2015 IL App (4th) 140257-U

NO. 4-14-0257

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 18, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Woodford County
ANTHONY R. CRANFORD,	)	No. 12CF129
Defendant-Appellant.	)	
	)	Honorable
	)	John B. Huschen,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Knecht and Harris concurrend in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant is not entitled to a second remand for compliance with Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013) where he received a full and fair opportunity to raise his claims of error.

(2) Defendant forfeited review of his contentions the trial court improperly considered compensation and harm to the community as factors in aggravation when sentencing him.

¶ 2 In January 2013, defendant, Anthony R. Cranford, entered an open plea of guilty to one count of unlawful possession of cannabis with intent to deliver (720 ILCS 550/5(c) (West 2010)). The trial court accepted the open guilty plea and later sentenced defendant to 5 1/2 years' imprisonment, followed by 1 year of mandatory supervised release (MSR). Defendant appeals a second time from the denial of his postsentencing motions, arguing (1) his attorney did not properly certify compliance with Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013), (2) the

trial court improperly considered elements of the crime as factors in aggravation, and (3) his guilty plea was not knowing and voluntary. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On October 18, 2012, the State charged defendant by information with one count of unlawful possession of cannabis with intent to deliver (720 ILCS 550/5(c) (West 2010)), a Class 4 felony. The charge alleged on October 17, 2012, defendant knowingly and unlawfully possessed, with intent to deliver, more than 10 grams but not more than 30 grams of a substance containing cannabis. The information was superseded by an indictment one week later. Because of defendant's criminal history, extended-term sentencing applied to this offense.

¶ 5 In December 2012, defendant petitioned for election of treatment under section 40-5 of the Alcoholism and Other Drug Abuse and Dependency Act (Treatment Alternatives for Safe Communities (TASC) probation) (20 ILCS 301/40-5 (West 2012)). In response, the trial court ordered defendant to submit to an examination by TASC to determine whether he suffered from alcoholism or drug addiction and the likelihood of being rehabilitated through treatment. The TASC evaluation, dated January 14, 2013, stated defendant "appears to meet TASC acceptability criteria" and recommended he complete residential substance abuse treatment.

¶ 6 In January 2013, defendant entered into an open plea to unlawful possession of cannabis with intent to deliver. The trial court advised defendant of the nature of the charge and the range of possible penalties, including the applicability of extended-term sentencing. The court said:

> "Class 4 felonies are punishable by imprisonment in the Department of Corrections of not less than one year nor more than three years. If I find that you've been convicted of the same or a

greater class offense within the last ten years, then you can be sentenced to up to six years in prison."

(The trial court did not discuss whether defendant was eligible for TASC probation.) The court admonished defendant he had the right to plead not guilty and persist in that plea. The court further advised defendant by pleading guilty, he would give up his right to trial and relinquish his rights to be confronted with the witnesses against him and to cross-examine those witnesses.

¶ 7 In response to the trial court's queries, defendant said he understood the nature of the charge against him and the range of possible penalties for the offense of unlawful possession of cannabis with intent to deliver. Defendant also informed the court he understood the rights he would be waiving by pleading guilty. Defendant stated his choice to plead guilty was made of his own free will and no person forced, threatened, or pressured him to enter such a plea.

¶ 8 The State then presented a factual basis for the plea: in October 2012, the Peoria police became aware defendant was selling cannabis out of his home and conducted "trash pulls" at his home. Based on the evidence gathered from the trash pulls, the police obtained a search warrant and searched defendant's home on October 17, 2012. The police recovered 22 grams of cannabis, a large amount of cash, a digital scale, two cannabis grow kits, and a ledger with names and prices. Defendant admitted to the police he sold cannabis out of his home.

¶ 9 The trial court found a sufficient factual basis and accepted defendant's plea of guilty as knowing and voluntary, and it entered a finding of guilty. The court ordered a presentence investigation report (PSI) and continued the matter for a sentencing hearing.

