2015 IL App (4th) 131099-U

NO. 4-13-1099

FILED
June 16, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
STEPHEN M. WILLIAMS,	)	No. 13CF813
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Knecht and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed in part, finding the trial court did not err in sentencing defendant and defendant did not receive ineffective assistance of counsel. The appellate court reversed the four-year term of mandatory supervised release and remanded with directions that the term be two years.

¶ 2 In July 2013, defendant, Stephen M. Williams, pleaded guilty to one count of aggravated criminal sexual abuse, and the trial court sentenced him to 24 months' probation. In September 2013, the State filed a petition to revoke defendant's probation. In October 2013, defendant stipulated he violated his probationary terms. In November 2013, the court resentenced defendant to seven years in prison, with a four-year term of mandatory supervised release (MSR).

¶ 3 On appeal, defendant argues (1) the sentencing court relied on unreliable hearsay, (2) the presentence investigation report failed to comply with the statute and was not neutral, (3)

he was denied the effective assistance of counsel, and (4) the court improperly imposed a four-year term of MSR. We affirm in part, reverse in part, and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 In May 2013, the State charged defendant by information with two counts of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(d) (West 2012)), alleging he, being at least 5 years older than the victim, committed acts of sexual penetration with the victim, who was at least 13 years of age but under 17 when the acts were committed, in that he intentionally placed his penis in her vagina.

¶ 6 In July 2013, defendant pleaded guilty to a single count. In exchange for the plea, the State agreed the second count would be dismissed and defendant would be sentenced to 24 months' probation and 180 days in jail. The trial court accepted defendant's guilty plea and sentenced him in accord with the agreement. The terms of the probation prohibited defendant from contacting any resident of the Cunningham Children's Home and required him to comply with the Sex Offender Registration Act (730 ILCS 150/1 to 12 (West 2012)). The sentence was contingent upon the results of a sex-offender evaluation. On September 18, 2013, the court confirmed the sentence after reviewing the evaluation.

¶ 7 On September 19, 2013, the State filed a petition to revoke defendant's probation. The petition alleged defendant violated the terms of his probation the day his sentence was confirmed by being in a public park, by being present in the park with residents of Cunningham Children's Home, and by being in the park with a female under the age of 18. In October 2013, defendant entered an open stipulation that he had violated the terms of his probation.

¶ 8 In November 2013, the trial court conducted the sentencing hearing. The court indicated it considered the presentence report, and the only correction involved the number of

days of sentence credit. The court also indicated it reviewed defendant's sex-offender evaluation. The State did not present any evidence in aggravation, and defense counsel did not present any evidence in mitigation. Following recommendations from counsel and defendant's statement in allocution, the court resentenced defendant to seven years in prison. In doing so, the court noted defendant's criminal history and the need to deter others from committing the same offense. Moreover, the court stated a maximum term was necessary because defendant's "history, his character, [and] his condition indicates that he will continue to prey upon young women as best he can whenever he can." The court's written sentencing judgment indicates defendant was subject to an MSR term of four years.

¶ 9 Defense counsel filed a motion to reconsider the sentence, arguing the sentence was excessive. Counsel also argued the trial court gave inadequate consideration to defendant's potential for rehabilitation and his lack of a violent criminal history. In December 2013, the court denied the motion. This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 A. Hearsay at Sentencing

¶ 12 Defendant argues he should be granted a new sentencing hearing where the sentencing court quoted multiple unreliable hearsay statements from his sex-offender evaluation, which alleged he had committed uncharged sex offenses, as the justification for imposing the maximum sentence. The State argues defendant forfeited this issue by failing to raise it in his motion to reconsider his sentence. See *People v. Hestand*, 362 Ill. App. 3d 272, 279, 838 N.E.2d 318, 324 (2005) (a defendant must object at trial and raise the issue in a posttrial motion to preserve the issue for review). Acknowledging the State's forfeiture argument, defendant asks this court to consider the issue as a matter of plain error.

