2015 IL App (1st) 132600-U

FOURTH DIVISION
September 30, 2015

No. 1-13-2600

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. 12 CR 18174
	)	
JERMAINE HARPER,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Judgment entered on defendant's burglary conviction affirmed over his forfeited claim that his sentence is excessive; fines and fees order modified.

¶ 2 Following a joint bench trial with codefendants Johnelle Brunt, Latrail Brunt[1], and Cory Smith[2], who are not parties to this appeal, defendant Jermaine Harper was found guilty of burglary, then sentenced as a Class X offender (730 ILCS 5/5-4.5-25 (West 2012)) to nine years'

[1] Codefendant Latrail's appeal is pending under appeal number 1-14-0291.
[2] Codefendant Smith's appeal is pending under appeal number 1-13-2885.

imprisonment. On appeal, defendant contends that his sentence is excessive, given the nature of the offense and the mitigating evidence presented. He also contends that the $200 DNA analysis fee assessed in his case is void and should be vacated.

¶ 3 The record shows that defendant was charged with burglary in connection with an incident that occurred on Interstate 55 near Pulaski Avenue in Chicago, Illinois, on September 7, 2012. At trial, Burlington North Santa Fe Railroad (BNSF) security officer Gerald Sowell testified that at approximately 4 p.m. on that date, he was driving south on Interstate 55 when he observed three black males wearing black T-shirts removing merchandise from a train container on a railroad bridge over the interstate. As the men started running down the embankment toward the interstate, Officer Sowell slowed his vehicle and was able to identify Latrail and Smith as the two males who were removing merchandise from the container, and defendant as the male who was on the ground handling the merchandise. He then sent a radio message describing the three men, left the interstate, and circled around to the train container, but discovered that Latrail, Smith, and defendant had left the area.

¶ 4 He further testified that while he was inspecting the area around the container, he received a radio call from his partner, Officer Jose Rodriguez. After receiving the call, he proceeded to 36th Place near Kedzie Avenue, where Officer Rodriguez was located, and saw Latrail, Smith, and defendant in custody wearing white T-shirts. He identified them to Chicago police officers as the men he had seen removing merchandise from the train container. He also identified Johnelle who was also in custody and wearing a green T-shirt.

¶ 5 Officer Rodriguez testified that he was employed as a BNSF police officer and received a radio call at approximately 4 p.m. on September 7, 2012, from Officer Sowell and proceeded to the railroad bridge over Interstate 55. There, he observed 10 people in black T-shirts, including Smith and Latrail, breaking into a train container. He approached the group, but they fled into a red minivan and a white Denali. Officer Rodriguez sent a flash radio message to the Chicago Police Department describing the men and the vehicles. Minutes later, he received a call that a tactical unit had a vehicle matching his description, and went to that location. There, he observed a red minivan, and Smith, Latrail, Johnelle, and defendant in custody.

¶ 6 Chicago police officer Robert Vahl testified that about 4 p.m. on September 7, 2012, he and his partner, Officer Barsch, received a radio call that BNSF was looking for a red minivan occupied by four black males. They observed a van matching that description near 36th Place, "curbed" the vehicle, and ordered the four men out of it. Officers Sowell and Rodriguez arrived shortly thereafter and identified all four men. A search of the minivan revealed three black T-shirts.

¶ 7 Following closing arguments, the court found defendant guilty of burglary. At the subsequent sentencing hearing, the State outlined defendant's criminal history from 1997 to the present in reverse order. The State noted that defendant had two misdemeanor traffic offenses in 2012 and 2009, and misdemeanors for possession of cannabis in 2007, 2006, and two in 2005. Defendant also had felony convictions for manufacture and delivery of cannabis in 2005 and 2000, theft in 2003, attempted burglary in 2002, and burglary in 2000. Finally, the State noted

defendant's two 1997 convictions for possession of a controlled substance, and informed the court that defendant was subject to mandatory Class X sentencing.

¶ 8 In mitigation, defense counsel informed the court that defendant is a responsible person in the life of his girlfriend who is hard of hearing, and that he also has children. Counsel pointed out that defendant lives on the south side of the city in a very violent area, but has no violence in his background, and that most of his convictions are for drug and vehicle offenses. Defense counsel further stated that defendant had finished high school and lost his father at a very early age, and asked for the minimum sentence of six years' imprisonment.

