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2015 IL App (3d) 130505-U

Order filed July 8, 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,
)	Tazewell County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-13-0505
v.)	Circuit Nos. 12-CF-351 and 12-CF-366
)	
DAUGHLTON L. CALVIN,)	Honorable
)	Kevin R. Galley,
Defendant-Appellant.)	Judge, Presiding.

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

ORDER

- ¶ 1 *Held:* Trial court's improper consideration of certain aggravating factors warranted remand for resentencing.
- ¶ 2 Defendant, Daughlton L. Calvin, was convicted on two counts of drug-induced homicide. 720 ILCS 5/9-3.3(a) (West 2012). At sentencing, the court cited a number of aggravating factors—both statutory and nonstatutory—before sentencing defendant to terms of imprisonment of 12 and 15 years, to be served consecutively. On appeal, defendant contends that a number of those aggravating factors considered by the trial court were improper. Defendant requests that

we review this issue for plain error. We vacate defendant's sentence and remand for resentencing.

¶ 3

FACTS

¶ 4

Defendant was charged in separate cases with two counts of drug-induced homicide (720 ILCS 5/9-3.3(a) (West 2012)). The two cases were subsequently consolidated. The indictment alleged that defendant knowingly delivered methadone to Travis Whiteman and Cody Schillinger, and that Whiteman and Schillinger died as a result of ingesting that methadone. The matter proceeded via bench trial.

¶ 5

The evidence adduced at trial established that on May 29, 2011, defendant and three of his friends stole a purse belonging to Heather Wise. The purse contained five bottles of methadone, 20 Xanax pills, and some cash. The four friends divided the contents of the purse; two friends took the pills and one bottle of methadone, while defendant and his third friend took the cash and the remaining four bottles of methadone. Defendant took his share of the methadone to Danielle Martin's house, where he shared it with a number of people, including Schillinger. Defendant did not receive any money from the people at Martin's house with whom he shared the methadone.

¶ 6

At approximately 7 a.m. on May 30, 2011, defendant and Schillinger hid the remaining methadone. At approximately 1 p.m., defendant was arrested at Martin's house for stealing Wise's purse. Defendant spent the night of May 30 in jail.

¶ 7

When defendant was released from jail on the morning of May 31, he and Schillinger went to retrieve the hidden methadone. They then met with Whiteman, and defendant gave Whiteman 30 milliliters of methadone. Whiteman consumed the entire amount while he was with defendant, and died of a methadone overdose that night. Defendant and Schillinger later

consumed more methadone before picking up Martin that night.

¶ 8 Martin noticed that defendant was barely responsive, noting that he was "[k]ind of half asleep in the passenger seat of the car." Defendant began to make "funny gurgling noises," and Schillinger drove immediately to the hospital. Martin could tell that defendant "was in very bad condition."

¶ 9 At the hospital, Schillinger told Martin that he had not taken any drugs. Martin, however, did not believe him: "I was very concerned," Martin testified.

"I actually told him, you know, that we're in a hospital right now, if you need help, too, no ones's [*sic*] going to be mad, you know. We can get you help, too. We're here, but he just kept saying, you know, he was fine, he didn't do anything, he was fine."

Schillinger only told police that he had ingested some tramadol. Schillinger told his father and stepmother that he had not taken anything. Later in the night, once he was home, Schillinger admitted to his father and stepmother that he had taken tramadol, but denied consuming methadone. Schillinger died the next morning, June 1, from the combined effects of methadone and a gastrointestinal hemorrhage.

¶ 10 Detective Stephen Brock of the Morton police department spoke with defendant in the hospital on May 31. Defendant told Brock that he had purchased methadone and tramadol from Wise. Defendant's parents arrived "shortly thereafter," and his mother found tramadol pills in defendant's pocket. She gave the pills to Brock. Brock, along with Detective Chad Hazelwood of the Pekin police department, interviewed defendant again the next day. Although Schillinger had already died at that point, Brock, at the request of defendant's parents, did not inform defendant that Schillinger was dead. Brock did not testify as to whether, in the interview on

June 1, defendant did or did not mention that Schillinger had ingested methadone.

¶ 11 Hazelwood was investigating Whiteman's death when he learned of Schillinger's death. On June 1, Hazelwood spoke to defendant in the hospital. Defendant explained to Hazelwood that he had taken methadone then blacked out. Hazelwood testified that defendant *did* indicate to him that Schillinger had also taken methadone. However, on cross-examination, the following colloquy occurred:

"[Defense counsel:] Didn't you testify that [defendant] did not indicate that Mr. Schillinger took any [methadone]?"

