2015 IL App (4th) 131109-U

NO. 4-13-1109

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

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

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
DANIEL L. DUNFORD,	)	No. 13CF254
Defendant-Appellant.	)	
	)	Honorable
	)	Scott H. Walden,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding (1) the trial court properly considered the relevant mitigating factors in sentencing defendant, and (2) the defendant waived appellate review of his claim that the court erred in imposing public-defender reimbursement.

¶ 2 In April 2013, the State charged defendant, Daniel L. Dunford, with one count of burglary, a Class 2 felony (720 ILCS 5/19-1(a) (West 2012)). In October 2013, following a bench trial, the trial court found defendant guilty beyond a reasonable doubt. In December 2013, the court sentenced defendant to 5½ years' imprisonment and, as part of defendant's fines and fees, ordered defendant to pay $323 as reimbursement for public-defender services (725 ILCS 5/113-3.1 (West 2012)).

¶ 3 Defendant appeals, arguing (1) his sentence is excessive given the nature of his offense and does not adequately take into account mitigating factors; and (2) the hearing on defendant's ability to pay for court-appointed counsel was inadequate.

¶ 4 I. BACKGROUND

¶ 5 In April 2013, the State charged defendant by information with burglary, alleging he knowingly and without authority entered Toni Deming's Chevy pickup truck with the intent to commit a theft therein. 720 ILCS 5/19-1(a) (West 2012). Defendant pleaded not guilty and waived his right to a jury trial. In October 2013, the matter proceeded to a bench trial.

¶ 6 A. Bench Trial

¶ 7 Deming testified she was awake around 4 a.m. taking care of her sick daughter the day defendant was arrested. She heard a sound she thought was a raccoon in the driveway and then the doorbell rang. Deming stated, "It sounded like somebody hit the recycle bin that we have back there *** maybe like stumbling around. Right after that *** the doorbell rang, like they fell into the side of the house and hit the doorbell." Deming went to the door and saw a man wearing a dark coat and dark pants walking across her neighbor's property. According to Deming, the man walked up the street, checking cars to see if any were unlocked. Deming called the police to report the man, and while she was on the phone she noticed the dome light in her husband's truck was on. Nothing appeared to be missing from the truck; however, the light had not been on earlier and things were strewn about the interior of the truck and loose change had been moved.

¶ 8 Quincy police officer David Distin testified he responded to an attempted vehicular burglary call on the morning in question. Approximately two blocks from Deming's home, Distin located a person matching the description dispatch had given him: "a male subject

wearing a dark jacket or coat and dark pants who appeared to the caller [(Deming)] to be intoxicated." Distin observed the man, later identified as defendant, walked with an interrupted gait and approached a vehicle, paused, and continued walking. Distin approached defendant and asked if he had seen anyone getting into vehicles, which defendant denied. Distin asked if defendant had gotten into any vehicles, which he also denied. Defendant's pockets were "bulgy" and appeared very full. Distin asked if defendant had anything illegal on him and defendant responded, "[N]o, you can search me." The search revealed defendant had five packs of cigarettes, $105 in bills, and $43.44 in change. The cigarettes "were all different [brands]. Some were open, some were closed[,] and some were opened but full." Defendant claimed he regularly carried that much change on him. When asked about the cigarettes, defendant first claimed they were all his, but later defendant claimed he saw a vehicle with the driver's door open and he found one pack of cigarettes on the ground outside the vehicle. Defendant picked up the cigarettes and reached into the open door and picked up some change from the seat. Distin arrested defendant and later interviewed him at police headquarters.

¶ 9 According to Distin, defendant reiterated he took two quarters and two pennies from the vehicle with the open driver's side door, which defendant indicated was not burglary. Distin informed defendant "that it was, in fact, burglary," and defendant began to cry. According to Distin, defendant "said something to the effect that, I know it's wrong, but it's not like I stole a lot." Defendant initially claimed he had $30 on him because he had recently cashed a paycheck. When confronted with the actual amount of money found on him, defendant claimed he had taken two quarters, two pennies, and two $1 bills from the open vehicle.

¶ 10 Distin expressed his disbelief in defendant's changing stories. Defendant again began to cry and stated he would say whatever Distin wanted to hear so he could leave. Distin

testified he never told defendant he would be permitted to leave if he admitted breaking into vehicles. Distin told defendant he wanted to hear the truth, and defendant eventually admitted breaking into several vehicles.

¶ 11 Following defendant's arrest, the police department received at least two complaints of vehicle break-ins. None of the callers mentioned anything had been taken.

¶ 12 Quincy police officer Chad Scott testified he also responded to the vehicular burglary call and corroborated Distin's testimony. Scott further testified he assisted in logging the evidence. Defendant carried 140 quarters, 54 dimes, 50 nickels, and 54 pennies, totaling $43.44 in change.