¶ 9 In announcing its sentencing decision, the court stated that the factors in mitigation were that defendant has a few children, is 38 years old, has a high school diploma, and some employment history. The court then noted that defendant does have some issues with respect to drinking a pint of whiskey three times a week and smoking "five marijuana blunts a day" even after he participated in a substance abuse treatment program ten years ago as indicated in the presentence investigation report. The court then stated that defendant's criminal background, which made him a Class X offender, was the "most aggravating factor" in this case because the burglary was interrupted so there were no proceeds. The court then recited defendant's criminal history, as outlined by the State, noting that most of his convictions were related to controlled substances, and that there was a gap between his "thieving kind" of behavior, then sentenced him to nine years' imprisonment.

¶ 10 Following the court's decision, defense counsel informed the court that defendant did want to appeal and asked that the State Appellate Defender be appointed. The court responded:

> "What about with respect to his sentence? If you wish to appeal any aspect of your sentence you have to file first before you file a Notice of Appeal a written motion asking the Court to reconsider the sentence. Once the Court rules on any motion filed to reconsider the sentence the 30 days to file a written Notice of Appeal with the Clerk of the Circuit Court would begin. *** If either of you fail to place the reasons of [*sic*] grounds in your written motions asking me to reconsider the sentence then you would waive those grounds and you would be unable to ever appeal the decision or any decision regarding your sentence. You would only be able to appeal the finding of this Court finding you guilty."

The court asked defendant if he understood his post-trial and appellate rights and defense counsel responded that he did. The following colloquy then took place:

> [Defense Counsel]: Your Honor, I'm not filing a motion to reconsider sentence. I've talked to my client about it. The purpose of this is to just— we just want to attack the conviction on appeal.
>
> The Court: All right.
>
> [Defense Counsel]: We are not going to do a motion to reconsider sentence. And that's correct, Mr. Harper?
>
> Mr. Harper [Defendant]: Yes, sir.
>
> The Court: Do you understand that you can't appeal the nine-year sentence?
>
> Mr. Harper: Yes, sir.

¶ 11 In this appeal from that judgment, defendant does not challenge the sufficiency of the evidence to sustain his conviction, but contends that his sentence is excessive. As evidence, he cites his history of chemical dependency, his family ties, and his minimal, non-violent criminal background. He also maintains that the trial court failed to consider the mass incarceration of African-American males, and the financial costs of his incarceration in determining the length of his sentence. The State responds that he has forfeited this issue for review by failing to raise it in a post-trial motion.

¶ 12 In order to preserve an issue for appeal, defendant must specifically object at trial and raise the specific issue again in a post-trial motion. *People v. Woods*, 214 Ill. 2d 455, 470 (2005). In this case, defendant did not file a motion to reconsider his sentence even after he was specifically admonished by the trial court regarding his appeal rights and his need to file a motion should he wish to challenge his sentence on appeal. When defense counsel informed the court that defendant would not be challenging his sentence on appeal, defendant indicated to the court that he understood the ramifications of that decision and that he agreed with the decision not to file a motion to reconsider his sentence. Under these circumstances, we find that defendant has forfeited this issue for review. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010).

¶ 13 Defendant acknowledges his failure to preserve the issue, but in order to circumvent forfeiture, he contends that he was denied his right to the effective assistance of counsel who failed to file the motion to reconsider his "excessive" sentence. In support of this contention, defendant cites *People v. Bailey*, 364 Ill. App. 3d 404, 408 (2006), where the Fourth District Appellate Court found that a failure to file a motion to reconsider sentence does not *per se*

amount to ineffective assistance, and that the omission constitutes ineffective assistance only where the failure to raise the issue prejudiced defendant. Defendant claims that he was prejudiced by counsel's inaction because the waiver precluded reconsideration of his excessive sentence.

¶ 14 In order to prevail on a claim of ineffective assistance, defendant must show that counsel's performance "fell below an objective standard of reasonableness," and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 446 U.S. 668, 687-88 (1984). In doing so, defendant must overcome the presumption that the challenged action or inaction of counsel was the product of trial strategy, and not deficient performance. *People v. Coleman*, 183 Ill. 2d 366, 397 (1998).

