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2015 IL App (3d) 130875-U

Order filed July 29, 2015
Modified upon denial of rehearing October 1, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 13th Judicial Circuit, La Salle County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-13-0875 Circuit No. 13-CF-26
TERENCE L. MILLER,)	
Defendant-Appellant.)	Honorable H. Chris Ryan, Judge, Presiding.

PRESIDING JUSTICE McDADE delivered the judgment of the court.
Justices O'Brien and Wright concurring in the judgment.

ORDER

¶ 1 *Held:* The trial court abused its discretion at sentencing when it considered aggravating factors inherent in the offense of unlawful delivery of a controlled substance but the error was not reversible plain error.

¶ 2 Defendant, Terence L. Miller, was convicted of unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2012)) and sentenced to a seven-year term of imprisonment. Defendant appeals contending the trial court relied on improper aggravating factors when determining the appropriate sentence. We affirm.

FACTS

¶ 3

¶ 4

A jury convicted defendant of unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2012). Before sentencing defendant, the trial court ordered a presentence investigation report, which revealed that since 2003, defendant committed residential burglary as an adult and juvenile, domestic battery, aggravated battery, and had been sentenced twice to the Department of Corrections. In addition, the report disclosed defendant also committed more than 20 misdemeanor and traffic violations.

¶ 5

At defendant's sentencing hearing, defense counsel requested that defendant receive a sentence of six years' imprisonment. The State requested a sentence of nine years' imprisonment. After hearing the parties' arguments and reviewing a letter written by defendant, the trial court made the following statements with respect to the aggravating and mitigating factors it considered when determining the appropriate sentence:

"Aggravating. A sentence is necessary to deter others. The sale of controlled substances in our society, while it has no direct impact on someone, especially in this case that we can see, it certainly has an indirect impact on society.

One of the most aggravating is the prior criminal history. In this particular matter, he's—being unemployed, he's a profit individual. He's doing this for money.

And mitigation. Apparently, he has one dependent. It doesn't look like there's any support on that.

Apparently he does have a situation, one could argue, as [defense counsel] has, that he's an addict. Not rising to the level of a defense, but on the other hand, it certainly is something the Court can consider.

[Defendant's] letter kind of follows up a little bit and explains some things to me about what's going on and what he was thinking about.

After considering the factors in aggravation and mitigation in this particular matter, this is a sentence that's going to be imposed primarily for the protection of society. I mean, he's just—he's been doing this—he's 25. He's been in the system ever since he was old enough to get in the system."

¶ 6 Ultimately, the trial court sentenced defendant to a term of seven years' imprisonment and two years' mandatory supervised release. Defendant did not raise an objection or file a posttrial motion challenging the factors the trial court relied upon when determining his sentence.

¶ 7 ANALYSIS

¶ 8 On appeal, defendant argues the cause should be remanded for resentencing because the trial court abused its discretion when it considered two improper factors in aggravation that: (1) defendant expected to receive compensation for committing the offense; and (2) defendant's criminal conduct threatened harm to society. Defendant argues these factors were inherent in the offense and therefore cannot be considered as factors in aggravation. Defendant concedes he failed to preserve this issue for review but requests that this court review this claim for plain error. We find the trial court abused its discretion in relying on aggravating factors inherent in the offense, but the error was not plain error.

¶ 9 Generally, a factor implicit in the offense for which a defendant is convicted cannot be used as a factor in aggravation during sentencing. *People v. Ferguson*, 132 Ill. 2d 86, 97 (1989).

The fact that defendant received compensation is a factor inherent in the crime of unlawful delivery of a controlled substance and, therefore, may not be considered as a factor in aggravation. *People v. Smith*, 198 Ill. App. 3d 695, 698 (1990). However, a court "may properly consider a defendant's efforts to maximize profits from a drug enterprise in sentencing for unlawful possession, to the extent that such evidence reflects on the nature of the crime." *People v. M.I.D.*, 324 Ill. App. 3d 156, 159-60 (2001).

¶ 10 In the present case, the court said the following in regard to the compensation factor: "One of the most aggravating is the prior criminal history. In this particular matter, he's—being unemployed, he's a profit individual. He's doing this for money."

¶ 11 It is clear from the court's language that it was not considering defendant's efforts to maximize profits, but rather, was considering defendant's intent to deliver the narcotics for compensation as opposed to keeping them for personal use. The expectation of compensation considered by the court was inherent in the offense, and the court should not have considered it.

¶ 12 Next, defendant challenges the court's reliance on the aggravating factor of the impact defendant's conduct had on society. 730 ILCS 5/5-5-3.2(a)(1) (West 2012). The potential danger posed by drugs to society in general is inherent in the offense of unlawful delivery of a controlled substance. *People v. Robinson*, 391 Ill. App. 3d 822, 844 (2009). However, this does not mean that harm to society can never be considered as an aggravating factor in such a case. A court may consider the specific degree of harm caused by a particular offense. *Id.*

¶ 13 At the sentencing hearing, the court stated:

"Aggravating. A sentence is necessary to deter others. The sale of controlled substances in our society, while it has no direct impact on someone,

especially in this case that we can see, it certainly has an indirect impact on society."

