2015 IL App (4th) 130886-U

NO. 4-13-0886

FILED
December 24, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from |
| Plaintiff-Appellee, | ) | Circuit Court of |
| v. | ) | Livingston County |
| BARBARA M. MAYS, | ) | No. 13CF79 |
| Defendant-Appellant. | ) | |
| | ) | Honorable |
| | ) | Jennifer H. Bauknecht, |
| | ) | Judge Presiding. |

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Knecht and Steigmann concurred in the judgment.

**ORDER**

¶ 1 *Held*: The appellate court affirmed, concluding defendant's claims were forfeited and she failed to persuade the court the plain-error rule excused her forfeiture or that her case should be remanded pursuant to Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013). The appellate court further declined to address defendant's claim of ineffective assistance of counsel.

¶ 2 In June 2013, defendant, Barbara M. Mays, pleaded guilty to three drug-related charges in Livingston County case No. 13-CF-79 and two forgery charges in Livingston County case No. 12-CF-319. In September 2013, the trial court sentenced defendant to concurrent terms of seven, six, and four years' imprisonment in case No. 13-CF-79 to run consecutively to the sentence imposed in case No. 12-CF-319. That same month, defendant filed a motion to reconsider her sentence, which the court denied. Defendant appeals, asserting she is entitled to a

remand for a new sentencing hearing or, alternatively, Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013) compliance, because the trial court (1) improperly considered two aggravating factors inherent in the charged offenses, (2) incorrectly concluded she was not 100% committed to recovery, and (3) failed to consider two mitigating factors. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 In March 2013, the State charged defendant by information in case No. 13-CF-79 with (1) unlawful delivery of a controlled substance, a Class 2 felony (720 ILCS 570/401(d)(i) (West 2012)) (count I); (2) unlawful possession with intent to deliver a controlled substance, a Class 1 felony (720 ILCS 570/401(c)(1) (West 2012)) (count II); and (3) unlawful possession of a controlled substance, a Class 4 felony (720 ILCS 570/402(c) (West 2012)) (count III).

¶ 5 In June 2013, defendant and the State reached an open plea agreement. Under the agreement, respondent offered to plead guilty to counts I, II, and III in case No. 13-CF-79 and two counts of forgery in case No. 12-CF-319 in exchange for the State's dismissal of Livingston County case No. 12-CF-229. Upon finding a sufficient factual basis and the plea to be knowing and voluntary, the court accepted respondent's open plea and granted the State's motion to dismiss case No. 12-CF-229.

¶ 6 In July 2013, defendant filed a motion to continue her sentencing hearing as she was admitted to a 60-day residential-treatment program, which the court granted.

¶ 7 In September 2013, the trial court held a sentencing hearing. A presentence investigation report (PSI) presented to the court noted defendant was discharged from the residential-treatment program before a relapse-prevention plan could be completed "because she

was not engaging enough in groups." Defense counsel asserted defendant's lack of engagement stemmed from defendant's preference to discuss traumatic events in her life with an individual counselor.

¶ 8 The PSI detailed defendant's extensive criminal history which included, among other convictions, a 1999 possession of drug paraphernalia conviction, a 2006 possession of a controlled substance conviction, a 2006 possession of a hypodermic syringe conviction, and a 2009 driving under the influence of drugs conviction. Previously, on multiple occasions, when defendant was sentenced to probation or conditional discharge, her sentences were eventually revoked. The PSI also indicated defendant was released on bond in case No. 12-CF-319 when she committed the offenses in case No. 13-CF-79. In the description of the circumstances of the offense, it indicated that on March 27, 2013, an officer conducted a recorded interview of defendant during which she stated she sold heroin approximately six times over a one-year period to four different individuals. Attached to the PSI was a handwritten letter by defendant, to the court, wherein she indicated: "I'm not a drug dealer[,] only a handful of times have I gotten heroin for someone." The PSI investigator's remarks noted as follows:

> "[Defendant] has been a heroin addict for over 10 years. In that 10 years[,] she has been sentenced to prison on [six] different occasions for offenses that are in relation to her heroin addiction. She has not been on probation since 2005 (and that was revoked). [Defendant] expressed during her interview for this report that she recognizes the pattern which is spelled out in her criminal history and substance abuse sections of this report. She is able to stay

> clean when in jail or prison and she feels confident when she gets out and can stay clean for a year at the most, before she 'thinks' she can do heroin just one time and then she quickly tailspins out of control, committing new offenses, to get money for her habit, landing he[r] back in jail and/or prison time and time again."