¶ 13 "[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, 931 N.E.2d 1249, 1256 (2010). Under both prongs of the plain-error analysis, the burden of persuasion remains with the defendant. *People v. Wilmington*, 2013 IL 112938, ¶ 43, 983 N.E.2d 1015. As the first step in the analysis, we must determine whether any error occurred at all. *People v. Eppinger*, 2013 IL 114121, ¶ 19, 984 N.E.2d 475. "If error did occur, we then consider whether either prong of the plain-error doctrine has been satisfied." *People v. Sykes*, 2012 IL App (4th) 111110, ¶ 31, 972 N.E.2d 1272.

¶ 14 The alleged error raised by defendant centers on the trial court's consideration of the sex-offender evaluation authored by Michael Kleppin, a forensic therapist. At sentencing, the court quoted from the evaluation, which stated "the reports of [defendant] engaging in sexual activity with a group of minors, who are involved in the child welfare system due to various issues of their own is of serious concern." The court also quoted from the evaluation that "[r]eviews of the materials suggest [defendant] operates by providing sanctuary as well as other potential incentives to those on the run and in turn may have used this to gain compliance in various ways including sexual. As such it seems as though [defendant] is quite manipulative and predatorial in his behavior for sex." Defendant notes the evaluation does not specifically identify the source of the reports or materials and Kleppin did not testify. Defendant argues the court erred in sentencing him to the maximum term while considering multiple hearsay statements that were uncorroborated.

> "The only requirement for admission is that the evidence be reliable and relevant, and this is a decision left to the discretion of

> the trial court. Evidence of other crimes with which the defendant has been charged, but not convicted, is admissible when the testimony is trustworthy and subject to cross-examination. The formal rules of evidence are relaxed to provide the judge with a wide range of information regarding the defendant's life, character, criminal history and propensity to continue to commit other crimes. Even hearsay evidence is not *per se* inadmissible; a hearsay objection affects the weight rather than the admissibility of the evidence, but double hearsay should be corroborated, at least in part, by other evidence." *People v. Spears,* 221 Ill. App. 3d 430, 437, 582 N.E.2d 227, 230-31 (1991).

¶ 15 The hearsay rule does not prohibit an expert from explaining the basis for his opinion. *People v. Lovejoy*, 235 Ill. 2d 97, 142, 919 N.E.2d 843, 868 (2009). An expert may disclose underlying facts and conclusions to explain the basis for his opinion even though the contents of the reports on which he relied "would clearly be inadmissible as hearsay if offered for the truth of the matter asserted." *People v. Pasch*, 152 Ill. 2d 133, 176, 604 N.E.2d 294, 311 (1992).

¶ 16 Here, Kleppin's evaluation indicated he conducted an interview with defendant, administered various psychological tests to him, and reviewed documentation from the Champaign County probation department. He referenced documentation from the probation department indicating defendant was accused of taking in other runaway girls from the Cunningham Children's Home and engaging in sexual activity with them. In citing the material, Kleppin opined defendant "operates by providing sanctuary as well as other potential incentives

to those on the run and in turn may have used this to gain compliance in various ways including sexual." Kleppin stated "it seems as though [defendant] is quite manipulative and predatorial in his behavior for sex." Kleppin relied on all of the materials to diagnose defendant with a sexual disorder not otherwise specified and opined defendant presented a "moderate-high to high" risk of sexual recidivism.

¶ 17 In considering Kleppin's expert opinion, the trial court concluded defendant would "continue to prey upon young women as best he can whenever he can" and that incarceration would be "the only thing that keeps him away" from them. When the court quoted portions of Kleppin's report, it was repeating the basis for the expert's opinion. Thus, the court neither admitted substantively hearsay evidence about uncharged crimes nor considered such statements for the truth of the matters asserted. Accordingly, defendant has failed to show a clear or obvious error occurred.

¶ 18 Even if it could be found to be error for the trial court to have considered the contents of the sex-offender evaluation in the absence of live testimony, we would find defendant was not prejudiced and his sentence need not be reversed. See *People v. Raney*, 2014 IL App (4th) 130551, ¶ 44, 8 N.E.3d 633 (stating "[i]f a defendant has been prejudiced by the procedure used or the material considered by the trial court, the sentence cannot stand").