¶ 14 The court considered harm as it applied to society in general, not to the specific degree of harm caused by defendant's crime; it thereby improperly relied on a factor inherent in the offense. Accordingly, the trial court abused its discretion when it considered two aggravating factors which are inherent in the offense.

¶ 15 We now consider whether this error rose to plain error. Plain error is a narrow and limited exception to the rule of forfeiture. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). The plain error doctrine does not require a reviewing court to consider all forfeited errors, as it is not a general savings clause preserving for review all errors affecting substantial rights notwithstanding whether the errors were brought to the attention of the trial court. *People v. Herron*, 215 Ill. 2d 167, 177 (2005). Rather, under plain error, a reviewing court may review a forfeited sentencing error where: (1) the evidence at the sentencing hearing was closely balanced; or (2) the error was so egregious that the defendant was denied a fair sentencing hearing. *People v. Hall*, 195 Ill. 2d 1, 18 (2000). The defendant has the burden of persuasion under both prongs of the plain error doctrine. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). If the defendant does not meet this burden, a reviewing court will honor the procedural default of the issue. *Id.*

¶ 16 Here, the defendant does not assert that the evidence was closely balanced. Instead, he argues that a trial court's consideration of a factor inherent in an offense affects a defendant's fundamental right to liberty and should be considered under the second prong of plain error. In support of this, defendant argues that the trial court's reliance on two improper factors in sentencing is so egregious that it denied him the right to a fair sentencing hearing. We disagree.

¶ 17 Our supreme court had equated the second prong of plain error analysis with structural error. *People v. Thompson*, 238 Ill. 2d 598, 613-14 (2010). Under this analysis, "automatic reversal is only required where an error is deemed 'structural,' *i.e.*, a systemic error which serves to 'erode the integrity of the judicial process and undermine the fairness of the defendant's trial.' " *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009) (quoting *Herron*, 215 Ill. 2d at 186). The supreme court has found structural error to exist in only a limited class of cases, such as a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction. *Thompson*, 238 Ill. 2d at 609.

¶ 18 Here, we conclude that the trial court's consideration of two factors inherent in the offense of unlawful delivery of a controlled substance is not reversible error under the second prong of plain error. Considering a factor inherent in the offense of unlawful delivery of a controlled substance is not included in the limited class of errors which our supreme court has considered structural and reversible under the second prong. Therefore, we do not find that this sentencing error is reversible under the second prong of the plain error doctrine.

¶ 19 In reaching our conclusion, we reject defendant's reliance on *People v. Martin*, 119 Ill. 2d 453 (1988) for the proposition that the trial court's consideration of aggravating factors inherent in an offense amounts to a violation of the second prong of plain error. We note that the *Martin* court found that the trial court's consideration of harm to the victim during sentencing for involuntary manslaughter was invalid under the first prong of the plain error analysis. *Id.* at 459. *Martin* does not stand as precedent that the trial court's error constitutes a violation of the second prong. Significantly, defendant failed to cite any authority supporting his contention that the

consideration of aggravating factors inherent in an offense constitutes a violation of the second prong of the plain error doctrine.

¶ 20 In a petition for rehearing, defendant argues that the six errors described in *Thompson* as reversible under the second prong of the plain error doctrine are not exclusive and that the error at issue is of a similar magnitude, and therefore, warrants reversal under the second prong. Even if we were to agree with defendant's argument that the examples listed in *Thompson* are not exclusive, we find the present error was not so egregious that it denied defendant a fair sentencing hearing. *Hall*, 195 Ill. 2d at 18.

¶ 21 At the time of the offense, defendant was eligible to receive a sentence of three to seven years' imprisonment. 730 ILCS 5/5-4.5-35(a) (West 2012). However, because of defendant's residential burglary (720 ILCS 5/19-3 (West 2004) (Class 1 felony)) conviction in 2005, the circuit court was authorized to impose an extended-term sentence of up to 14 years' imprisonment. 730 ILCS 5/5-5-3.2(b)(1), 5-4.5-35(a) (West 2012). While the trial court did not make an express finding that the sentence it imposed was an extended-term sentence, the presentence investigation report included in the record on appeal demonstrates that defendant was eligible for a 14-year prison term. Defendant's seven-year sentence is at the lowest end of the extended-term sentencing range.

¶ 22 Further, at his sentencing hearing, defendant requested a six-year term of imprisonment. The State requested a nine-year term. The sentence imposed falls closer to the term requested by defendant and not the State. Moreover, defendant's extensive criminal history as an aggravating factor is sufficient to warrant the sentence imposed. 730 ILCS 5/5-5-3.2(a)(3) (West 2012). In light of this, we conclude defendant has not met his burden of persuasion on this issue, and therefore we reject his plain error argument on rehearing.

¶ 23

CONCLUSION

¶ 24

The judgment of the circuit court of La Salle County is affirmed.

¶ 25

Affirmed.