

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2015 IL App (4th) 130739-U

NO. 4-13-0739

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

June 25, 2015

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)

Plaintiff-Appellee,)

v.)

KEITH L. ROBERSON,)

Defendant-Appellant.)

) Appeal from

) Circuit Court of

) Champaign County

) No. 11CF1233

) Honorable

) Harry E. Clem,

) Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Pope and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court held defendant forfeited his claim by failing to argue before the trial court the State's aggravation evidence consisted of inadmissible double hearsay evidence.

¶ 2 In April 2012, defendant, Keith L. Roberson, entered an open plea of guilty to one count of armed habitual criminal, a Class X felony, in connection with events that transpired in August 2011. 720 ILCS 5/24-1.7(a) (West 2010). In May, the trial court sentenced defendant to a term of 20 years' imprisonment. Defendant appeals, alleging the trial court improperly considered inadmissible double hearsay evidence in imposing the sentence. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On August 2, 2011, an off-duty Champaign police sergeant observed defendant in Centennial Park. The officer alerted on-duty officers because defendant was wanted on a warrant in connection with an April 29, 2011, incident. Defendant ran when he saw the police

squad cars. A chase ensued and defendant eventually surrendered. At the time of arrest, defendant had a backpack on his person containing a loaded .38-caliber handgun. Based on the August 2, 2011, incident and defendant's multiple prior felony convictions, the State charged defendant in Champaign County case No. 2011-CF-1233 with one count of armed habitual criminal. 720 ILCS 5/24-1.7(a) (West 2010). In case No. 2011-CF-897, the State charged defendant with one count of armed habitual criminal and one count of aggravated discharge of a firearm in connection with the April 29, 2011, incident.

¶ 5 In April 2012, defendant, who was present with private counsel, James Dedman, entered an open plea of guilty to the armed habitual criminal charge connected with the August 2, 2011, incident. In exchange for defendant's guilty plea in case No. 2011-CF-1233, the State agreed to dismiss case No. 2011-CF-897, alleging armed habitual criminal and aggravated discharge of a firearm associated with the April 29, 2011, incident.

¶ 6 In May 2012, the matter proceeded to a sentencing hearing. The presentence investigation report indicated defendant's prior convictions for multiple felonies: a 2004 Class 1 felony conviction for unlawful possession with intent to deliver a controlled substance, for which he received 24 months' probation; a 2005 Class 1 felony conviction for attempt (home invasion), for which he received eight years' imprisonment; a 2006 Class 4 felony conviction for obstructing justice, for which he received 30 months' imprisonment; a 2008 Class 2 felony conviction for manufacture and delivery of not less than 30 but not more than 500 grams of cannabis on school grounds, for which he received three years' imprisonment; and a 2010 Class 3 felony conviction for theft of property valued between \$300 and \$10,000, for which he received 24 months' conditional discharge. The presentence investigation report also revealed defendant has two young children with whom he had daily contact prior to his incarceration. "Although he

has never held a job, he stated he provided for them by providing clothes for them and acting as their 'babysitter.' " Defendant has his general equivalency diploma, a Level C welding trade certification, and was enrolled in 12 credit hours at Parkland Community College at the time of his arrest.

¶ 7 At the sentencing hearing, the State presented testimony from Detective Keith Johnston. Johnston testified the Champaign police department received a call of shots fired near Dorsey Homes, a public housing complex at the time, on April 29, 2011. Officers responded and saw people running from the basketball court, which is located near a playground. Johnston testified officer Kendrick Walls spoke with an 11-year-old, T.H. T.H. said he was near the basketball court when he saw a man walk up with a handgun. T.H. heard shots and ran from the area, leaving his bicycle behind. Johnston testified T.H. told Walls he returned to retrieve his bike. T.H. gave Walls a description of the man with the gun and a description of the gun itself. Johnston further testified police officers recovered two spent shell casings and a cellular telephone from the scene.