¶ 10 In February 2013, the trial court conducted a sentencing hearing. At the sentencing hearing, the court asked the parties if they had any corrections to the PSI and defense counsel stated: "I don't believe there's a warrant pending right now in Peoria County." However,

the court determined the information in the PSI was correct and defendant had an outstanding warrant in Peoria. Defendant's PSI report reflected various criminal offenses consisting of aggravated criminal sexual abuse, aggravated battery, burglary, manufacture or delivery of cannabis, and retail theft. Defendant was also convicted of driving with a suspended license, consumption of alcohol, and failing to register as a sex offender.

¶ 11 The State did not present any evidence in aggravation. Defendant testified on his own behalf and presented the TASC evaluation in mitigation. Defendant testified he has three children and had been employed at Grainland for two years. At the time of his arrest, he cooperated and offered to help the police arrest his drug dealer. He admitted he was addicted to marijuana and believed TASC probation is "a good opportunity for [him] to fix this problem." On cross-examination, defendant testified he was 28 years old and "need[ed] some kind of structure to help [him] with [his] drug problem." He also indicated if he does not receive TASC probation, "there is a very strong possibility that [he] will go back to using drugs."

¶ 12 Defendant made a statement in allocution, reiterating he had a drug problem and needed help. After permitting defendant to make a statement in allocution, the trial court heard argument on sentencing. The State noted defendant was eligible for extended-term sentencing of one to six years and recommended a sentenced to the Department of Corrections. Defense counsel recommended TASC probation.

¶ 13 In sentencing defendant, the trial court considered the statutory factors in aggravation and mitigation. As a factor in mitigation, the court found imprisonment would entail hardship to defendant's dependents, but not excessive hardship. The court also noted he was employed and offered to assist the State by serving as an informant. In aggravation, the trial court found "defendant has a history of prior delinquency and criminal activity," his "conduct

caused and threatened serious harm," and he "received compensation for committing the offense." The court found "[t]he sentence is necessary to deter others from committing the same crime."

¶ 14 The trial court further noted defendant was not eligible for TASC consideration because the Peoria County probation department had not consented. However, the court explained:

> "even if they would consent, the court would find that, giving consideration to the nature and circumstances of the offense, and to the history, character, and condition of the individual the court finds that imprisonment is necessary for the protection of the public based on his prior criminal record."

¶ 15 Before entering its final sentencing decision, the trial court commented on the nature and circumstances of the offense. The court voiced its discontent defendant was relying upon the government to solve his problems and advised him to help himself and "[d]on't look to the government or me or this court to solve your problems for you." The court then made the following statements:

> "What you have done in the past here, sir, is awful. You have abused—sexually abused people, you've stolen from people, you have sold drugs to people. You don't have to sit in this chair very long, one week would probably do it, to convince you and all the other people that are in this room the devastation that is caused by—in people's lives because people like you give them dope. You should know. You sat there yourself and said what a terrible

life I have because I smoke dope. But yet you're assisting other people in living the same miserable life that you are. ***

You can't expect with this kind of record—you knew exactly what was going to happen to you when you got caught. You've been to prison. You have three sentences to prison. You should know what is going to happen to you if you continue to act—to break the law.

I am very serious about this, Mr. Cranford. You have a lot of things going for you. I mean, you've done a lot of good things. I have not discounted the fact that you tried to assist the government. I'm not putting aside the fact that you had a job for a number of years. You know, it becomes your responsibility at some point in time to get your life in order. I have to worry about the public. I have to worry about other people committing the same crime. I have to worry about merchants being stolen from and young people in this city of Eureka having a source of dope. I have to worry about that, not just you."

The trial court sentenced defendant to 5 1/2 years in the Illinois Department of Corrections with credit for time served.

