2015 IL App (1st) 132463-U

THIRD DIVISION
September 9, 2015

No. 1-13-2463

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. 10 CR 13018
	)	
JAMES BANKS,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justice Hyman and Presiding Justice Mason concurred in the judgment.

O R D E R

¶ 1 *Held*: Court did not violate any statutory duty or deprive defendant of due process by not expressly inviting defense counsel to present argument in mitigation during sentencing hearing.

¶ 2 Following a 2013 bench trial, defendant James Banks was convicted of armed violence and sentenced to 20 years' imprisonment. Defendant contends on appeal that the trial court erred by not giving him an opportunity during the sentencing hearing to present argument in mitigation before pronouncing sentence. For the reasons stated below, we affirm.

¶ 3 Defendant was charged with armed violence, possession of a controlled substance with intent to deliver, and unlawful use of a weapon by a felon on or about June 19, 2010, for allegedly possessing a firearm while (a) possessing one gram or more, but less than 15 grams, of heroin with the intent to deliver and (b) having a prior conviction for unlawful use of a weapon in case 99 CR 14627. At trial, the defense theory was that defendant possessed a gun when he was arrested in a tavern for an unrelated offense but the heroin was behind the bar rather than on defendant's person as a police officer testified. Defense counsel advanced this theory by cross-examination of the officer and by defendant's testimony, and argued for a finding of not guilty on armed violence. The court found defendant guilty of all three offenses and merged the latter two offenses into the armed violence count.

¶ 4 Defense counsel filed a post-trial motion challenging the sufficiency of the evidence. The parties argued the motion; that is, defense counsel did not rest on his written motion. The court denied the motion and immediately proceeded to sentencing.

¶ 5 The presentencing investigation report (PSI) reflected defendant's six felony convictions from 1991 through 2013, including that the weapon possessed in case 99 CR 14627 was an explosive or firework. Defendant was born in 1966, the middle of five children of a married couple, and has a close relationship with his parents and siblings. He was married in 2004 and separated in 2006, and has seven children. He attended but did not complete high school. He is healthy except for treated high blood pressure, drinks alcohol socially, and denies alcohol abuse or illegal drug use. He admitted to being a member of, and "general" in, the Black P Stones street gang until he was 40 years old.

¶ 6 At sentencing, the court first asked the State to present its case in aggravation. The State asserted that it had no corrections to the PSI, argued defendant's criminal history, and sought a prison sentence of 23 years rather than the minimum sentence of 15 years. The court clarified that it was sentencing defendant on one count, armed violence, and asked defendant if he wanted to exercise his right to make a statement. Defendant declined, and the court immediately passed sentence. The court said that it "listened to the arguments of the attorneys," considered the statutory aggravating and mitigating factors and non-statutory mitigating factors, and reviewed the PSI and trial evidence before sentencing defendant to 20 years' imprisonment. The court learned from defense counsel that defendant had 1,080 days of credit and admonished defendant of his appeal rights.

¶ 7 Defense counsel filed a motion to reconsider sentence, arguing that the sentence was excessive and deprived defendant of due process but not arguing that the court denied him the opportunity to argue mitigation at sentencing. Defense counsel stood on the written motion at the motion hearing, and the court denied reconsideration. This appeal followed.

¶ 8 On appeal, defendant contends that the trial court erred by not giving him an opportunity during the sentencing hearing to present argument in mitigation before pronouncing sentence. Specifically, he contends that the court is statutorily required to provide that opportunity and that he was deprived of due process by the court's failure to do so. He acknowledges that he did not raise this claim in the trial court but contends that it should be considered as plain error and that trial counsel was ineffective for not objecting at sentencing and not raising the issue in the post-sentencing motion.

¶ 9 Section 5-4-1(a) of the Code of Corrections (730 ILCS 5/5-4-1(a) (West 2012)) provides in relevant part that, in a sentencing hearing, "the court shall:

(1) consider the evidence, if any, received upon the trial;

(2) consider any presentence reports;

(3) consider the financial impact of incarceration based on the financial impact statement filed with the clerk of the court by the Department of Corrections;

(4) consider evidence and information offered by the parties in aggravation and mitigation;

(4.5) consider substance abuse treatment, eligibility screening, and an assessment, if any, of the defendant by an agent designated by the State of Illinois to provide assessment services for the Illinois courts;

(5) hear arguments as to sentencing alternatives; [and]

(6) afford the defendant the opportunity to make a statement in his own behalf."

¶ 10 In *People v. Alexander*, 2014 IL App (1st) 112207, ¶¶ 58-63, a defendant contended as a matter of apparent first impression that section 5-4-1(a)(5) creates a mandatory duty for the trial court to "hear arguments as to sentencing alternatives," which the trial court violated by denying both parties the opportunity to present argument at sentencing. The claim was forfeited as the defendant did not object at sentencing nor raise the issue in a post-sentencing motion, and we found that the claim did not constitute plain error overcoming forfeiture because it did not constitute error. *Id.*, ¶ 59.

¶ 11 In the *Alexander* sentencing hearing, the State told the trial court that it had no evidence but only argument, the defendant presented evidence in mitigation and stated that he found no

errors in the PSI, defendant allocuted, and the court began to pronounce sentence when the State objected that it had argument. The court replied "I don't do it like that. You are done" and continued pronouncing sentence. *Id.*, ¶¶ 34-35.

> "Defendant argues that the waiver rule should be relaxed in this case because the defense did not have an opportunity to object where the trial court announced the sentence immediately after defendant's statement in allocution. However, the appellate record indicates the defense had ample opportunity during the sentencing hearing to object, including well before the State's objection, and the defense never once expressed interest in arguing." *Id.*, ¶ 60.