¶ 13 Angela Glasgow, defendant's mother, testified on his behalf. Glasgow testified her husband worked at Domino's and each night put his change in a bucket. Defendant would occasionally perform chores and receive the contents of the change bucket in return. Glasgow further testified she routinely bought different types of cigarettes to try and cigarettes on sale. She would give the packs to her children if she didn't like them and kept extra packs of cigarettes to give to her children when they came by.

¶ 14 The State argued the circumstantial evidence in this case was extremely strong and proved beyond a reasonable doubt defendant entered Deming's vehicle with the intent to commit a theft therein. The trial court found the police officers, Deming, and Glasgow all credible witnesses. Further, the court found beyond a reasonable doubt the person Deming saw entered her vehicle with the intent to commit a theft because the dome light had been turned on and the person she observed testing car door handles was not merely performing a safety check. The court also found the State proved beyond a reasonable doubt defendant was the individual because he (1) matched the description of the suspect, (2) was the only person the police officers

saw out walking in the rain at 4:30 a.m., and, (3) had a large quantity of change and five different packs of cigarettes on his person. Accordingly, the court found defendant guilty.

¶ 15 B. Sentencing

¶ 16 In December 2013, the matter proceeded to sentencing. Neither party presented additional evidence beyond the presentence investigation report (PSI). The PSI shows defendant's father physically and sexually abused him as a child. Defendant has a young daughter but is not required to pay child support. Defendant worked at Qdoba from February 2012 until his conviction in October 2013. His employer described defendant as "excellent" and "a very good employee." His manager told defendant he would have a job there upon his release from prison. The PSI also details defendant's prior criminal history, including (1) a 2008 criminal-damage-to-property felony; (2) a 2007 misdemeanor battery conviction; (3) a 2009 burglary conviction; (4) a 2010 obstruction-of-justice felony; (5) a 2012 felony theft conviction; and (6) a 2012 misdemeanor domestic-battery conviction.

¶ 17 The State noted defendant's numerous prior offenses and highlighted the multiple times defendant's probation was revoked. In particular, defendant's sentence of probation for the 2009 burglary was revoked and defendant was resentenced to five years' imprisonment. In addition to being nonprobationable, defendant was extended-term eligible. Thus, he faced a potential sentence of 3 to 14 years' imprisonment. The State recommended a 6½-year term of imprisonment.

¶ 18 Defendant conceded he was not eligible for probation and requested a prison term closer to the three-year minimum. In mitigation, defendant argued no one was harmed nor was harm contemplated, the amount taken was small, defendant had a new child for whom to provide, and he had an excellent work history and a job waiting for him upon his release.

¶ 19 Defendant made a brief statement in allocution, maintaining his innocence but expressing his willingness to accept whatever sentence the trial court deemed appropriate. Defendant apologized for his past. He stated he intended to get a degree in culinary arts and work his way up to be a part owner of a restaurant. Defendant expressed his desire to raise his daughter and help her avoid his mistakes.

¶ 20 The trial court stated it considered the PSI, arguments by counsel, defendant's statement in allocution, and the evidence at the bench trial. The court noted defendant was only 24 years old and briefly recited defendant's most serious prior offenses and the multiple revocations of probation. The court also considered defendant's work ethic, his employer's reference, the fact a job awaited him upon his release, and his new child. Given defendant's prior conviction for burglary, the court sentenced defendant to 5½ years' imprisonment. The judge stated, "Under the circumstances, I suppose it is on the low level end of burglaries, but when you've got a prior and all these other offenses this seems like an appropriate sentence to me."

¶ 21 After ascertaining the public defender spent 11 hours plus the time required for the bench trial on this matter, the trial court stated:

> "All right. [Defendant], you were provided with a public defender and told you may have to reimburse Adams County for providing you with a public defender. You're entitled to a hearing on that issue. This is that hearing. I've considered the information in the [PSI], the arguments—or the affidavit that you filed [*sic*] out to get counsel appointed in the first place. Is there anything else you would like me to consider before determining whether you should

have to reimburse Adams County for providing you with a public defender?"

Defendant responded, "No, sir." The court noted defendant had bond posted and ordered the $323 balance of the bond be assessed as public-defender fees. Defendant filed no posttrial motions.

¶ 22 This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 Defendant appeals, arguing (1) his 5½ year sentence is excessive in light of the nature of his offense and the trial court's failure to consider mitigating factors; and (2) the court erred in assessing the public-defender reimbursement following a hearing that did not comply with section 113-3.1(a) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/113-3.1(a) (West 2012)). The State contends defendant forfeited both of these claims by failing to file a postsentencing motion raising the issues or otherwise objecting before the trial court. The State further contends neither issue warrants plain-error review.