[Hazelwood:] Yeah. I don't recall if he said that he did or not."

¶ 12 The court found defendant guilty on both counts, and the cases proceeded to sentencing. At sentencing, the Tazewell County coroner, Dr. Jeffrey Baldi, testified to the problem posed by drug overdoses in the county. Baldi pointed out that there was a marked increase in overdoses, especially in the case of prescription drugs. Baldi stated: "I will tell you that I feel like I walked into the eye of a storm when I [became the county coroner] in September."

¶ 13 Baldi also prepared a report documenting the drug-related deaths in Tazewell County over a four-year period. The two-page report listed the number of drug-related deaths in each year beginning in 2010, and listed the drug responsible for each death. The drug categories contemplated in the report were: heroin, methadone, cocaine, prescription drugs, fentanyl, ethanol, cannabis, and compressed duster (huffing). Defendant objected to the admission of the report, arguing that it was irrelevant. The court overruled the objection, and explained its reasoning as follows:

"730 ILCS 5/5-5-3.2 contains the statutory factors in aggravation. Sub-paragraph A, sub-paragraph 7, enumerates a factor which allows the Court to consider a

sentence as being necessary to deter others from committing the same criminal conduct.

"The Court believes the information requested for admissibility is relevant."

¶ 14 Hazelwood testified at sentencing that defendant's girlfriend would not take methadone because her friend had died of a methadone overdose. Hazelwood stated that defendant knew this, and conveyed it to Hazelwood during an interview. Daniel Vickers testified that he purchased heroin from defendant multiple times through an intermediary. Schillinger's stepmother testified that she worked in the intensive care unit (ICU) at St. Francis hospital. She testified that on any given day, approximately 40% of the patients in the ICU are there due to drug overdoses.

¶ 15 Following the reading of victim impact statements, defendant took the witness stand. Defendant testified that he turned to drugs to cope with the death of his grandmother. Although he began by taking prescription drugs, he eventually gravitated to "heavier drugs." Defendant admitted that he began delivering Xanax and methadone, but denied ever delivering any other drugs. Defendant admitted that he had been adjudicated delinquent for the offense of aggravated assault for displaying a BB gun while driving his car. The adjudication was the only entry in the juvenile record section of defendant's presentence investigation report (PSI). The PSI also indicated that defendant had not been convicted of any felonies as an adult.

¶ 16 The State argued that consecutive sentences were mandatory, but argued alternatively that permissive consecutive sentences were warranted. The State requested sentences of not less than 10 years' imprisonment on each count. Defendant argued for an aggregate sentence of between 6 and 10 years' imprisonment.

¶ 17 The court found no factors in mitigation, but noted that defendant's age was "a salient factor in determination of an appropriate sentence." In aggravation, the court first found that defendant's conduct caused serious harm, stating: "[Defendant's] conduct in both cases caused the death of Travis Whiteman and Cody Schillinger. A result, of course, far in excess of the language of the Statute, which reads, caused or threatened serious harm." The court further stated that it found "Paragraph A, sub 2, also applicable, and in a compelling fashion[.]" See 730 ILCS 5/5-5-3.2(a)(2) (West 2012) ("the defendant received compensation for committing the offense"). The court reasoned that "dealing drugs became a lifestyle" for defendant. The court also cited a need for deterrence as a statutory aggravating factor, noting that such a need was "demonstrated acutely by Dr. Baldi's report[.]"

¶ 18 As a nonstatutory factor, the court also cited defendant's "utter disregard in totality for the person you call your friend, Cody Schillinger." The court pointed out that defendant failed to inform medical personnel or anyone else that Schillinger had also ingested methadone. The court opined that this failure belied defendant's goal of minimizing his own accountability. The court referred to the failure as "[t]he factor that impacts me the most in assessing an appropriate sentence ***."

¶ 19 The court sentenced defendant to a term of 12 years' imprisonment for the death of Whiteman, and a term of 15 years' imprisonment in the death of Schillinger. The court reasoned that defendant's sentence should be greater in Schillinger's death because defendant had the opportunity to prevent his death. Although the court found consecutive sentences not mandatory, it ordered the sentences served consecutively.

