2015 IL App (4th) 140107-U

NO. 4-14-0107

FILED
December 15, 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.	)	McLean County
JUSTIN D. GIBSON,	)	No. 12CF1260
Defendant-Appellant.	)	
	)	Honorable
	)	Scott Drazewski,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The plain-error doctrine did not apply to excuse defendant's forfeiture of his argument on appeal that the trial court improperly considered pending criminal charges as factors in aggravation when imposing defendant's sentence.

¶ 2 Defendant, Justin D. Gibson, appeals his sentence of 30 months' probation and 180 days in jail imposed upon his conviction of violating an order of protection. He claims the trial court improperly considered three charges pending against him as factors in aggravation. We find defendant forfeited review of this issue by not raising it in a written postsentencing motion. Conceding forfeiture, defendant argues this court could nevertheless consider the claim under the plain-error doctrine. Because we find the plain-error doctrine does not apply, we affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 In December 2012, the grand jury indicted defendant on one count of violation of an order of protection with a prior conviction of domestic battery, a Class 4 felony (720 ILCS 5/12-3.4(a)(1), (d) (West 2012)). The referenced order of protection was entered sometime prior to November 22, 2012, in McLean County case No. 12-OP-309. This order of protection required defendant to stay 500 feet away from his ex-girlfriend, Tina Attig. Defendant and Attig are the parents of a minor born June 20, 2011. The order of protection was referenced in a visitation order entered in a family law case (McLean County case No. 12-F-281). The visitation order entitled defendant to alternate weekend visitation. It was undisputed defendant could also have visitation on holidays as agreed upon by the parties.

¶ 5 In count I of the indictment, the State alleged defendant violated the order of protection by appearing at Attig's home on November 22, 2012, Thanksgiving Day, and forcing his way inside. On October 30, 2013, the grand jury indicted defendant on a second count, that of criminal trespass to a residence, a Class 4 felony (720 ILCS 5/19-4(a)(2), (b)(2) (West 2012)), based upon the same facts as alleged in count I.

¶ 6 On November 6, 2013, the trial court conducted a bifurcated bench trial and proceeded on count I only. Because the evidence supporting the conviction is not at issue, we will only briefly summarize the testimony presented at the trial. On Thanksgiving Day 2012, Attig's mother, Wanda Terven, had arranged with defendant and his mother, Kathy Roberts, for defendant to visit the minor beginning at 5 p.m. Although the testimony varied, defendant and Roberts appeared at Attig's residence sometime between 3:30 and 4 p.m. Terven opened the door and told defendant he would have to come back later for the minor. Defendant advised he was not leaving without the minor. Defendant used his foot to prevent Terven from closing the

door. Attig's father approached the door and told defendant to stop. They closed the door and called the police. When Attig presented the order of protection, the officers arrested defendant.

¶ 7 After considering the evidence and arguments of counsel, the trial court found defendant guilty.

¶ 8 On January 24, 2014, the trial court conducted defendant's sentencing hearing. The State did not present any evidence in aggravation. Defendant testified on his own behalf in mitigation. He said had been working with Attig regarding a visitation schedule. He said he had registered for "classes through PSR to learn how to control [his] emotions in situations[.]" He acknowledged he "reacted in an inappropriate manner" regarding the incident.

¶ 9 During the prosecutor's recommendation, the following exchange occurred:

> "MR. LEE [(Assistant State's Attorney)]: Now, in addition, while certainly we all know that the defendant is presumed innocent of any pending charges, the fact that he still has three pending cases, two of them being felonies involving charges of, in one case, violation of an order of protection, resisting a peace officer; and in the other felony case, aggravated battery upon a pregnant person, this pregnant person being someone other than the victim in this named case, and also resisting a peace officer, domestic battery and violation—and then finally a misdemeanor offense of violation of bail bond. The fact that those are pending before this defendant certainly would cast serious doubt upon the suggestion that the defendant at this point is so to speak on the right path.

MR. DAVIS [(Assistant Public Defender)]: Judge, I object to any remarks suggesting that a charge alone without a conviction can be used to demonstrate my client's character in any way and should affect this case. I think it's completely improper. I would ask that it be stricken.

THE COURT: All right. Let me indicate that I think that it can be considered, not to establish that he, in fact, committed the offense, but there is sufficient probable cause that would allow the charges to have been filed. Granted, if it was screened by only the state's attorney's office, that would go to what weight to give to that particular charge that has been filed. To the extent that it has been independently reviewed by either a grand jury or by a judge at a preliminary hearing, that would have more weight. But you're correct in that the court isn't considering it for—or those I should say as convictions. The defendant enjoys the presumption of innocence. I'm merely indicating that there is probable cause at this point in time that would exist as it would relate to those charges that are currently pending.

You may proceed.

MR. LEE: Thank you, Your Honor. And for clarification, on the felony charges that I have mentioned, the defendant has been indicted by a grand jury on all charges."

