by the State, not the trial court. An objection by defendant following the State's allegedly erroneous comments would not have interrupted the trial court; moreover, it would have allowed the court to rule on the objection, clarifying whether it relied on the comments in resentencing. Therefore we find *Saldivar*, *Davis*, and *Dameron* inapposite and defendant has forfeited the issue for appeal.

¶ 15 Under plain error analysis, a reviewing court may consider an error, despite forfeiture, when a clear and obvious error occurred and 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 as to challenge the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Before considering defendant's claim under either prong, we must first determine

whether error has occurred. *Id.* Defendant bears the burden of persuasion in showing an error occurred. *Id.*

¶ 16 A trial court's determination of a defendant's sentence is reviewed for an abuse of discretion. *People v. Johnson*, 347 Ill. App. 3d 570, 573-74 (2004). The trial court's consideration of an improper factor in aggravation constitutes an abuse of discretion. *People v. McAfee*, 332 Ill. App. 3d 1091, 1096 (2002). In considering whether a factual error affected the trial court's decision, the reviewing court must look to whether the lower court's comments show a reliance on the factual error in fashioning the sentence. *People v. Cotton*, 393 Ill. App. 3d 237, 266 (2009). A reviewing court presumes that the trial court considered only competent and proper evidence in determining a sentence. *People v. Ashford*, 168 Ill. 2d 494, 508 (1995).

¶ 17 Defendant argues that the trial court relied on improper factors in aggravation because it considered two incorrect statements made by the State. He asserts (1) the State "seriously exaggerated Riney's conduct after arrest," in a way that was "disingenuous and prejudicial," and (2) the State erroneously referred to the gun as "fully-loaded." We address each comment and the trial court's alleged reliance in turn.

¶ 18 In arguing defendant's conduct threatened serious harm, the State asserted, "As your Honor remembers, there was evidence elicited during this trial of threats made by defendant to the police officers following him being taken into custody." This statement was not false. Officer DeRosa testified that defendant threatened to kill the officers while being transported to the station. Defendant argues that the State took this threat out of context because they did not mention that he was handcuffed in the back of the police car at the time. Yet, the State's comment includes the fact that defendant was already in custody. Furthermore, the trial judge

was present to hear the statement in context during the actual testimony at trial. As such, the trial court had the information necessary to weigh the seriousness of defendant's threat. Accordingly, we find the State's "threat" comment was neither false nor prejudicially exaggerated. Therefore, even if the trial court relied upon the comment, such reliance would not be consideration of an improper factor in aggravation.

¶ 19 Unlike its comments on defendant's threat, the State's comment that the gun was loaded was clearly false. The State's witnesses acknowledged that the gun had no magazine and contained no bullet in its chamber. However, it is not clear that the trial court relied upon this misstatement in deciding defendant's sentence. The State referenced the gun as loaded only once during the entirety of its argument. The record contains no explicit comments by the court which show reliance on the State's statements. Defendant argues that the court's reliance is indicated by its perfunctory statement that it had "considered the parties' argument." Yet the court, at the same time, indicated that it had "considered the facts and circumstances of this case." The fact that the court considered the prosecution's arguments does not necessarily indicate that the court relied on every word the State said. Given the fact that the prosecution only fleetingly mentioned the gun was loaded during its larger argument, the lack of any indication from the court that it relied on that particular statement, and the court's consideration of the actual trial proceedings, the defendant has failed to show that the trial court relied upon the State's misstatement. Therefore, he has failed to meet his burden of persuasion.

¶ 20 Defendant analogizes his case to *People v. Ross*, 303 Ill. App. 3d 966 (1999), and *People v. Holloman*, 304 Ill. App. 3d 177 (1999). In *Ross*, the trial court stated that the defendant's offense was motivated by gang rivalry, despite the evidence uniformly indicating that the

defendant and his victim were both members of the same gang. *Ross*, 303 Ill. App. 3d at 985. In *Holloman*, the trial court stated that the defendant had a drug trafficking charge based upon an erroneous PSI, before explaining the need to take drug dealers off the street. *Holloman*, 304 Ill. App. 3d at 185. In both *Ross* and *Holloman*, The reviewing court remanded the case for resentencing, finding the lower court had relied upon improper factors and that it was unclear whether that reliance was insignificant. See *Ross*, 303 Ill. App. 3d at 985; *Holloman*, 304 Ill. App. 3d at 185. Both *Ross* and *Holloman* involved a trial court misstating the facts of a case. In the present case, however, the State made the inaccurate statement. Thus, while in *Ross* and *Holloman* the trial courts' own statements provided evidence of their reliance on inaccurate factors, the present case includes no such statements and is distinguishable.

¶ 21 Defendant also argues that his 12-year sentence is clear evidence that the court relied upon the State's statements. He notes that at his original sentencing, when his PSI reported nine prior felony convictions, the trial court sentenced him to 12 years' imprisonment. At his resentencing, when his PSI reported four prior felony convictions, the court sentenced him to the same 12-year term. He argues that the trial court, barring additional factors in aggravation, should have sentenced him to a shorter term on remand based on his shorter reported criminal history. Because the court did not shorten his sentence, defendant reasons, it must have considered additional factors in aggravation. Defendant concludes that because the State's comments were the "only additional aggravating facts," it must have relied upon them in resentencing defendant to the same term. Yet, on defendant's original appeal, this court did not conclusively find that the trial court had relied on the Minnesota convictions, but rather, found error because we could not determine "whether the judge considered defendant's out-of-state

convictions in crafting the sentence imposed." *People v. Riney*, 2012 IL App (1st) 100323-U, ¶ 50. Therefore, as it is not clear that defendant's original sentence was predicated on the erroneous convictions, his argument that his new sentence would have been lower without the State's comments is unpersuasive.

¶ 22 As we find the trial court did not err, we need not consider whether either prong of plain error analysis applies. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 23 Defendant alternatively contends that his trial counsel's failure to object or correct the State's misstatements constituted ineffective assistance of counsel. To establish a claim of ineffective assistance of counsel, a defendant must show: (1) counsel's representation was objectively deficient and (2) counsel's deficient actions prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984). To show prejudice, a defendant must show that there is a reasonable probability that, without counsel's errors, the proceeding's result would have differed. *Id.* As already discussed, we find that defendant has failed to show that the trial court relied upon the State's mistaken comments. Because the court did not rely on the statements, it is not reasonably probable that defense counsel's objection to the statements would have changed defendant's sentence. As we find defendant has failed to show prejudice under the second prong of the *Strickland* test, we need not address whether defense counsel's representation was constitutionally deficient. *People v. Evans*, 186 Ill. 2d 83, 94 (1999).

¶ 24 For the foregoing reasons, we find that the trial court did not rely on improper factors in aggravation when it sentenced defendant to 12 years' imprisonment. We also find defendant was not prejudiced by defense counsel's failure to object to the State's comments. Accordingly, the judgment of the circuit court of Cook County is affirmed.

1-13-1100

¶ 25 Affirmed.