¶ 15 We initially observe that the decision not to file a motion to reconsider sentence is a matter that is left to the professional judgment and discretion of counsel. *People v. Owens*, 386 Ill. App. 3d 765, 772 (2008). In this case, counsel informed the court that defendant intended to appeal, and the court directly addressed the requirements for appealing the sentence. Defendant indicated his understanding of his post-trial and appellate rights, and counsel then announced that, after talking with defendant, they were not filing a motion to reconsider sentence. The court specifically informed defendant that he would not be able to challenge his sentence on appeal if he did not file a motion to reconsider his sentence, and defendant indicated his understanding, and expressed his concurrence with counsel's decision not to file a motion to reconsider. Under these circumstances, where defendant expressly consented to counsel's decision not to file a motion to reconsider sentence after discussing it with counsel, and being admonished of the

ramifications of not pursuing the motion by the court (*Owens*, 386 Ill. App. 3d at 772-773), defendant cannot now claim that his counsel provided ineffective assistance. It is well-settled that a party may not proceed in one manner in the circuit court and later contend on appeal that the requested course of action was in error, *i.e.*, "it may not advance a theory or argument on appeal that is inconsistent with the position taken below." *People v. Denson*, 2014 IL 116231, ¶ 17.

¶ 16 Moreover, the record shows that defendant was convicted of the Class 2 felony of burglary (720 ILCS 5/19-1 (West 2012)), but was subject to mandatory Class X sentencing because of his criminal history (730 ILCS 5/5-4.5-25 (West 2012)). The nine-year sentence imposed by the trial court fell at the low end of the prescribed 6-to-30-year range (730 ILCS 5/5-4.5-25(a) (West 2012)), and was entered after the court considered the appropriate sentencing factors, including defendant's chemical dependency, his family ties, and his criminal history. Under these circumstances, defendant cannot show that the sentence imposed by the court was excessive because it is within the prescribed range and is not greatly at variance with the purpose and spirit of the law, or manifestly disproportionate to the offense. *People v. Cabrera*, 116 Ill. 2d 474, 493-94 (1987).

¶ 17 Defendant contends, nonetheless, that the trial court failed to consider the financial impact of an extended period of incarceration on the State of Illinois and its obligation to the public as a result of the mass incarceration of African-American men. In support of this claim, defendant cites numerous secondary materials, which are not relevant authority on appeal. *People v. Heaton*, 266 Ill. App. 3d 469, 476 (1994). Moreover, insofar as they constitute an

attempt by defendant to integrate expert opinion evidence into the record, which was not subject to cross-examination by the State or considered by the trier of fact, these materials will not be considered on appeal. *People v. Mehlberg*, 249 Ill. App. 3d 499, 531-32 (1993). Finally, there is nothing in the record to suggest that the trial court did not consider the appropriate factors in rendering its sentencing decision, and in the absence of evidence to the contrary, we presume that the court considered the financial impact of defendant's incarceration and the court's obligations to the public. *People v. Acevedo*, 275 Ill. App. 3d 420, 426 (1995).

¶ 18 For the reasons stated, we find that defendant has not shown that he was prejudiced by counsel's decision not to challenge his sentence in a motion to reconsider, and that the omission did not constitute ineffective assistance of counsel. *Bailey*, 364 Ill. App. 3d at 409.

¶ 19 Defendant finally contends, the State concedes, and we agree that he was improperly assessed a $250 DNA analysis fee. The DNA Analysis fee is assessed when defendant submits specimens for analysis and categorization into genetic marker grouping. 730 ILCS 5/5-4-3(j) (West 2012). The supreme court has held that this fee can be assessed only on an individual whose DNA is not already on file in the State's database. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). Since defendant's DNA is on file with the Illinois State Police in connection with a 2003 burglary conviction, he was not required to submit a specimen for DNA analysis in this case, and we vacate the assessment. *Marshall*, 242 Ill. 2d at 303.

¶ 20 We, therefore, order the clerk of the circuit court of Cook County to modify defendant's fines and fees order by vacating the $250 DNA Analysis fee (Ill. S. Ct. R. 615(b)(1) (eff. April 1, 2015)), and affirm the judgment of the circuit court of Cook County in all other respects.

¶ 21 Affirmed; fines and fees order modified.