¶ 9 In mitigation, defendant called Claire Mays, defendant's mother. Claire testified defendant was working "very hard at staying clean." Claire believed defendant was on the right course and requested a sentence of probation and counseling. Defendant gave a statement in allocution, requesting leniency.

¶ 10 In making its sentencing recommendation, the State argued defendant's extensive criminal history was "the most aggravating factor." The State noted defendant was extended-term eligible based on her criminal history. Defendant's criminal history included "crimes of dishonesty, property crimes, [and] drug crimes." The State noted prior sentences of probation were subsequently revoked. Since 2003, defendant had been sentenced to a term of imprisonment seven times for a total of 18 years. The State argued the record demonstrated the severity of defendant's offenses was increasing. The State also noted defendant was released on bond in case No. 12-CF-319 when she committed the offenses in case No. 13-CF-79. The State asserted defendant was both part of the drug problem because she was addicted and contributing to the problem because she was obtaining and "selling it for money." Finally, the State highlighted defendant's statements to the officer in the interview as compared to her assertions in her letter attached to the PSI. Accordingly, the State recommended consecutive sentences of nine years' imprisonment in case No. 13-CF-79 and four years' imprisonment in case No. 12-CF-

319.

¶ 11 In response, defense counsel acknowledged the State's assertions were correct—drugs are a societal problem. However, defense counsel highlighted that defendant was off drugs, had children and a support system, and was nonviolent. Accordingly, defendant requested a sentence of intensive drug probation.

¶ 12 In pronouncing its sentence, the trial court indicated the law directed it to consider factors in aggravation and mitigation. As to aggravating factors, the court stated as follows:

> "[T]here are a number of aggravating factors. The State has pointed out most of them. Obviously the [d]efendant's prior record is an aggravating factor. The [d]efendant received compensation for committing the offense in terms of a monetary compensation. You know, I have yet to have, read any appellate opinion or higher concerning the threat of harm to somebody that is selling heroin, the threat of harm to society by somebody who is selling heroin."

As to the threat of harm to society, the court found selling heroin threatened serious harm to (1) those who consume the drug; and (2) the community, including emergency and first responders. The court indicated this threat was "not the strongest factor in aggravation, but it's something *** the [c]ourt is always mindful of." The court also noted an element of deterrence; however, it found deterrence was not a strong factor because defendant was selling to support her habit.

¶ 13 As to factors in mitigation, the trial court found such factors lacking. The court agreed that defendant was nonviolent and was making an effort to maintain a sober lifestyle; however, it was unsure as to the likelihood of defendant complying with the terms of probation.

The court found defendant 95% committed to recovery based on her lack of participation in group counseling while in the residential treatment program.

¶ 14 The trial court indicated, although it wished to see defendant in intensive drug probation, it had to also consider the:

> "whole slew of very strong aggravating factors. I have your prior record. I have the very serious nature of these offenses. I have the fact that you were selling drugs, not just using drugs. If it was just a simple possession charge it would be a no brainer. You're on probation at the time that you committed the more serious charges."

Accordingly, in case No. 13-CF-79, the court sentenced defendant to concurrent sentences of (1) six years' imprisonment on count I, (2) seven years' imprisonment on count II, and (3) four years' imprisonment on count III. (The court later merged count III with count II.) In case No. 12-CF-319, on each count, the court sentenced defendant to concurrent terms of three years' imprisonment. The sentences in case Nos. 12-CF-319 and 13-CF-79 were ordered to run consecutively for a cumulative term of 10 years' imprisonment. That same month, defendant filed a motion to reconsider her sentence.