¶ 8 Johnston then testified officer Patrick Simons investigated the contents of the phone. A Bluetooth device labeled "Mississippi" was synced with the phone. Johnston testified he was familiar with defendant and, because of his professional responsibilities, Johnston was aware defendant's nickname is "Mississippi." Johnston further testified members of the investigation department put together a photo lineup for T.H. to view. From the photo lineup, T.H. identified defendant as the man who discharged a handgun near Dorsey Homes on April 29, 2011. On cross-examination, defense counsel established Johnston did not participate in the investigation into the April 29, 2011, incident and did not prepare a report. Johnston read the police reports prepared by other officers and testified as to what he read.

¶ 9 Defendant presented witness Shanicka Dixon in mitigation. Lareena Wilkins, with whom defendant has a son, is Dixon's sister. Dixon testified defendant is kindhearted, has never harmed or hurt anyone, and supports his children.

¶ 10 During argument, the State asked the trial court to consider Johnston's testimony regarding the April 29, 2011, incident in aggravation. The State further "ask[ed] the [c]ourt to send a message to Mr. Roberson and to those similarly situated, that it is never acceptable to arm yourself in public, it is never acceptable to discharge a weapon in public." The State requested a 25-year term of imprisonment.

¶ 11 Defense counsel argued ample aggravation existed without consideration of Johnston's testimony regarding the April 29, 2011, incident. Counsel pointed out Johnston had no connection with the investigation into the Dorsey Homes shooting and the identification witness was not subject to cross-examination. Defendant maintained he did not commit the Dorsey Homes shooting and did not plead guilty to that offense. Defendant did not request a specific sentence but asked the court to impose a sentence shorter than the term requested by the State. Defendant spoke in allocution, acknowledging he was wrong for possessing a firearm, apologizing, and accepting responsibility for his actions. Defendant asked the court to show mercy for his children's sakes, stating he never knew his father and expressing his desire for his children not to experience the same.

¶ 12 The trial court noted defendant pleaded guilty to a nonprobational Class X felony with a sentencing range between 6 and 30 years' imprisonment. The judge considered defendant's rehabilitative potential and "sought to impose a sentence that [was] consistent with the offense committed and *** would serve as a deterrent for anyone who might consider

committing such an offense." The court sentenced defendant to 20 years' imprisonment. The judge went on to say:

"For the record, as indicated, the [c]ourt has considered matters in aggravation and in mitigation. In mitigation, the [d]efendant pleaded guilty to the charge in this cause. The [d]efendant is still a relatively young person. The [d]efendant apparently has family support and support from friends.

The [d]efendant apparently supports his children, although quite frankly, the [c]ourt is at some loss to know how he does that since he's never had steady, gainful employment.

As far as matters in aggravation, the [c]ourt has taken into account the [d]efendant's history of criminality, which began with a felony conviction in 2004, and has continued through the present proceedings.

The [c]ourt is required to consider whether the [d]efendant's conduct caused or threatened harm to anyone. Carrying a gun through a park certainly threatens harm.

The [c]ourt takes notice of the numerous times that the [d]efendant did not comply with sentences—provisions of sentences that have been previously imposed by the [c]ourt.

I would take note, despite [d]efendant's disclaimer that he's never harmed anyone, his—one of his first convictions was attempt home invasion. The—and I'm considering the testimony of

Detective Johnston to this extent; the [d]efendant has pleaded guilty here to, first of all possessing a weapon that he knew as a convicted felon he couldn't possess, and carrying it around in a public place. And apparently, in the incident referred to by *** Detective Johnston, he was engaged in similar conduct. And on that occasion was identified by someone else who was present as a person who had discharged a firearm in a public place.

The [d]efendant may be kindhearted, but he has an extensive criminal background for a person his age. These are not, as was characterized by the [d]efendant and his witness, mistakes. These are decisions that the [d]efendant made to break the law. And in this case, to break a very serious law; that is what it is because of his past convictions.

I believe that any sentence less than that which was imposed by the [c]ourt would be inconsistent with the [d]efendant's history of criminality, his failure to take advantage of prior sentences and change the direction of his life."

Pursuant to the plea agreement, the court ordered the information containing the charges connected with the April 29, 2011, Dorsey Homes shooting dismissed and stricken.