¶ 20 ANALYSIS

¶ 21 On appeal, defendant does not challenge his convictions. Instead, defendant maintains that the trial court considered improper aggravating factors, and contends that the matter should thus be remanded for resentencing. Specifically, defendant argues that the trial court erred in considering the following: (1) the serious harm caused by his conduct; (2) that he received compensation for committing the offense; (3) the need for deterrence; and (4) that he failed to notify anyone that Schillinger had ingested methadone. Defendant concedes that he has forfeited the above arguments by his failure to file a motion to reconsider sentence (see *People v. Hillier*, 237 Ill. 2d 539, 544 (2010)), but urges that we review these errors under the plain error rubric. We find that the trial court's consideration of certain aggravating factors and evidence was plain error. Because we cannot determine from the record that the weight placed on the improper factors was insignificant, we vacate the sentence of the trial court and remand for resentencing.

¶ 22 A. Aggravating Factors

¶ 23 Imposition of a sentence is normally within a trial court's sound discretion. *People v. Jones*, 168 Ill. 2d 367, 373 (1995). However, the question of whether a court relied upon an improper factor in imposing sentence is a question of law, and is therefore subject to *de novo* review. *E.g.*, *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8. We examine each of the above four aggravating factors in turn.

¶ 24 1. Serious Harm

¶ 25 Section 5-5-3.2(a)(1) of the Unified Code of Corrections (Code) provides the fact that a "defendant's conduct caused or threatened serious harm" shall be considered an aggravating factor at sentencing. 730 ILCS 5/5-5-3.2(a)(1) (West 2012). The trial court explicitly cited this statutory subsection in sentencing defendant. Defendant contends that this consideration was improper, because the fact of serious harm was implicit in the offense of drug-induced

homicide.¹

¶ 26 In *People v. Saldivar*, 113 Ill. 2d 256 (1986), our supreme court addressed this issue directly. The court stated:

"Certain criminal conduct may warrant a harsher penalty than other conduct, even though both are technically punishable under the same statute. Likewise, the commission of any offense, *regardless of whether the offense itself deals with harm*, can have varying degrees of harm or threatened harm. The legislature clearly and unequivocally intended that this varying quantum of harm may constitute an aggravating factor." (Emphasis added.) *Id.* at 269.

Furthermore, the court found that:

"[T]he severity of the sentence depends upon the *degree of harm* caused to the victim and as such may be considered as an aggravating factor in determining the exact length of a particular sentence, *even in cases where serious bodily harm is arguably implicit in the offense for which a defendant is convicted*. (Emphases in original.) *Id.*

The *Saldivar* court found that it was permissible for the trial court to consider "the force employed and the physical manner in which the victim's death was brought about" when sentencing the defendant for voluntary manslaughter. *Id.* at 271. Nevertheless, the court

¹ "A person who violates Section 401 of the Illinois Controlled Substances Act [(720 ILCS 570/401 (West 2012))] *** by unlawfully delivering a controlled substance to another, and any person's death is caused by the injection, inhalation, absorption, or ingestion of any amount of that controlled substance, commits the offense of drug-induced homicide." 720 ILCS 5/9-3.3(a) (West 2012).

concluded that the trial court had not considered the manner of death, but instead the mere fact of death, which was impermissible as it was implicit in the offense of voluntary manslaughter.

¶ 27 A factor implicit in the offense for which a defendant is convicted may not later be used as an aggravating factor at sentencing. *People v. Phelps*, 211 Ill. 2d 1, 12 (2004). The court's analysis in *Saldivar*, however, makes clear that while a court may not consider the mere fact of serious harm in aggravation (where serious harm is implicit in the offense), it may still consider the degree or severity of that harm as an aggravating factor. Even when the harm implicit in the offense is death—of which there are no varying degrees—the court may consider the manner in which the defendant caused the death.

¶ 28 In citing the "serious harm" statutory factor, the trial court's lone comment was as follows: "[Defendant's] conduct in both cases caused the death of Travis Whiteman and Cody Schillinger. A result, of course, far in excess of the language of the Statute, which reads, caused or threatened serious harm." As did the *Saldivar* court, we find that the trial court's focus was on the end result of defendant's conduct—that is, the death of Whiteman and Schillinger—rather than the manner in which death was brought about. See *Saldivar*, 113 Ill. 2d at 271-72. Because the death of the victims is implicit in the offense of drug-induced homicide, it cannot be considered in aggravation. See *id.*

¶ 29 In the interest of clarity upon remand, it should further be noted that the offense of drug-induced homicide is generally ill-suited to a consideration of the "serious harm" aggravating factor. In the case of many offenses in which death is an element—such as voluntary manslaughter, as considered in *Saldivar*—a defendant may bring about death in a number of ways that vary in severity or egregiousness. Drug-induced homicide, however, contemplates only one manner of death: an adverse reaction to the delivered drugs.