¶ 16 In March 2013, defendant filed a motion to reconsider the sentence, arguing the court imposed an excessive sentence given the mitigation evidence. Defendant's attorney also filed a Rule 604(d) certificate stating "he has consulted with the Defendant *** concerning his

contentions of error." A hearing was held in April 2013, and the trial court denied defendant's motion to reconsider the sentence.

¶ 17 In the first direct appeal in this case, we remanded to the circuit court "for the filing of a corrected Supreme Court Rule 604(d) certificate indicating consultation about errors in both the plea *and* the sentence." (Emphasis added.) *People v. Cranford*, No. 4-13-0312 (2013) (unpublished order under Supreme Court Rule 23(b)).

¶ 18 On remand, defense counsel was allowed to withdraw and new counsel was appointed. In January 2014, defendant filed a motion to reconsider the sentence, arguing the court imposed an excessive sentence given the mitigation evidence. Defendant also moved to withdraw his guilty plea, arguing it was not knowing or voluntary because his former attorney misinformed him about his eligibility for TASC probation. Counsel filed a new Rule 604(d) certificate, which stated he consulted with defendant by mail or in person "to ascertain [his] contentions of error in the sentence or the entry of the plea of guilty." In March 2014, the trial court denied defendant's postsentencing motions.

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 A. Rule 604(d) Certificate

¶ 22 Defendant argues the Rule 604(d) certificate filed by defense counsel on remand did not strictly comply with Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013). Accordingly, defendant asks this court to remand a second time for further proceedings. The State concedes defense counsel failed to strictly comply with Rule 604(d)'s certificate requirement, but it maintains a second remand is not necessary because this issue was already fully and fairly litigated. We agree with the State.

¶ 23 In *People v. Shirley*, 181 Ill. 2d 359, 369-70, 692 N.E.2d 1189, 1194-95 (1998), the supreme court addressed the application of Rule 604(d)'s certificate requirement in the context of a second postjudgment proceeding after an initial remand. The court held if the defendant has received a full and fair opportunity to raise his claim of error in the entry of the plea or the sentence, or both, another remand is not required absent a good reason to do so. *Id*. at 369, 692 N.E.2d at 1194. The court reasoned strict compliance with Rule 604(d) does not require multiple remands and new hearings if it would be "an empty and wasteful formality." *Id*. at 370, 692 N.E.2d at 1195.

¶ 24 Defendant received a full and fair opportunity to raise his claim of error in the entry of the plea and sentence on remand. Indeed, the record shows defense counsel filed motions challenging both the plea and the sentence, and counsel offered additional argument at the March 2014 hearing. Moreover, the trial court indicated it "has again this afternoon reviewed the [PSI]," the transcript of the plea hearing, and explained in some detail the basis for denying defendant's motions. Based on our review of the record, we conclude defendant has received a full and fair opportunity to raise his claim of error and another remand would be an empty and wasteful formality. See *People v. Tejada-Soto*, 2012 IL App (2d) 110188, ¶ 14, 966 N.E.2d 375.

¶ 25 B. Factors in Aggravation

¶ 26 Defendant next contends the trial court improperly relied on factors inherent in the offense in sentencing him. In particular, defendant argues the court improperly considered as aggravating factors (1) his compensation for the sale of cannabis and (2) the fact his cannabis sales caused a threat of harm to the community. The State concedes the trial court improperly considered factors inherent in the offense, but it asserts defendant forfeited the issue by failing to raise it in a postsentencing motion. Defendant's reply brief does not respond to the State's

forfeiture argument and does not request plain-error review. Instead, defendant replies "counsel was ineffective for failing to include this issue *** in the post-plea motion."

¶ 27 1. *Forfeiture*

¶ 28 Our initial task is to determine the issue or issues that are properly before us. Section 5-4.5-50(d) of the Unified Code of Corrections provides, in pertinent part: "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." 730 ILCS 5/5-4.5-50(d) (West 2012). Thus, sentencing issues must be raised in a postsentencing motion to preserve them for appellate review. *People v. Reed*, 177 Ill. 2d 389, 390, 686 N.E.2d 584, 584 (1997).