¶ 19 Here, the trial court noted this case was defendant's eighteenth criminal conviction to go along with two juvenile adjudications. The court found defendant had violated his probation in previous cases and emphasized how he violated his probation in this case within a couple of hours after leaving the interview with his probation officer. Defendant's lengthy criminal history and the need to deter others from committing the crime of aggravated criminal sexual abuse called for a maximum prison sentence in this case. Thus, we find the court would

have imposed the same sentence even if it had never relied on the hearsay in Kleppin's evaluation.

¶ 20 B. Presentence Report

¶ 21 Defendant argues the presentence investigation report (1) failed to comply with the statutory requirement that the report include information about special resources available to assist his rehabilitation and (2) failed to comply with the requirement that it be neutral. We find no reversible error.

¶ 22 Section 5-3-1 of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-3-1 (West 2012)) requires the preparation of a written presentence report for any defendant convicted of a felony. Section 5-3-2(a)(2) of the Unified Code (730 ILCS 5/5-3-2(a)(2) (West 2012)) states the presentence report shall include the following:

> "(2) information about special resources within the community which might be available to assist the defendant's rehabilitation, including treatment centers, residential facilities, vocational training services, correctional manpower programs, employment opportunities, special educational programs, alcohol and drug abuse programming, psychiatric and marriage counseling, and other programs and facilities which could aid the defendant's successful reintegration into society."

Section 5-4-1(a)(2) of the Unified Code (730 ILCS 5/5-4-1(a)(2) (West 2012)) requires a sentencing court to consider any presentence reports.

¶ 23 Defendant argues the probation officer who prepared his presentence report disregarded the statutory requirements by refusing to provide an accounting of community

resources that may have been available to further his rehabilitation. In the report, the probation officer stated as follows:

> "Given the defendant's extensive history of non-compliance with social norms, prior community-based sentences and his dismal failures to abide by requirements set before him in this matter, this office respectfully declines to note any special conditions that might enhance this defendant's prospects at rehabilitation."

The State argues defendant has forfeited review of this issue by trial counsel's failure to object to any deficiencies at the sentencing hearing and by counsel's failure to raise the issue in a motion to reconsider the sentence. See *People v. Stewart*, 365 Ill. App. 3d 744, 748, 851 N.E.2d 162, 166 (2006) (stating if the presentence investigation "report considered by the court is deficient but the defendant fails to object, the issue is waived for review").

¶ 24 In *People v. Meeks*, 81 Ill. 2d 524, 533, 411 N.E.2d 9, 14 (1980), our supreme court found the presentence report failed to comply with the statute as it provided no "comment upon resources within the community which may have been available to assist defendant's rehabilitation." In upholding the sentence, the court noted defense counsel did not object to this deficiency. *Meeks*, 81 Ill. 2d at 533, 411 N.E.2d at 14.

> "It is the duty of the probation officer to prepare a presentence report consistent with the directives of the statute. It is the duty of the parties, however, to bring to the attention of the sentencing authority any alleged deficiency or inaccuracy in the presentence report. The requirement that the trial judge consider the presentence report was complied with in the present case; any

objections to the sufficiency of the report must first be presented to the trial court." *Meeks*, 81 Ill. 2d at 533, 411 N.E.2d at 14.

Here, as defense counsel did not object to the sufficiency of the report, this issue has been forfeited.

¶ 25 Defendant also argues the presentence report failed to comply with the requirement that it be neutral. Defendant points out the summary section of the report indicated he was "unemployed," "undereducated," and presented "a history of court involvement that begins in 1978 with an abuse-neglect case where he was removed from the home as a small child." Defendant also takes issue with the report's statement that he was "the product of a sex-crime himself" and the conclusion that a "review of his criminal history reveals an individual who shirks societal norms and simply does what he wants, whenever he wants regardless of the laws or consequences." Defendant argues a probation officer's opinions have no place in a presentence report and he should be granted a new sentencing hearing where the judge can have the benefit of a neutral and unbiased report.