¶ 15 In October 2013, the trial court held a hearing on defendant's motion to reconsider her sentence. Defense counsel filed a certificate pursuant to Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013). Following arguments of the parties, the court denied defendant's motion, finding the sentence was appropriate given the aggravating and mitigating factors and defendant's rehabilitative potential.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 On appeal, defendant asserts this court should remand for a new sentencing hearing or, alternatively, Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013) compliance, because the trial court (1) improperly considered two aggravating factors inherent in the charged offenses, (2) incorrectly concluded she was not 100% committed to recovery, and (3) failed to consider two mitigating factors. In response, the State asserts defendant forfeited her claims and has failed to persuade (1) the plain-error rule excuses her default, (2) her case should be remanded for compliance with Rule 604(d), or (3) she received ineffective assistance of counsel. We address these arguments in turn.

¶ 19 A. Forfeiture

¶ 20 It is undisputed that defendant's motion to reconsider her sentence did not allege the trial court (1) improperly considered two aggravating factors inherent in the charged offenses or (2) incorrectly concluded she was less than 100% committed to recovery. Section 5-4.5-50(d) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-4.5-50(d) (West 2012)) requires a defendant to preserve any sentencing issues in a postsentencing motion. As defendant did not properly preserve these issues, we agree with the State that these claims are forfeited.

¶ 21 The State further asserts defendant's claim that the trial court failed to consider two mitigating factors is forfeited. In response, defendant contends the following paragraph in her motion to reconsider her sentence properly preserved the issue for appeal:

> "[T]he sentence imposed *** was unduly harsh and punitive in ***
> light of the factors in mitigation which apply in this cause,

> including[] that [her] criminal conduct neither caused nor threatened serious physical harm to another; [she] did not contemplate that her criminal conduct would cause or threaten serious physical harm to another; *** [her] character and attitudes *** following treatment indicates she is unlikely to commit another crime and [she] is particularly likely to comply with the terms of a period of probation, and the imprisonment of the defendant would entail excessive hardship to her children."

Forfeiture applies when the trial court did not have "an opportunity to review the same essential claim that [is] later raised on appeal." *People v. Heider*, 231 Ill. 2d 1, 18, 896 N.E.2d 239, 249 (2008). Here, defendant's motion to reconsider her sentence argued her sentence was unduly harsh in light of the factors in mitigation; it did not allege the trial court failed to consider mitigating factors. Therefore, we agree with the State that this issue has been forfeited.

¶ 22 Had defendant properly raised these issues in a postsentencing motion, the trial court could have answered her claims "by either (1) acknowledging its mistake and correcting the sentence, or (2) explaining that the court did not improperly sentence [the] defendant." *People v. Rathbone*, 345 Ill. App. 3d 305, 310, 802 N.E.2d 333, 337 (2003). We would then have no need to speculate as to the court's basis for its sentence.

¶ 23 B. Plain-Error Review

¶ 24 In her initial brief, defendant does not assert that we should review her claims for plain error. However, in her reply brief, defendant requests, in relation to her claim that the trial court failed to consider mitigating factors, we review her claim for plain error. Specifically,

defendant asserts the evidence at her sentencing hearing was so closely balanced that the error alone threatened to tip the scales of justice against her.

¶ 25 Under the plain-error doctrine, "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). Plain-error review is a narrow and limited exception to the forfeiture rule, intended to protect a defendant's rights and the integrity of the judicial process; it is not a general saving clause allowing for review of all forfeited issues. *People v. Allen*, 222 Ill. 2d 340, 353, 856 N.E.2d 349, 356 (2006). To allow plain-error review on every forfeited issue would cause the exception to consume the general rule of forfeiture. *Rathbone*, 345 Ill. App. 3d at 311, 802 N.E.2d at 338.