¶ 13 Defense counsel filed a motion to reconsider, arguing the trial court placed too much weight on Johnston's testimony regarding the April 29, 2011, shooting. Defendant, *pro se*, filed a motion to reconsider and a motion to withdraw his guilty plea, alleging Dedman provided ineffective assistance of counsel. Following a hearing, the trial court allowed Dedman's motion

to withdraw. The court allowed defendant 30 days to obtain new counsel. Defendant later sent the court a letter requesting appointed counsel. The court appointed the public defender and allowed 30 days for counsel to amend defendant's motions.

¶ 14 Assistant Public Defender Scott Schmidt thereafter filed a motion to reconsider the sentence or, in the alternative, to withdraw defendant's guilty plea and vacate the sentence. The motion argued defendant's sentence was excessive in light of the State's evidence in aggravation and the trial court's failure to adequately consider defendant's rehabilitative potential. The motion also alleged defendant's guilty plea was not knowing and voluntary and was a result of Dedman's promise of a sentence of imprisonment in the single digits. The motion also alleged defendant received ineffective assistance of counsel in that Dedman did not adequately communicate with defendant and did not inform defendant evidence relating to the dismissed charges connected to the April 29, 2011, incident could be presented at sentencing.

¶ 15 At the hearing on the second motion to reconsider or withdraw the guilty plea, testimony addressed the State's aggravation evidence with respect to whether Dedman informed defendant the State could present aggravation evidence at all. When called to testify, Dedman expressed his surprise at how much weight he perceived the trial court gave to the evidence regarding the Dorsey Homes shooting. The trial court found defendant's guilty plea was fully informed and voluntary and defendant was aware of the sentencing range for the offense. The court also rejected defendant's allegations of ineffective assistance of counsel and denied defendant's motion to withdraw his guilty plea. Neither party presented evidence or argument on the motion to reconsider the sentence. The court noted the seriousness of the charge, defendant's five prior felony convictions, and the fact multiple sentences of imprisonment failed to deter defendant from committing further crimes. The court declined to alter the sentence imposed.

¶ 16 Defendant filed a notice of appeal. On April 23, 2013, the appellate court entered an order allowing defendant's motion for summary remand for strict compliance with Illinois Supreme Court Rule 604(d) (eff. Jan. 1, 2013). On August 5, 2013, Public Defender Randall Rosenbaum filed another motion to withdraw the plea or, alternatively, to reconsider the sentence. The August 5, 2013, motion incorporated the arguments raised in the motions filed by Dedman and Schmidt and raised an additional claim of ineffective assistance of counsel, alleging Dedman failed to contact and present additional witnesses in mitigation.

¶ 17 Following a hearing, the trial court took the matter under advisement and ultimately entered a written order on defendant's various postplea motions. We set forth the sole paragraph in the eight-page order relevant to this appeal:

"In regard to [d]efendant's request that the [c]ourt impose a lesser sentence than that previously imposed, [d]efendant claims that the [c]ourt placed too much weight on the testimony of Champaign Police Detective Keith Johnston, who testified as an aggravation witness for the People at the May 24, 2012[,] sentencing hearing. Detective Johnston testified from police reports he had reviewed about an incident that had occurred on April 29, 2011. On that date, an eyewitness identified [d]efendant, from a photo lineup, as the person who had discharged a firearm within the Dorsey Homes public housing complex. In considering Detective Johnston's testimony, the [c]ourt understood that the testimony was hearsay and considered the testimony to be background information to [d]efendant's arrest on the charge in this

cause. The testimony was accorded minimal weight in the [c]ourt's sentencing decision."

The court denied defendant's motion to withdraw his guilty plea and again declined to alter the original sentence of 20 years' imprisonment.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, defendant argues the trial court committed prejudicial error by considering Johnston's testimony regarding the April 29, 2011, Dorsey Homes shooting when sentencing defendant on the charge of armed habitual criminal connected with defendant's August 2, 2011, possession of a loaded firearm. Defendant argues Johnston's testimony constituted unreliable, uncontroverted, uncorroborated, double-hearsay evidence and, therefore, was inadmissible at sentencing. The State contends defendant has forfeited this argument by failing to object to the testimony during the sentencing hearing and by failing to preserve the argument in a postsentencing motion.