¶ 29 In this case, defendant's motion to reconsider the sentence argued the trial court failed to give proper weight to mitigating factors and imposed an excessive sentence. At the hearing on defendant's motion, counsel argued the court failed to consider "all of the positive things that [defendant] has done," such as holding a job for three years, accepting responsibility by pleading guilty, and offering to "cooperate with the police in a controlled buy." In response, the State argued the trial court properly weighed the factors in aggravation and mitigation and the sentence is appropriate. The trial court denied defendant's motion to reconsider the sentence, finding it considered all factors, including defendant's age, his "various felony convictions," as well as the fact he was on probation at the time of his arrest.

¶ 30 After reviewing the record, defendant fails to persuade us that he has preserved for review his claim that the trial court improperly considered compensation and harm to the community as aggravating factors. Our supreme court has explained two reasons for requiring objections to be made at trial to preserve an issue for appeal. "One is that this allows the trial

court an opportunity to review a defendant's claim of sentencing error and save the delay and expense inherent in appeal if the claim is meritorious. [Citation]. A second reason for this requirement is to prevent a litigant from asserting on appeal an objection different from the one he advanced below." *People v. Heider*, 231 Ill. 2d 1, 18, 896 N.E.2d 239, 249 (2008). Our review of the record leaves us unsatisfied these purposes have been met. The trial court was deprived of an opportunity to review defendant's claim, and defendant is asserting in this court a completely different objection from the one he raised below. At the motion hearing, defense counsel expressly referred to the factors in mitigation, argued the court failed to give proper weight to mitigating factors, and urged the trial court to reduce defendant's sentence. In circumstances such as these, where the trial court lacked an opportunity to review the same essential claim raised on appeal, this court has found forfeiture to result. See *People v. Hanson*, 2014 IL App (4^{th}) 130330. Because defendant failed to raise the issue of improper consideration of compensation and harm to the community as aggravating factors in his postsentencing motion, we find defendant has forfeited the issue.

¶ 31 2. *Plain-Error Review*

¶ 32 Defendant's reply brief does not respond to the State's forfeiture argument and does not request plain-error review. Instead, defendant replies "counsel was ineffective for failing to include this issue *** in the post-plea motion." To obtain plain-error review, a defendant must demonstrate a clear or obvious error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410 (2007). In the sentencing context, a defendant is required to show either that the (1) evidence at the sentencing hearing was closely balanced, or (2) error was so egregious as to deny the defendant a fair sentencing hearing. *People v. Hall*, 195 Ill. 2d 1, 18,

743 N.E.2d 126. 136 (2000). Under both prongs of the plain-error doctrine, defendant has the burden of persuasion. *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184, 1187 (2010).

¶ 33 Defendant has failed meet his burden of establishing plain error. The absence of an argument for plain-error review cannot satisfy defendant's burden. When defendant declines to put forth an argument articulating how either of the two prongs of plain-error review is satisfied, he forfeits plain-error review. *People v. Nieves*, 192 Ill. 2d 487, 502-03, 737 N.E.2d 150, 158 (2000). Here, defendant responded to the State's forfeiture argument by asserting ineffective assistance of counsel. Thus, plain-error review is inappropriate.

¶ 34 3. *Ineffective Assistance of Counsel*

¶ 35 Defendant next argues, if we were to find forfeiture, we may reach the issue because trial counsel was ineffective for failing to raise the issue in a postsentencing motion. We decline the invitation. Instead, we reference our decision in *People v. Durgan*, 346 Ill. App. 3d 1121, 806 N.E.2d 1233 (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 his ineffective-assistance-of-counsel claim.