Defendant also argued that an objection would have been futile as the trial court had already overruled the State's objection. "However, the trial court's response, 'You are done,' was clearly directed at the State's objection that it did not receive an opportunity to argue as it requested, and the trial court did not explicitly bar defendant from arguing." *Id.* Lastly, we found that the court had not deprived defendant of his substantial right to a fair sentencing hearing, and thus not satisfied the second prong of plain error, because the court had not barred the defense from arguing in mitigation and the defense did not request an opportunity to argue. *Id.*, ¶¶ 61-62.

¶ 12 Here, we find that there was no plain error because there was no error. We need not resolve whether section 5-4-1(a) is mandatory or merely directory because we conclude that the court did not act contrary to the statute or otherwise deny defendant due process. Paragraph (4) is most directly on point, and it instructs the court to "consider evidence and information *offered by the parties* in aggravation and mitigation." (Emphasis added.) While it would have been better practice for the court to invite defense counsel to argue in mitigation, the clear requirement of the

statute is to hear and consider the arguments and evidence that the parties choose to present. While defendant cites ample case law for the principle that the defense must be given the opportunity to argue mitigation, we find that the court does not deprive a defendant of that opportunity solely by not expressly inviting counsel to do so. We do not presume that defense counsel – especially trial counsel here, who showed no signs of timidity in the trial or post-trial proceedings – was cowed into not making argument in mitigation by the court merely not inviting him or her to do so. Notably, we did not find error in *Alexander* where the court expressly barred the State from making argument in aggravation because the court did not similarly forbid the defense from arguing nor did the defense request to argue mitigation. Moreover, if counsel had felt after sentencing that he had been deprived of the opportunity to argue mitigation or had some particular argument that he would have liked to present to the court at sentencing, he would have so argued in his motion for reconsideration. Trial counsel challenged the sentence the court imposed – again demonstrating that he was not timid or afraid to confront the court – but raised no issues with the procedure the court used to reach that sentence.

¶ 13 Section 5-4-1(a)(5) instructs the court to "hear arguments as to sentencing alternatives," but the court here was correctly reminded of the lowest sentence it could impose, 15 years' imprisonment. 720 ILCS 5/33A-3(a), 730 ILCS 5/5-4.5-25(b)-(d) (West 2012) (periodic imprisonment, impact incarceration, probation, and conditional discharge inapplicable). While it would have been better practice for the court to hear defense counsel ask for a minimum or near-minimum sentence, we will not find a deprivation of due process in the court not expressly hearing what presumably would have been the defense sentencing alternative. The court had the

PSI and said that it reviewed it, and notably the court did not simply accept the State's recommended sentence of 23 years' imprisonment in the absence of defense argument but imposed a sentence three years shorter.

¶ 14 Defendant argues that his claim falls under the second prong of plain error, where an error is sufficiently grave that it deprived him of a fair sentencing hearing. However, our supreme court has repeatedly emphasized the limited nature of plain error, which is not a general saving clause preserving all errors that affect substantial rights but a narrow exception to forfeiture to protect the rights of the defendant and the integrity and reputation of the judicial process. *People v. Hanson*, 2014 IL App (4th) 130330, ¶ 27, citing *People v. Allen*, 222 Ill. 2d 340, 353 (2006). Because there is a statutory "presumption that sentencing errors not raised in the trial court are *actually* forfeited for review" (emphasis in original) (*Hanson*, 2014 IL App (4th) 130330, ¶ 37, citing 730 ILCS 5/5-4.5-50(d) (West 2012)), we have held that:

> "When a defendant expects the reviewing court to bypass the forfeiture statute and address his claim, his burden of establishing plain error is more than a *pro forma* exercise. Any defendant is capable of merely asserting a few ten-dollar phrases – such as 'substantial rights,' 'grave error,' and 'fundamental right to liberty' – but those phrases mean nothing unless the defendant persuades the reviewing court that the sentencing error in his case merits plain-error review. As we held in *Rathbone*, 'it is not a sufficient argument for plain[-]error review to simply state that because sentencing affects the defendant's fundamental right to liberty, any error committed at that stage is reviewable as plain error. Because all sentencing errors arguably affect the defendant's fundamental right to liberty, determining whether an error is reviewable as plain error requires more

in-depth analysis.' " *Hanson*, 2014 IL App (4th) 130330, ¶ 37, quoting *People v. Rathbone*, 345 Ill. App. 3d 305, 311 (2003).

¶ 15 Here, as stated above, the trial court had the PSI and stated that it reviewed it, was apprised of the minimum sentence, and did not merely follow the State's sentencing recommendation but imposed a sentence three years shorter. Also as noted above, trial counsel could have raised the mitigation argument issue if he felt deprived of the opportunity to argue, but he did not raise such an issue at sentencing or in his post-sentencing motion. See *Hanson*, 2014 IL App (4th) 130330, ¶ 17 (not objecting in the trial court deprives the court of the opportunity to remedy its oversight). Under such circumstances, we find that defendant has failed to establish plain error by deprivation of a fair sentencing hearing.

¶ 16 Defendant also contends that trial counsel was ineffective for not objecting at sentencing or raising the issue in his post-sentencing motion; that is, that the forfeiture itself was reversible error. See *People v. Tate*, 2012 IL 112214, ¶¶ 14-15, 18. However, we find no ineffectiveness. Trial counsel could have requested to make argument in mitigation at sentencing if he wanted to do so, and if counsel felt that he had been deprived of the opportunity to argue mitigation, he would have so argued in his motion for reconsideration but did not. Moreover, assuming *arguendo* that counsel's performance was deficient, we find no prejudice because defendant was not deprived of due process for the reasons stated above.

¶ 17 Accordingly, the judgment of the circuit court is affirmed.

¶ 18 Affirmed.