¶ 10 After considering the evidence, the presentence investigation report, recommendations of counsel, and defendant's statement in allocution, the trial court imposed a sentence upon defendant, finding as follows:

> "In relating to you that I similarly concur in essence with placing you upon a term of probation, I'm going to indicate to you that I'm not in any way, shape, or form considering the merits or the lack thereof of whether the State can prove beyond a reasonable doubt or not the additional charges that remain pending. Clearly this particular disposition may and/or could impact upon your ability to assess and weigh other options that might become available to you, but I'm not trying to facilitate that resolution by my sentence that I'm imposing today. In essence, what I'm telling you is the sentence that I'm imposing today stands alone, and you'll deal with those additional matters when you are required to do so."

The court sentenced defendant to 30 months' probation and 180 days in jail.

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 In this appeal, defendant does not challenge his conviction. Instead, defendant argues he is entitled to a new sentencing hearing because the trial court improperly relied on his three pending criminal charges as factors in aggravation. Although defendant's counsel objected to the State's mention of the pending charges during the sentencing hearing, defendant failed to file a written postsentencing motion raising the issue. As a result, defendant concedes he has

forfeited review of the issue for the purpose of this appeal. See *People v. Hillier*, 237 Ill. 2d 539, 544-45 (2010).

¶ 14 Nevertheless, defendant urges this court to review the issue despite his forfeiture under the plain-error doctrine. A reviewing court may apply the doctrine to a sentencing issue when (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so serious that it affected the fairness of the sentencing hearing. *Hillier*, 237 Ill. 2d at 545. Specifically, defendant urges review under the second-prong of the doctrine because, as he alleges, the error "was very serious."

¶ 15 However, the plain-error doctrine is not a general savings clause to preserve any and all errors which may have affected sentencing. *People v. Ahlers*, 402 Ill. App. 3d 726, 734 (2010). Defendant argues the error "greatly affected [his] substantial rights" in that the court relied upon these pending charges to enhance his sentence. We note defendant's claim here is similar to claims this court has repeatedly considered and rejected. See e.g. *People v. Rathbone*, 345 Ill. App. 3d 305, 311 (2003) (not all errors affecting a defendant's sentence are considered those that affect a defendant's substantial rights).

¶ 16 Indeed, the trial court may not rely on bare arrests or pending charges in aggravation of a sentence. *People v. Johnson*, 347 Ill. App. 3d 570, 575 (2004). For a sentencing court to consider an arrest or a pending charge, the court must be presented with live testimony or other evidence at the sentencing hearing regarding the arrest or charge. *People v. Thomas*, 111 Ill. App. 3d 451, 454 (1983); see also *Johnson*, 347 Ill. App. 3d at 576 (trial court impermissibly considered bare fact that defendant had been arrested for a sexual assault in Arkansas); *People v. Wallace*, 145 Ill. App. 3d 247, 256 (1986) (trial court improperly considered pending rape charge as aggravating factor).

> "While evidence of past criminal conduct is often not admissible at trial, it is relevant information at sentencing. Previous convictions are routinely considered. In addition, outstanding indictments or other criminal conduct for which there has been no prosecution or conviction may be considered in sentencing. Such evidence, however, should be presented by witnesses who can be confronted and cross-examined, rather than by hearsay allegations in the presentence report, and the defendant should have an opportunity to rebut the testimony. [Citations.]" *People v. Jackson*, 149 Ill. 2d 540, 548 (1992).

¶ 17 Assuming *arguendo* that the trial court erred by mentioning defendant's pending charges as a potential factor in aggravation, it is apparent from the record defendant's sentencing hearing was not fundamentally unfair. See *People v. Mattingly*, 180 Ill. App. 3d 573, 580 (1989). The court specifically stated it was not considering the pending charges when fashioning defendant's sentence. Indeed, during the State's sentencing recommendations, the trial court and the prosecutor engaged in a colloquy regarding the potential relevance and consideration of defendant's pending charges. However, the court made it clear on the record the pending charges were not considerations or factors in sentencing. In fact, during the court's pronouncement of sentence, the court specifically stated it was not "in any way, shape, or form considering the merits or the lack thereof" of the pending charges. The court emphatically stated "the sentence [it] impos[ed] today stands alone," separate from the pending charges.

¶ 18 Additionally, we note defendant was convicted of a Class 4 felony, which carried a minimum sentence of one year and a maximum of three years in prison (730 ILCS 5/5-4.5-

45(a) (West 2012)), or a maximum term of probation of 30 months (730 ILCS 5/5-4.5-45(d) (West 2012)). Defendant asked for probation, which is what the court imposed. The State presented no evidence in aggravation. The trial court noted it considered defendant's testimony as evidence in mitigation and his statement in allocution in fashioning his sentence. As mentioned above, the court specifically stated the sentence imposed was in relation *only* to the present conviction. Accordingly, we do not view any alleged errors in the sentencing hearing as having jeopardized the integrity of the judicial process. See *Ahlers*, 402 Ill. App. 3d at 735. We conclude defendant's sentencing hearing was not fundamentally unfair and thus, defendant's claim is insufficient to warrant plain-error review.

¶ 19 III. CONCLUSION

¶ 20 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.

¶ 21 Affirmed.