¶ 25 A. Sentencing

¶ 26 Under section 5-4.5-50(d) of the Unified Code of Corrections, a defendant must file a written motion with the trial court to challenge either the correctness of a sentence or an aspect of the sentencing hearing. 730 ILCS 5/5-4.5-50(d) (West 2012). A defendant must raise issues in a written motion to reconsider the sentence before the trial court in order to preserve those issues for appellate review. *People v. Reed*, 177 Ill. 2d 389, 393, 686 N.E.2d 584, 586 (1997); see also 730 ILCS 5/5-8-1(c) (West 1994). (We note the statute at issue in *Reed* (730 ILCS 5/5-8-1(c) (West 1994)) is currently codified under section 5-4.5-50(d) of the Unified Code

of Corrections.) Thus, any issues not raised before the trial court are deemed forfeited. *People v. Rathbone*, 345 Ill. App. 3d 305, 310, 802 N.E.2d 333, 337 (2003).

¶ 27 Defendant concedes his failure to file a postsentencing motion challenging his sentence operates as forfeiture. However, defendant contends this issue warrants plain-error review.

¶ 28 The plain-error rule is a narrow, limited exception to the forfeiture rule. *People v. Ahlers*, 402 Ill. App. 3d 726, 733, 931 N.E.2d 1249, 1255. We review unpreserved error only when a clear and obvious error occurs and (1) the evidence is closely balanced; or (2) the error is so serious it affected the fairness of defendant's sentencing hearing and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007). The burden of persuasion rests with the defendant under both prongs of the plain error doctrine. *Ahlers*, 402 Ill. App. 3d at 734, 931 N.E.2d at 1255.

¶ 29 Defendant contends his sentence is excessive in light of the nature of his offense; however, he alleges no error, let alone a clear and obvious error, and has failed to meet his burden establishing plain error. See, *e.g.*, *People v. Hanson*, 2014 IL App (4th) 130330, ¶¶ 28-30, 25 N.E.3d 1.

¶ 30 Defendant further contends the trial court erred by failing to fully consider all of the mitigating evidence, which led to an unfair sentencing hearing. Alternatively, defendant argues this court should overlook his forfeiture because the evidence was closely balanced. We note, initially, that defendant's arguments are premised upon an assumption that the trial court erroneously ignored the mitigating evidence. We disagree with this premise.

¶ 31 The first step in plain-error analysis is to determine whether there was an error at all. *Piatkowski*, 225 Ill. 2d at 565, 870 N.E.2d at 411. It is well settled the trial court must not

ignore relevant mitigating factors. *People v. Flores*, 404 Ill. App. 3d 155, 157, 935 N.E.2d 1151, 1154 (2010). However, "a trial court is not required to expressly outline its reasoning for sentencing, and absent some affirmative indication to the contrary (other than the sentence itself), we must presume that the court considered all mitigating factors on the record." *People v. Jones*, 2014 IL App (1st) 120927, ¶ 55, 8 N.E.3d 470. This presumption may be overcome only by showing explicit evidence from the record that the court did not consider mitigating evidence. *Flores*, 404 Ill. App. 3d at 158, 935 N.E.2d at 1155.

¶ 32 Having reviewed the record, we conclude the trial court did not err by ignoring relevant mitigating evidence. The court considered the PSI—including the information about defendant's abusive childhood and his work history—arguments by counsel, defendant's statement in allocution, and the evidence at the bench trial. The court noted defendant's relative youth, his work ethic, his employer's reference, the fact a job awaited him upon his release, and his new child. Given defendant's criminal history, which included multiple prior felony charges and one term in prison for the same offense—burglary—for which he was convicted in this case, it was reasonable for the court to give less weight to the mitigating evidence, "as [defendant] had not taken advantage of previous opportunities to rehabilitate himself." *People v. Starnes*, 374 Ill. App. 3d 329, 337, 871 N.E.2d 815, 822 (2007). We presume the court considered all relevant mitigating evidence and the record contains no explicit evidence to the contrary. *Jones*, 2014 IL App (1st) 120927, ¶ 55, 8 N.E.3d 470.

¶ 33 As we find the trial court did not err, we need not discuss whether the evidence at the sentencing hearing was closely balanced or if the integrity of the judicial system was called into question. Thus, we decline defendant's invitation to review his excessive-sentence claim under the plain-error doctrine.

