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2015 IL App (3d) 140809-U

Order filed December 17, 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. 3-14-0809
v.)	Circuit No. 13-CF-225
)	
CAMERON A. FOSTER,)	Honorable
)	Kevin Lyons,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Carter and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in sentencing defendant.

¶ 2 Defendant, Cameron A. Foster, appeals from his sentence of 12 years' imprisonment, arguing that the trial court erroneously considered: (1) facts that were not in evidence; (2) a factor inherent in the offense; and (3) its own opinion of fatherhood in sentencing defendant. We affirm.

3 FACTS

¶ 4 On July 15, 2013, defendant entered an open plea of guilty to harassment of a witness (720 ILCS 5/32-4a(a)(2) (West 2012)). As a factual basis, the State stated that Willie Wilson testified in a Peoria County murder trial. The judge in defendant's trial also presided over the murder trial. After the jury returned a guilty verdict in that case, defendant and his friends went to Wilson's girlfriend's house. When Wilson answered the door, defendant hit Wilson over the head with a flower pot that was on the porch, and defendant's friends hit and punched Wilson. Defendant was identified by Wilson and his girlfriend as one of the attackers. The court accepted defendant's plea.

¶ 5 On September 26, 2013, a sentencing hearing was held. Because of a prior conviction for residential burglary, for which he was on parole at the time of this offense, defendant was eligible for an extended-term sentence of 7 to 14 years' imprisonment. The State argued that defendant planned the attack after hearing the verdict at the murder trial. The State reminded the judge that he presided over the murder trial and that Wilson did not testify very well at that trial, causing the prosecutor to play a video statement that the State had recorded with Wilson prior to trial. The State surmised that this was because he was threatened prior to his testimony. Another factor in aggravation, according to the State, was the physical harm it caused the victim. The State asked that defendant be sentenced at or near the maximum: 14 years in the Department of Corrections (DOC).

¶ 6 In mitigation, the defense noted that the victim suffered some abrasions and bruising, but no serious physical injuries, and that defendant "owned up" to his offense by pleading guilty. The defense asked the court to consider the hardship that any sentence of imprisonment would have on defendant's six children, three of which lived with defendant, and to sentence defendant on the low end of the range.

¶ 7 After defendant made a statement, the court said that it did not find that imprisonment would be a hardship for defendant's dependants. The court said:

"The Presentence [Investigation] Report [PSI] reports that the defendant has fathered six children, the defendant has never been married but is currently in a relationship with, and it names the person. It goes on to say that the defendant reported that he is not ordered to pay child support, and that there is no set visitation schedule. According to the defendant he sees his children whenever he wants and financially provides for them, to which I would have to say really? Really?"

The court noted that defendant's mother wrote a letter to the court in which she said that defendant was a great father. The court said, "I'm not quite sure what a great father is under that description, I don't know, but it would seem to me that it would have to require financial support and visitation that is regular and verified and not all over the board."

¶ 8 The court found that "defendant's criminal conduct caused and threatened serious harm," that he had a history of criminal activity, that the sentence was necessary to deter others, and noted that it found the indictment "unnerving to the criminal justice system." The court said:

"That the defendant was bothered, I guess, by the fact that a jury convicted his friend, acquaintance or somebody that he knew, I guess, and he didn't like that, and within an hour of the verdict, gathered together with other people and went and found where he lived. I don't even remember whether Willie Wilson was afraid and didn't live—I think he moved out of the Taft Homes, but he was at his girlfriend's, as I recall."

The court noted that the victim was afraid to testify at the murder trial, that "[t]o say that he was sheepish and apprehensive would be an understatement," that his video testimony was "quite compelling," and that he was attacked "all because he had the blue paper subpoena from the State that required him to testify."

¶ 9 The court further found in aggravation that defendant had a prior conviction for mob action and that he was on parole for a residential burglary at the time of the offense. The court also noted that:

"[M]y recollection of the factual basis was not some sort of I Love Lucy skit where the flower pot sort of cracked over the top of the head of the witness. I believe it was a cement—a concrete container that was sizeable, to say the least, that was lifted and crashed on to the skull of the witness."

Defendant's codefendant was present when the verdict was read, which is how the court concluded that defendant and his friends found out the verdict and decided to beat up Wilson.

¶ 10 The court sentenced defendant to 12 years in the DOC, stating that an extended term was "necessary to preserve the safety and integrity of the system and protect the public." The court further noted that he did not give defendant 14 years because he pleaded guilty.

¶ 11 ANALYSIS

¶ 12 On appeal, defendant argues that his case should be remanded for resentencing because the court considered: (1) facts that were not in evidence; (2) a factor inherent in the offense; and (3) the court's own opinion of fatherhood, when sentencing defendant. We reject each of these contentions.

¶ 13 Defendant concedes that he did not preserve these issues for review, but asks this court to review the issue as a matter of plain error. "[S]entencing errors raised for the first time on appeal

are reviewable as plain error if (1) the evidence was closely balanced or (2) the error was sufficiently grave that it deprived the defendant of a fair sentencing hearing." *People v. Ahlers*, 402 Ill. App. 3d 726, 734 (2010). "Under both prongs of the plain-error doctrine, the defendant has the burden of persuasion." *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Defendant contends that the second prong applies. However, "[t]he first step of plain-error review is determining whether any error occurred." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 14

I. Facts Not in Evidence

¶ 15

Defendant first contends that the trial court erred in considering facts not in evidence in sentencing defendant.