¶ 26 "[T]he purpose of the requirement of a presentence investigation report is to insure that the trial judge will have all necessary information concerning the defendant before sentence is imposed, including the defendant's criminal history." *People v. Youngbey*, 82 Ill. 2d 556, 564, 413 N.E.2d 416, 420-21 (1980). Section 5-3-2(a)(6) of the Unified Code (730 ILCS 5/5-3-2(a)(6) (West 2012)) states the presentence report shall contain "any other matters that the investigatory officer deems relevant or the court directs to be included." It is not improper for the probation officer who initiated the revocation proceeding to also prepare the presentence report. *People v. Peacock*, 109 Ill. App. 3d 684, 687, 440 N.E.2d 1260, 1262-63 (1982). However, "[t]he presentence investigation must be conducted by a neutral party." *People v.*

Blanck, 263 Ill. App. 3d 224, 237, 635 N.E.2d 1356, 1366 (1994).

¶ 27 While the Unified Code "does not expressly authorize a probation officer to make a sentence recommendation, *** the trial judge may receive such a recommendation." *People v. Young*, 52 Ill. App. 3d 671, 675, 367 N.E.2d 976, 979 (1977). Moreover, "[c]onsideration by a sentencing judge of a probation officer's assessment of the defendant's potential for successful completion of a term of probation is not improper." *People v. Gibson*, 114 Ill. App. 3d 488, 496, 449 N.E.2d 182, 188 (1983).

¶ 28 Here, the presentence report indicated defendant claimed to have completed the eighth grade, but he had not graduated from high school or obtained his general equivalency diploma. The report stated defendant was not employed but had worked some in the past. The report also included sections on defendant's finances, his health, and his religious background.

¶ 29 Defendant complains the report was not neutral because it characterized him in the summary section as "a 42 year old, unemployed, under-educated, five-time convicted felon." However, the report included sections detailing defendant's employment, education, and criminal history, which the trial court could consider in determining a sentence. That the probation officer sought to summarize defendant's history in these areas does not show a particular bias against him. That the report referenced his removal from his home as a child in a 1978 abuse/neglect case did not imply he was responsible. Moreover, the statement that defendant was "the product of a sex-crime himself" because he was "born to a 12 year old girl" provided mitigating, not prejudicial, evidence to the court.

¶ 30 In contrast to the trial judge, whose knowledge of a defendant's circumstances is dependent on what is heard or read in the courtroom, the probation officer has a greater opportunity to become familiar with all aspects of the defendant's life, including family history,

educational background, criminal cases, and other information. Information of this nature, and a recommendation based on the defendant's life circumstances, can prove helpful to the court in fashioning a sentence. We find no error.

¶ 31 C. Assistance of Counsel

¶ 32 Defendant argues he was denied the effective assistance of counsel where defense counsel failed to object to the trial court's consideration of the presentence report and the inadmissible hearsay. We disagree.

¶ 33 A defendant's claim of ineffective assistance of counsel is analyzed under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Cathey*, 2012 IL 111746, ¶ 23, 965 N.E.2d 1109. To prevail on such a claim, "a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To establish deficient performance, the defendant must show his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219, 808 N.E.2d 939, 953 (2004) (citing *Strickland*, 466 U.S. at 687-88). Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Evans*, 209 Ill. 2d at 219-20, 808 N.E.2d at 953 (citing *Strickland*, 466 U.S. at 694). A defendant must satisfy both prongs of the *Strickland* standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 317-18, 939 N.E.2d 310, 319 (2010).