¶ 34 B. Public-Defender Reimbursement

¶ 35 Defendant contends the trial court erred in assessing a public-defender fee following a hearing that failed to comply with the requirements of section 113-3.1(a) of the Code. 725 ILCS 5/113-3.1(a) (West 2012). Specifically, defendant contends the hearing was inadequate because the court had no evidence before it of defendant's ability to pay the reimbursement. Defendant asks this court to vacate the public-defender fee or, alternatively, to reverse and remand for a proper hearing on his ability to pay the public-defender fee.

¶ 36 Section 113-3.1 provides the procedural framework for a hearing to determine whether (and how much) a defendant should be ordered to reimburse the county or the State for appointed counsel. 725 ILCS 5/113-3.1 (West 2012); see, *e.g.*, *People v. Somers*, 2013 IL 114054, ¶ 14, 984 N.E.2d 471. The "hearing need only (1) provide the defendant with notice that the trial court is considering imposing a payment order ***, and (2) give the defendant an opportunity to present evidence regarding his ability to pay and other relevant circumstances, and otherwise to be heard regarding whether the court should impose such an order." *People v. Johnson*, 297 Ill. App. 3d 163, 164-65, 696 N.E.2d 1269, 1270 (1998). Notice is sufficient if the court informs the "defendant in open court immediately prior to the section 113-3.1 hearing of (1) the court's intention to hold such a hearing, (2) what action the court may take as a result of the hearing, and (3) the opportunity the defendant will have to present evidence and otherwise to be heard." *Id.* at 165, 696 N.E.2d at 1270. Defendant does not challenge the sufficiency of the notice he received regarding the hearing. Rather, defendant argues the hearing was insufficient.

¶ 37 The State contends defendant forfeited this claim by failing to object or raise the matter before the trial court. Defendant contends the forfeiture doctrine—and, in turn, plain-error analysis—does not apply to an improper hearing under section 113-3.1. We find defendant

has waived his claim with respect to the evidence before the trial court regarding his ability to pay the reimbursement. Further, we find plain-error analysis does not apply in this situation. See *People v. Dunlap*, 2013 IL App (4th) 110892, ¶ 12, 992 N.E.2d 184. The parties seem to be under the impression "forfeiture" and "waiver" are one and the same. We set forth the distinction between these doctrines in *People v. Bowens*, 407 Ill. App. 3d 1094, 943 N.E.2d 1249 (2011), and reiterated the distinction in *Dunlap* as follows:

> " 'Waiver is the intentional relinquishment of a known right, whereas forfeiture is the failure to make a timely assertion of a known right. [Citations.] *** [Parties] may (1) make a tactical decision not to object to otherwise objectionable matters, which thereby waives appeal of such matters, or (2) fail to recognize the objectionable nature of the matter at issue, which results in procedural forfeiture.' " *Dunlap*, 2013 IL App (4th) 110892, ¶ 9, 992 N.E.2d 184 (quoting *Bowens*, 407 Ill. App. 3d at 1098, 943 N.E.2d at 1256).

Plain-error analysis "applies to cases involving procedural default [(forfeiture)] ***, not affirmative acquiescence [(waiver)]." *Bowens*, 407 Ill. App. 3d at 1101, 943 N.E.2d at 1258.

¶ 38 On appeal, the defendant in *Dunlap* argued the trial court erred in imposing a public-defender fee following a hearing where the court failed to consider the defendant's affidavit of financial condition pursuant to section 113-3.1. *Dunlap*, 2013 IL App (4th) 110892, ¶ 8, 992 N.E.2d 184. At the hearing to determine whether to impose a public-defender assessment, the court stated it reviewed the PSI, informed the defendant it was considering a $400 assessment, and concluded, "[T]his is your opportunity if you've got any evidence or

anything you want to say on whether or not I should impose that." *Id.* ¶ 5, 992 N.E.2d 184. The defendant declined to take the opportunity. In so doing, this court found defendant "affirmative[ly] acquiesced not only to the amount of the reimbursement, but also to the materials the court relied upon to arrive at the amount of the reimbursement." *Id.* ¶ 11, 992 N.E.2d 184.

¶ 39 In the case at bar, the trial court gave defendant a similar opportunity to present evidence of his inability to pay a reimbursement, asking, "Is there anything else [beyond the PSI and the financial affidavit] you would like me to consider before determining whether you should have to reimburse Adams County for providing you with a public defender?" Defendant declined to take the opportunity. Thus, in accordance with *Dunlap*, we find defendant affirmatively acquiesced to the materials the court used in determining whether to impose a public-defender fee. We also note the consideration of existing evidence regarding defendant's financial situation, such as information from the PSI or the financial affidavit, is entirely proper. *People v. Barbosa*, 365 Ill. App. 3d 297, 302, 849 N.E.2d 152, 155 (2006). Accordingly, we affirm the court's imposition of the public-defender reimbursement.

¶ 40 III. CONCLUSION

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

¶ 42 Affirmed.