¶ 26 Sentencing errors raised for the first time on appeal are reviewable as plain error if (1) the evidence at the sentencing hearing was so closely balanced that the error alone threatened to tip the scales of justices against the defendant, or (2) the error was sufficiently grave that it deprived the defendant of a fair sentencing hearing. *People v. Scott*, 2015 IL App (4th) 130222, ¶ 41, 25 N.E.3d 1257; *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007). "Under both prongs of the plain-error doctrine, the defendant has the burden of persuasion." *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184, 1187 (2010).

¶ 27 As defendant has not asserted the alleged error deprived her of a fair sentencing hearing, we limit our review to the closely balanced evidence prong. *Hillier*, 237 Ill. 2d at 545-46, 931 N.E.2d at 1188 ("[W]hen a defendant fails to present an argument on how either of the two prongs of the plain-error doctrine is satisfied, he forfeits plain-error review.").

¶ 28 "In determining whether the closely balanced prong has been met, we must make

a 'commonsense assessment' of the evidence (*People v. White*, 2011 IL 109689, ¶ 139[, 956 N.E.2d 379]) within the context of the circumstances of the individual case." *People v. Adams*, 2012 IL 111168, ¶ 22, 962 N.E.2d 410. We initially note, defendant's analysis under the closely balanced evidence prong does not review the evidence in mitigation and aggravation, but rather, simply asserts the trial court's consideration of improper factors in aggravation and failure to consider relevant factors in mitigation resulted in her receiving a lengthier sentence. As such, defendant has failed to meet her burden of persuasion to demonstrate the evidence was closely balanced. See *Hillier*, 237 Ill. 2d at 545, 931 N.E.2d at 1187.

¶ 29 Moreover, our review of the evidence demonstrates it was not closely balanced. In mitigation, the evidence showed defendant was nonviolent, maintained a sober lifestyle after being arrested, and had a family support system. In aggravation, the PSI detailed defendant's extensive criminal history. See 730 ILCS 5/5-5-3.2(a)(3) (West 2012). Defendant's criminal history included, among other convictions, a 1999 possession of drug paraphernalia conviction, a 2006 possession of a controlled substance conviction, a 2006 possession of a hypodermic syringe conviction, and a 2009 driving under the influence of drugs conviction. Defendant was sentenced to prison six times for offenses that related to her addiction. On multiple prior occasions when defendant was sentenced to probation or conditional discharge, her sentences were later revoked. Defendant recognized her pattern of staying clean while imprisoned and then repeating her cycle of resuming heroin use and committing new offenses when released from prison. While released on bond in case No. 12-CF-319, defendant committed the offenses in case No. 13-CF-79. See 730 ILCS 5/5-5-3.2(a)(12) (West 2012). Although defendant admitted selling heroin approximately six times over a one-year period to four different

individuals, she did not believe she was a "drug dealer." In considering the evidence presented, we find such evidence was not so closely balanced as to warrant plain-error review.

¶ 30 C. *People v. Atwood*

¶ 31 In her initial brief, defendant requests, pursuant to *People v. Atwood*, 193 Ill. App. 3d 580, 593, 549 N.E.2d 1362, 1370 (1990), that we review her claim that the trial court improperly considered two aggravating factors inherent in the charged offenses because of the importance of proper consideration of these factors to a defendant. We decline defendant's invitation.

¶ 32 In *Atwood*, 193 Ill. App. 3d at 593, 549 N.E.2d 1369, the State "point[ed] out that the issue of improper consideration of aggravating factors was raised by defendant for the first time on appeal." This court, referencing *People v. Martin*, 119 Ill. 2d 453, 519 N.E.2d 884 (1988), found the issue not to have been "waived" because (1) the defendant was not required to object to the inclusion of improper factors being taken into consideration while the trial court was pronouncing its sentence, and (2) "of the importance of proper consideration of these factors." *Atwood*, 193 Ill. App. 3d at 593, 549 N.E.2d 1370.