¶ 16

"The appellate court defers to the trial court's decisions concerning sentencing and presumes that the trial court considered only appropriate factors in sentencing, unless the record affirmatively shows otherwise." *People v. Kelley*, 2015 IL App (1st) 132782, ¶ 93 (quoting *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002)). "Sentencing 'requires careful consideration of all factors in aggravation and mitigation, including, *inter alia*, the defendant's age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education, as well as the nature and circumstances of the crime and of defendant's conduct in the commission of it.'" *Id.* ¶ 94 (quoting *Quintana*, 332 Ill. App. 3d at 109) The discretion of the trial court as to what evidence may be presented at a sentencing hearing is broad. *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)) The burden of proof at sentencing is lower than proof beyond a reasonable doubt, and the important consideration is that the evidence received be relevant and reliable. *Id.*

¶ 17 The factual basis for defendant's guilty plea included a reference to the fact that Wilson testified in the previous murder case. Because of this reference in the factual basis, the State reminded the judge that Wilson had to be impeached as his testimony was poor and surmised that this was because Wilson had been threatened before testifying. While defendant asserts that the trial court's consideration of Wilson's demeanor and conduct in testifying in the previous murder trial was improper, we hold that such facts are relevant to sentencing because they went to the nature and circumstances of the charged crime. See *Kelley*, 2015 IL App (1st) 132782, ¶ 93.

¶ 18 Defendant also contends that the court improperly noted that: (1) Wilson "had previously lived at Taft homes but had moved out to live with his girlfriend"; (2) defendant's codefendant was present at the murder trial and found out about the verdict; and (3) "defendant had attacked Wilson 'all because he had *** the blue paper subpoena from the State that required him to come and testify.'" The reviewing court should not focus on a few words or statements of the trial court, rather, the determination of whether or not the sentence was improper must be made by considering the entire record as a whole. *People v. Ward*, 113 Ill. 2d 516, 526-27 (1986). Taking the record as a whole, the trial court did not unduly rely upon the propriety of these statements in sentencing defendant.

¶ 19 Lastly, defendant contends that the court erred in considering that the flower pot was cement or concrete and sizeable, facts which were not in evidence. When considering the record as a whole, the court's emphasis was more on the injuries that resulted from defendant hitting Wilson over the head with the flower pot than on the material of the flower pot itself.

¶ 20 II. Factor Inherent in the Offense

¶ 21 Defendant next contends that the trial court improperly considered a factor inherent in the offense by stating that "defendant's criminal conduct caused and threatened serious harm."

¶ 22 "[T]he trial court may search anywhere within reasonable bounds for facts which may serve to aggravate or mitigate the offense." *People v. Reed*, 376 Ill. App. 3d 121, 128 (2007). A trial court may not consider a factor inherent in the offense as an aggravating factor in sentencing. *People v. Phelps*, 211 Ill. 2d 1, 11 (2004). As the legislature already considered all inherent factors when determining an appropriate sentencing range for the offense, considering the factor again when sentencing results in an improper double enhancement. *People v. Conover*, 84 Ill. 2d 400, 404-05 (1981). However, "the 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.) *People v. Saldivar*, 113 Ill. 2d 256, 269 (1986).

¶ 23 Here, defendant was charged with communicating a threat of injury; causing harm was not an element of the underlying offense. Moreover, by stating that "defendant's criminal conduct caused and threatened serious harm" the court was considering the actual degree of physical harm that occurred. It was not an abuse of discretion for the court to do so. See *id.*

¶ 24 III. Opinion of Fatherhood

¶ 25 Lastly, defendant argues that the trial judge "relied on his own opinion of fatherhood when he sentenced defendant." It appears that defendant is arguing that the factors in mitigation were improperly applied, particularly concerning the hardship that defendant's incarceration would cause his dependents. The Unified Code of Corrections lists factors in mitigation that the trial court must consider when imposing a sentence of imprisonment. 730 ILCS 5/5-5-3.1(a) (West 2012). The court cannot ignore a pertinent mitigating factor (*People v. Burnette*, 325 Ill.

App. 3d 792, 808-09 (2001)), but the weight to be given each factor depends on the facts and circumstances of each case. *People v. Gross*, 265 Ill. App. 3d 74, 80 (1994).

¶ 26 As a mitigating factor, defendant argued that his incarceration would cause excessive hardship to his dependents. The trial court noticed that defendant had six children. Defendant reported that he did not have a visitation schedule or a court order to pay child support,¹ but he visited his children whenever he wanted and provided for them financially. Defendant's mother wrote a letter stating that he was a great father, to which the judge said he did not know what a "great father" was, but that it required regular and verifiable visitation and support, neither of which defendant proffered. Taking this as a whole, the court weighed the evidence on both sides and determined that this mitigating factor was not applicable in this case. The comments the trial court made explain why this particular factor did not apply.

¶ 27 IV. Structural Error

¶ 28 Even if we agreed with defendant that an error occurred, it would not rise to the level of plain error under the second prong. Second prong plain error is akin to structural error. *People v. Eppinger*, 2013 IL 114121, ¶ 19. The Illinois Supreme Court in *Thompson* specifically held that structural errors are found in only a "very limited class of cases." *Thompson*, 238 Ill. 2d at 609. The court defined the class to include: "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." *Id.* The errors alleged in this case do not fit in that class. Even if we were to look beyond the structural errors announced

¹A check of court files during the PSI determined that he was ordered to pay \$10 per month to one of his children, though defendant did not report this child support. This was not mentioned, by either party or the court, during sentencing.

in *Thompson*, we do not believe any of the *alleged* errors are "sufficiently grave that [they] deprived the defendant of a fair sentencing hearing." *Ahlers*, 402 Ill. App. 3d at 734.

¶ 29

CONCLUSION

¶ 30

The judgment of the circuit court of Peoria County is affirmed.

¶ 31

Affirmed.