¶ 30

2. Receipt of Compensation

¶ 31

Section 5-5-3.2(a)(2) of the Code provides the fact that a "defendant received compensation for committing the offense" shall be considered an aggravating factor at sentencing. 730 ILCS 5/5-5-3.2(a)(2) (West 2012). Defendant contends that the trial court erred in considering this factor because no evidence was adduced at trial that defendant was compensated for delivering methadone to either Whiteman or Schillinger.

¶ 32

In *People v. Conover*, 84 Ill. 2d 400, 405 (1981), our supreme court held that "receiving compensation for committing the offense under the statute applies only to a defendant who receives remuneration, other than proceeds from the offense itself, to commit a crime." Because most deliveries of controlled substances involve proceeds, "it is reasonable to conclude that the legislature already considered that factor in establishing the penalties." See *id.* (in context of burglary and theft). In the present case, when citing this aggravating factor, the trial court merely noted that defendant was a drug dealer. Under *Conover*, this is insufficient to trigger the "receipt of compensation" aggravating factor. Accordingly, the trial court's consideration of defendant's purported receipt of compensation was improper.

¶ 33

The State concedes that the receipt of compensation is implicit in the offense of drug-induced homicide, and would therefore be an improper consideration as a statutory aggravating factor. Instead, the State argues that compensation from selling drugs was part of defendant's lifestyle. The State contends that the court was free to consider this fact as indicative of defendant's "general moral character, mentality, social environment, and habits[.]" Citing *People v. Alexander*, 239 Ill. 2d 205, 213 (2010), the State maintains that these are all legitimate considerations at sentencing.

¶ 34

The State's argument ignores the fact that the court specifically cited section 5-5-3.2(a)(2)

as an aggravating factor. Rather than basing its sentence on its evaluation of defendant's "general moral character," the court explicitly cited defendant's receipt of compensation in the context of the statutory factor. As we have already discussed, this was improper.

¶ 35

3. Deterrence

¶ 36

Section 5-5-3.2(a)(7) of the Code provides the necessity "to deter others from committing the same crime" shall be considered an aggravating factor at sentencing. 730 ILCS 5/5-3.2(a)(7) (West 2012). Defendant argues that the trial court erred in considering Baldi's report when determining that the need for deterrence existed. Defendant maintains that the report itself was irrelevant, as it provided no indication of the number of overdose deaths from illegal drugs. The State does not refute defendant's argument that the report was irrelevant, instead simply arguing that the court's consideration of the need for deterrence was proper.

¶ 37

Although the discretion of a trial court in hearing evidence and determining appropriate sentences is broad, there are limits to this discretion. *People v. Jackson*, 149 Ill. 2d 540, 549 (1992). "[A] trial court 'must exercise care to insure the accuracy of information considered and to shield itself from what might be the prejudicial effect of improper materials.' " *Id.* (quoting *People v. Adkins*, 41 Ill. 2d 297, 300 (1968)). While our supreme court has not prescribed any specific traditional burden of proof to apply at sentencing, "the court has consistently stated that relevance and reliability are the important factors in the consideration of evidence at sentencing." *Jackson*, 149 Ill. 2d at 549; see also *People v. Lopez-Bonilla*, 2011 IL App (2d) 100688, ¶ 14.

¶ 38

Because the unlawful delivery of drugs is a necessary element of drug-induced homicide, deterrence of drug dealing would serve to deter the offense of drug-induced homicide. However, Baldi's report did not distinguish between deaths caused from overdoses of illegally acquired drugs and any other type of death. As defendant correctly points out, the deaths related to legal

substances, such as ethanol (alcohol), prescription drugs, fentanyl, methadone, or compressed duster are not themselves indicative of any criminal activity that may be deterred. Further, the report is devoid of context; that is, it provides no indication of how the number of drug-related deaths compares to similarly situated counties, so as to demonstrate a "drug problem." In short, the report simply does not speak to the deaths caused by drug-dealing in Tazewell County.

¶ 39 A trial court may properly consider the need for deterrence as a statutory aggravating factor. 730 ILCS 5/5-5-3.2(a)(7) (West 2012). In the case at hand, the trial court was free to consider the testimony of Schillinger's stepmother or Baldi in determining the need to deter the delivery of drugs. However, because Baldi's report was not relevant to drug deaths stemming from deterrable criminal activity, the court's consideration of the need for deterrence was improper insofar as that consideration was based upon that report.