¶ 33 Subsequent to our decision in *Atwood*, in *Rathbone*, we addressed plain-error analysis for sentencing issues. In *Rathbone*, 345 Ill. App. 3d at 312, 802 N.E.2d at 339, the defendant asserted the trial court committed plain error when it sentenced him based on an improper factor; the defendant did not assert (1) the evidence at sentencing was closely balanced, or (2) the error deprived him of a fair sentencing hearing. We disagreed with the line of cases citing *Martin* for authority to dispense with plain-error analysis for sentencing errors. *Rathbone*, 345 Ill. App. 3d at 312, 802 N.E.2d at 339. In addition, we noted *Martin* was decided before the

1993 amendment to section 5-8-1(c) of the Unified Code (730 ILCS 5/5-8-1(c) (West 2000) ("A defendant's challenge to the correctness of a sentence or to any aspect of the sentencing hearing shall be made by a written motion filed within 30 days following the imposition of sentence.")) and the supreme court's enforcement of that section in *People v. Reed*, 177 Ill. 2d 389, 393, 686 N.E.2d 584, 586 (1997) (requiring the defendant to file a written postsentencing motion in the trial court to preserve sentencing issues for appellate review). Accordingly, we decline defendant's request to relax the forfeiture rule and address her assertion the trial court improperly considered aggravating factors because of the "importance of proper consideration of these factors to a defendant."

¶ 34 D. Rule 604(d) Compliance

¶ 35 Defendant further asserts this court should remand for new postplea proceedings as defense counsel failed to comply with Rule 604(d). Specifically, defendant asserts, although defense counsel's Rule 604(d) certificate is technically compliant, the record impeaches the certificate because defense counsel omitted "meritorious" issues from her motion to reconsider her sentence. We find defendant's assertion unpersuasive.

¶ 36 A main purpose of Rule 604(d) is "to ensure that any improper conduct or other alleged improprieties that may have produced a guilty plea are brought to the trial court's attention *before* an appeal is taken, thus enabling the trial court to address them at a time when witnesses are still available and memories are fresh. Toward that end, the rule's certificate requirement is meant to enable the trial court to ensure that counsel has reviewed the defendant's claim and considered *all* relevant bases for the motion to withdraw the guilty plea or to reconsider the sentence." (Emphases in original.) *People v. Tousignant*, 2014 IL 115329, ¶ 16, 5

N.E.3d 176. Defendant cites no authority for her proposition that Rule 604(d) was intended to function as an avenue to hold defense counsel ineffective for failing to include a meritorious issue in a postsentencing motion. In fact, we have found Rule 604(d) was satisfied where defense counsel did not believe any amendments to a postplea motion were necessary. See *People v. Kerkering*, 283 Ill. App. 3d 867, 872, 671 N.E.2d 368, 372 (1996) (affirming where the "trial attorney apparently did not believe that any amendments were necessary"; the attorney need only file a new motion "if he or she determines that such action is 'necessary for [the] adequate presentation of any defects' "). We decline to adopt the view that the failure to include a contention of error in a postsentencing motion indicates a lack of compliance with Rule 604(d).

¶ 37 E. Ineffective Assistance of Counsel

¶ 38 Defendant further argues defense counsel rendered ineffective assistance by failing to include her contentions of error in her postsentencing motion, thereby forfeiting them on appeal. We decline defendant's invitation to address her ineffective-assistance-of-counsel claim on direct appeal. See *People v. Blair*, 2015 IL App (4th) 130307, ¶ 47. Instead, we reference our decision in *People v. Durgan*, 346 Ill. App. 3d 1121, 1143, 806 N.E.2d 1233, 1250 (2004), where we highlighted the benefits of considering ineffective-assistance-of-counsel claims through collateral review. Collateral review under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2012)) provides a mechanism by which the pitfalls of reviewing defendant's ineffective-assistance-of-counsel claim in this proceeding can be avoided. Given we lack a record developed precisely for evaluating the ineffective-assistance-of-counsel claim, we reject defendant's suggestion that we reach her ineffective-assistance-of-counsel claim.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we affirm defendant's sentence. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2014).

¶ 41 Affirmed.