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2015 IL App (3d) 130500-U

Order filed July 9, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	of the 10th Judicial Circuit,
)	Peoria County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-13-0500
v.)	Circuit No. 11-CF-619
)	
ISIAH FOSTER,)	Honorable
)	David A. Brown,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Defendant's aggravated battery with a firearm sentence was not the result of an impermissible double enhancement. (2) Defendant's DNA fee is vacated.

¶ 2 Defendant, Isiah Foster, was convicted of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2010)), aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2010)), and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)). The trial court merged the aggravated battery with a firearm and aggravated discharge of a firearm findings and sentenced defendant to 16 years' imprisonment. The trial court sentenced

defendant to a concurrent term of 5 years' imprisonment for unlawful possession of a weapon by a felon. On appeal, defendant argues that: (1) he is entitled to a new sentencing hearing because the court considered a factor inherent in the offense of aggravated battery with a firearm while imposing the 16-year prison sentence; and (2) defendant's DNA fee should be vacated. We affirm in part and vacate in part.

¶ 3

FACTS

¶ 4

Defendant was charged by indictment with aggravated battery with a firearm, aggravated discharge of a firearm, and unlawful possession of a weapon by a felon. The aggravated battery with a firearm charge alleged that defendant, "in committing a battery *** knowingly and without legal justification caused an injury to [the victim] by means of the discharging of a firearm in that he shot [the victim] with a handgun."

¶ 5

The case proceeded to a bench trial, and after hearing the evidence and arguments of the parties, the court found defendant guilty of each of the charged offenses.

¶ 6

During the sentencing hearing, the court considered the factors in mitigation and aggravation. In aggravation, the court discussed defendant's criminal history, which included defendant's numerous prior convictions and adjudications that dated back to when defendant was 12 years old. The court also noted that defendant did not complete a single semester of high school, never had a full-time job or income source apart from selling drugs and disability benefits. In mitigation, the court noted that "defendant's acts in this case threatened and did cause harm to another," the offense was not justified and was likely to reoccur, and defendant likely would not comply with the terms of probation. The court also considered the hardship a prison sentence would pose to defendant's dependents and the cost of incarceration. The court found that a prison sentence was necessary to send a message to defendant and provide some

amount of deterrence. The court merged the aggravated discharge of a firearm conviction into the aggravated battery with a firearm charge and sentenced defendant to 16 years' imprisonment. The court imposed a concurrent sentence of 5 years' imprisonment for unlawful possession of a weapon by a felon. Additionally, the court ordered defendant to "provide a DNA standard and pay unless it's already been done. I suspect it's already been done." The case payments sheet in the supplemental record shows that a \$250 DNA analysis fee was imposed.

¶ 7

ANALYSIS

¶ 8

I. Double Enhancement—Sentence

¶ 9

Defendant argues that the trial court improperly considered that defendant's conduct caused or threatened harm, a factor inherent in the offense of aggravated battery with a firearm, while imposing his prison sentences. As a result, defendant contends that his sentences were the result of an impermissible double enhancement. Defendant acknowledges that he forfeited review of this issue but argues that it is reversible under the plain error doctrine. We review issues of double enhancement *de novo*. *People v. Phelps*, 211 Ill. 2d 1, 12 (2004).

¶ 10

Forfeited claims of sentencing error may be reviewed for plain error. *People v. Nowells*, 2013 IL App (1st) 113209, ¶18. The plain error doctrine allows a reviewing court to consider an unpreserved sentencing error when: (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny defendant a fair sentencing hearing. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). The first step of plain error review is to determine whether any error occurred. *Id.*

¶ 11

Generally, a factor implicit in the offense for which a defendant is convicted cannot be used as an aggravating factor at sentencing. *People v. Rissley*, 165 Ill. 2d 364, 390 (1995). Double enhancement occurs where the same factor: (1) constitutes an element of the offense and

serves as a basis for imposing a harsher sentence than otherwise would have been imposed; or (2) is used twice to elevate the seriousness of the offense itself. *Phelps*, 211 Ill. 2d at 12-13. If the court considered an improper factor in sentencing, remand for resentencing is required where the reviewing court is unable to determine the weight afforded the improper factor. *People v. Heider*, 231 Ill. 2d 1, 21-22 (2008).

¶ 12 Here, defendant was charged with aggravated battery with a firearm. To convict defendant of this offense, the State had to prove that defendant, in committing a battery, knowingly or intentionally by means of discharging of a firearm caused any injury to another person. 720 ILCS 5/12-4.2(a)(1) (West 2010). While sentencing defendant, the trial court stated that defendant's acts in this case "threatened and did cause harm to another." As a result, the trial court considered injury or harm as an element of the offense and during sentencing. However, it is clear from the record that the trial court placed little weight on this factor as it mentioned harm once while discussing an extensive list of other factors in aggravation and mitigation. Therefore, the court's single reference to harm was not error and further plain error review is unwarranted.

¶ 13 II. DNA Fee

¶ 14 Defendant argues that the \$250 DNA fee should be vacated because his DNA was registered in connection with a prior felony conviction. The State concedes this issue.

¶ 15 Section 5-4-3 of the Unified Code of Corrections (730 ILCS 5/5-4-3 (West 2012)) authorizes the trial court to order the taking, analysis and indexing of a defendant's DNA, and the payment of a \$250 analysis fee, only where a defendant is not currently registered in the DNA database. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). When a defendant is already registered in the database as a result of a prior felony conviction, the trial court is without authority to order a subsequent DNA analysis and fee. *Id.*

¶ 16 Here, the trial court ordered defendant to submit to and pay for a DNA analysis if his DNA was not already on file. The case payment sheet indicated that the DNA analysis fee was imposed; however, defendant's presentence investigation report stated that defendant's DNA was registered at the time of sentencing. Based on this record, we agree that defendant's DNA was on file at the time he was sentenced and vacate defendant's \$250 DNA fee.

¶ 17 CONCLUSION

¶ 18 The judgment of the circuit court of Peoria County is affirmed in part and vacated in part.

¶ 19 Affirmed in part and vacated in part.