¶ 40 4. Defendant's Failure to Notify Authorities of Schillinger's Ingestion of Methadone

¶ 41 Finally, defendant argues that the trial court improperly considered his failure to notify police or medical personnel of Schillinger's ingestion of methadone as an aggravating factor. Defendant maintains that the evidence indicates that Schillinger himself did not admit to ingesting methadone, and would not have accepted medical treatment had defendant notified anyone of Schillinger's methadone use. Accordingly, defendant contends that the court's conclusion that defendant failed to make an effort to save Schillinger was not supported by the evidence.

¶ 42 The trial court, contrary to defendant's argument, was not concerned with the actual results of defendant's failure to notify anyone that Schillinger had ingested methadone. Instead, defendant's failure was indicative of his goal of minimizing his own accountability. This was compounded by the fact that defendant clearly knew the potential results of taking methadone,

based upon his own experience and that of his girlfriend. Defendant's desire to reduce his own accountability, at the expense of Schillinger, is indicative of his general moral character and mentality. These are both proper considerations at sentencing. *Alexander*, 239 Ill. 2d at 213.

¶ 43 B. Effect of Improper Considerations

¶ 44 "A sentence based on improper factors will not be affirmed unless the reviewing court can determine from the record that the weight placed on the improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence." *People v. Heider*, 231 Ill. 2d 1, 21 (2008). Accordingly, having established that the trial court erred in considering improper aggravating factors, it is the task of this court to determine if consideration of those factors led the trial court to impose a greater sentence.

¶ 45 Drug-induced homicide is a Class X felony, for which an offender may be sentenced to a term of imprisonment between 6 and 30 years. 720 ILCS 5/9-3.3(a) (West 2012); 730 ILCS 5/5-4.5-25 (West 2012). The trial court imposed sentences of 12 years' and 15 years' imprisonment in the deaths of Whiteman and Schillinger, respectively. Each sentence was at least twice the minimum sentence, and each was greater than the sentence requested by the State. Aside from those discussed *supra*, the only statutory factor in aggravation was defendant's adjudication of delinquency. See 730 ILCS 5/5-5-3.2(a)(3) (West 2012) ("the defendant has a history of prior delinquency or criminal activity[.]")

¶ 46 Further, the trial court's language at sentencing tends to indicate that its consideration of certain improper factors led to its imposition of a greater sentence. As to the "serious harm" factor, the court opined that defendant's conduct was "far in excess of the language of the Statute[.]" In regard to defendant's purported receipt of compensation, the court found that that aggravating factor applied "in a compelling fashion." The court's determination as to the need

for deterrence was significantly informed by Baldi's report, as the court noted that the need for deterrence was "demonstrated acutely by Dr. Baldi's report."

¶ 47 The sentences imposed by the trial court, the trial court's strong language at sentencing, and the sheer number of improperly considered factors leave this court unable to conclude that the weight placed on those factors was so insignificant that they did not lead to a greater sentence.

¶ 48 C. Plain Error

¶ 49 In determining that the trial court erroneously relied on improper factors when sentencing defendant and that such reliance was not insignificant, we now turn to the question of whether defendant is entitled to relief under the plain error doctrine.² Upon a showing of error, a defendant is entitled to relief if (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing. *Hillier*, 237 Ill. 2d at 545.³

¶ 50 In *People v. Martin*, 119 Ill. 2d 453, 458 (1988), our supreme court held that "[t]he trial judge's consideration of the fact that the defendant's conduct caused serious harm *** as a factor in aggravation in sentencing clearly affected the defendant's fundamental right to liberty [citation] and impinged on her right not to be sentenced based on improper factors." Numerous cases have followed *Martin* in holding that the consideration of improper factors is plain error because of the effect on a defendant's fundamental right to liberty. See, e.g., *People v. Maxwell*, 167 Ill. App. 3d 849, 851-52 (1988); *People v. Robinson*, 391 Ill. App. 3d 822, 843 (2009);

² Defendant concedes that he forfeited the above arguments by his failure to file a motion to reconsider sentence. See *Hillier*, 237 Ill. 2d at 544.

³ Defendant does not contend that the evidence at sentencing was closely balanced.

People v. Haley, 2011 IL App (1st) 093585, ¶ 62.

¶ 51 Under *Martin*, erroneous consideration of improper factors is sufficient to trigger plain error review. Further, we find that the errors were so egregious in number and kind as to deprive defendant of a fair sentencing hearing. See *Hillier*, 237 Ill. 2d at 545. Accordingly, we find that defendant has satisfied his burden in establishing plain error. We therefore remand the matter so that defendant may be resentenced.

CONCLUSION

¶ 52 The judgment of the circuit court of Tazewell County is vacated and the matter is remanded for resentencing.

¶ 53 Vacated; remanded for resentencing.