¶ 34 Defendant claims defense counsel's alleged errors prejudiced him as he received the maximum sentence. However, we find defendant cannot establish the prejudice prong of the *Strickland* standard. Defendant's presentence report presented a litany of crimes going back 20

years. Moreover, defendant showed little ability to comply with any terms of probation. Defendant's brief even acknowledges his "chance of again receiving probation may have been slim." Given that he pleaded guilty to the very serious offense of aggravated criminal sexual abuse and violated his probation shortly after meeting his probation officer by being in contact with minor females, a lengthy sentence was necessary to deter others from committing similar acts. In deciding on the maximum seven-year sentence, the trial court found defendant's "condition indicates that he will continue to prey upon young women as best he can whenever he can." The evidence supports the court's sentencing decision, and any failure on the part of counsel to object to hearsay in the sex-offender evaluation or the contents of the presentence report did not result in prejudice to defendant.

¶ 35 D. MSR Term

¶ 36 Defendant argues the trial court improperly imposed an MSR term of four years, where he did not have a prior conviction for aggravated criminal sexual abuse. Defendant notes aggravated criminal sexual abuse is a Class 2 felony. 720 ILCS 5/11-1.60(g) (West 2012). The normal MSR term for a Class 2 felony is two years. 730 ILCS 5/5-8-1(d)(2) (West 2012). A four-year MSR term is imposed "if the victim is under 18 years of age, for a second or subsequent offense of aggravated criminal sexual abuse or felony criminal sexual abuse." 730 ILCS 5/5-8-1(d)(5) (West 2012). Since defendant has no prior conviction for aggravated criminal sexual abuse, he contends the four-year term is void as unauthorized by statute.

¶ 37 In response, the State argues the four-year term of MSR is not void because the present case involves defendant's second admitted offense of aggravated criminal sexual abuse. While agreeing defendant does not have a "prior conviction" for aggravated criminal sexual abuse, the State argues section 5-8-1(d)(5) of the Unified Code does not expressly require a

defendant to have a "prior conviction" for that offense. Moreover, the State argues the record confirms defendant committed a prior offense of aggravated criminal sexual abuse, "albeit an offense that did not result in a judgment of conviction." The presentence report indicates defendant admitted violating his juvenile probation in 1986 by committing the offense of aggravated criminal sexual abuse. Thus, by committing this "offense," the State contends defendant was properly subject to an MSR term of four years.

¶ 38 We agree with defendant. Because defendant did not have any prior convictions for the offense of criminal sexual abuse, defendant is only required to serve a two-year term of MSR. See *People v. Anderson*, 402 Ill. App. 3d 186, 190-93, 931 N.E.2d 773, 776-78 (2010) (analyzing section 5-8-1(d)(5) and stating an offense does not qualify as a "second or subsequent offense," triggering an enhanced term of MSR, unless the defendant committed that offense sometime after conviction was entered on the first offense); see also *People v. Risch-Defina*, 284 Ill. App. 3d 1, 4, 671 N.E.2d 387, 389 (1996) (holding that, although the statute relating to theft of a firearm authorized the enhancement from a Class 4 felony to a Class 3 felony for a subsequent such offense, the theft could not be enhanced unless the defendant had previously been convicted of theft of a firearm).

¶ 39 Defendant's admission in a petition to revoke probation does not constitute a conviction. Section 2-5 of the Criminal Code of 2012 (720 ILCS 5/2-5 (West 2012)) defines "conviction" as "a judgment of conviction or sentence entered upon a plea of guilty or upon a verdict or finding of guilty of an offense, rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury." Defendant admitted violating the terms of his probation. He did not plead guilty and no verdict or finding of guilt was entered in 1986 on the offense of aggravated criminal sexual abuse. Moreover, no sentence was imposed

on the admission. See *People v. Risley*, 359 Ill. App. 3d 918, 920, 834 N.E.2d 981, 983 (2005) (stating a trial court, after revoking a defendant's probation, resentences the defendant on the original conviction). As defendant's admission to the probation violation was not a conviction, it did not constitute an "offense" requiring a four-year term of MSR. Accordingly, we reverse that part of the trial court's sentencing judgment imposing a four-year term of MSR and remand the cause for the issuance of a new sentencing judgment reflecting a sentence of seven years in prison and a two-year term of MSR.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we affirm in part, reverse in part, and remand with directions. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 42 Affirmed in part and reversed in part; cause remanded with directions.