¶ 21 Section 5-4.5-50(d) of the Unified Code of Corrections requires a defendant to file a written motion to challenge the correctness of a sentence or an aspect of the sentencing hearing. 730 ILCS 5/5-4.5-50(d) (West 2010). Issues must be raised before the trial court in a defendant's written motion to reconsider the sentence to preserve those issues for appeal. *People v. Reed*, 177 Ill. 2d 389, 393, 686 N.E.2d 584, 586 (1997). (We note the statute cited by the State in its brief (730 ILCS 5/5-8-1(c) (West 1994)) was at issue in *Reed* and is currently codified under section 5-4.5-50(d) of the Unified Code of Corrections.) Issues not raised before the trial court are deemed forfeited on appeal. *People v. Rathbone*, 345 Ill. App. 3d 305, 310, 802 N.E.2d 333, 337 (2003). Moreover, "[u]nder Rule 604(d), any issue not raised in a motion

to withdraw a guilty plea or to reconsider a sentence after a guilty plea is forfeited." *People v. Thompson*, 375 Ill. App. 3d 488, 492, 874 N.E.2d 572, 575-76 (2007). This rule permits the trial court to address any "contention of sentencing error and save the delay and expense inherent in appeal if they are meritorious." *Reed*, 177 Ill. 2d at 394, 686 N.E.2d at 586. See also *People v. Hanson*, 2014 IL App (4th) 130330, ¶ 17, 25 N.E.3d 1; *People v. Ahlers*, 402 Ill. App. 3d 726, 731-32, 931 N.E.2d 1249, 1254 (2010).

¶ 22 Defendant did not object to Johnston's testimony during the sentencing hearing. On cross-examination, defense counsel established Johnston did not personally participate in the investigation into the Dorsey Homes shooting. Defendant argued Johnston's testimony, particularly with respect to the cell phone contents, was insufficient to connect defendant with the April 29, 2011, incident and should not have been considered in aggravation. This contention goes to the weight of the evidence, not its admissibility.

¶ 23 Defendant's first motion to reconsider the sentence, filed by Dedman, reads, in pertinent part:

- "a. Other similarly situated Defendants have received sentences closer to the minimum.
- b. The Sentence was excessive.
- c. The Court should have considered the facts presented by Detective Johnson [*sic*] regarding the incident [of] April 29, 2011.
- d. The Court placed too much weight on the testimony of Detective John [*sic*] regarding the incident of April 29, 2011."

On appeal, defendant contends the motion was written in haste and should have alleged the trial court should *not* have considered Johnston's testimony. However, the record clearly shows

Dedman's argument concerned the *weight* the trial court gave Johnston's testimony and not the *admissibility* of the testimony. The second motion to reconsider the sentence or withdraw the guilty plea, filed by Schmidt, argued the sentence was excessive in light of "[t]he State's evidence in aggravation" and the trial court's inadequate consideration of defendant's rehabilitative potential and mitigation evidence. The motion also argued Dedman provided ineffective assistance of counsel. The third motion to reconsider or withdraw the guilty plea, filed by Rosenbaum, incorporated the arguments made in Dedman's and Schmidt's motions and set forth another ineffective assistance of counsel claim, alleging Dedman failed to contact and present additional mitigation witnesses. Nowhere in the various motions to reconsider the sentence or withdraw the guilty plea do the words "hearsay" or "inadmissible" appear, nor was the argument raised during any hearing before the trial court. For the first time on appeal, defendant argues Johnston's testimony was inadmissible double hearsay. Thus, we find defendant has forfeited, that is, procedurally defaulted, this claim.

¶ 24 We also note the record shows the trial court clearly did not afford Johnston's testimony significant weight. The court repeatedly emphasized defendant's extensive criminal history—independent of the incident to which Johnston testified—and defendant's recidivism and failure to adjust his behavior even after multiple sentences to the Department of Corrections. The judge also stated, in his written order, he considered the testimony only as "background" information and accorded it "minimal weight" with respect to the sentence imposed. It is clear from the record the trial court made its sentencing decision primarily on the basis of defendant's five prior felonies and to deter similarly situated felons from possessing firearms. The error, if any, was not "so egregious as to deny the defendant a fair sentencing hearing." *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184, 1187 (2010).

¶ 25

III. CONCLUSION

¶ 26 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we grant the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 27 Affirmed.