¶ 36 C. Motion To Withdraw Guilty Plea

¶ 37 Defendant next asserts he should be allowed to withdraw his guilty plea because his trial counsel misinformed him about his eligibility for TASC probation, and such

ineffectiveness rendered his plea unknowing and involuntary. The State asserts the trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea.

¶ 38 Our supreme court adopted Illinois Supreme Court Rule 402 (eff. July 1, 2012) to insure compliance with *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969), which found due process requires an affirmative demonstration a guilty plea is voluntary and intelligent before the plea can be accepted. *People v. Kidd*, 129 Ill. 2d 432, 443, 544 N.E.2d 704, 708 (1989). However, a court's failure to properly admonish a defendant under Rule 402, itself, does not automatically establish grounds for vacating the guilty plea. *People v. Fuller*, 205 Ill. 2d 308, 323, 793 N.E.2d 526, 537 (2002). "Consequently, the fact that the court improperly admonished defendant as to his minimum sentence should not, in and of itself, provide grounds for reversal of the trial court's decision." *People v. Davis*, 145 Ill. 2d 240, 250, 582 N.E.2d 714, 719 (1991). Substantial compliance with the rule suffices to establish due process. *Fuller*, 205 Ill. 2d at 323, 793 N.E.2d at 537. Thus, "[w]hether reversal is required depends on whether real justice has been denied or whether defendant has been prejudiced by the inadequate admonishment." *Davis*, 145 Ill. 2d at 250, 582 N.E.2d at 719; see also *Fuller*, 205 Ill. 2d at 323, 793 N.E.2d at 537.

¶ 39 Rule 402(a)(2) requires the trial court to inform the defendant of and determine the defendant understands "the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences." Ill. S. Ct. R. 402(a)(2) (eff. July 1, 2012).

¶ 40 Defendant does not dispute he was properly admonished under Rule 402(a)(2) about the minimum and maximum prison sentence, but he contends he was misinformed as to his eligibility for TASC probation. Defendant asserts if he was aware he was not eligible for TASC

placement, he would not have pleaded guilty for an open sentence. Defendant cites *Davis*, 145 Ill. 2d at 250, 582 N.E.2d at 719, in support of his argument.

¶ 41 In *Davis*, prior to the defendant's guilty plea, defense counsel informed the defendant he was eligible for TASC probation. Additionally, the trial court admonished the defendant he was eligible for probation and, after accepting the defendant's plea, ordered an evaluation of the defendant's qualifications for TASC. *Id*. at 245, 582 N.E.2d at 716. It was later discovered defendant was ineligible for probation and for TASC due to his prior criminal record. *Id.* at 248, 582 N.E.2d at 718. Nonetheless, the trial court denied the defendant's motion to withdraw his guilty plea. *Id.* at 243, 582 N.E.2d at 715. On appeal, the court held the combined errors led the defendant to incorrectly believe he would be eligible for a sentence other than incarceration. *Id.* at 251, 582 N.E.2d at 719. The court explained:

> "We find that defendant's claimed misapprehension as to his eligibility for TASC, alone, may be insufficient to disturb the trial court's ruling, as the denial of the defendant's motion to withdraw his plea did not appear to amount to an abuse of the court's discretion. However, coupled with the fact that the trial court gave incorrect admonishments, which further led the defendant to believe that he would be eligible for a sentence other than incarceration, we find there to be plain error present on the part of the trial court." *Id.*

Thus, the defendant had suffered prejudice. *Id.* at 250, 582 N.E.2d at 719.

¶ 42 We find *Davis* distinguishable. Unlike the facts presented by *Davis*, the trial court in the present case made no misleading statements during the plea proceedings. See *People*

v. Clark, 276 Ill. App. 3d 1002, 1005, 659 N.E.2d 421, 423 (1995) (distinguishing *Davis* where the trial court correctly admonished defendant as to the minimum and maximum sentence). Here, the trial court correctly informed defendant the minimum and maximum extended-term sentence for a Class 4 felony was not less than one year and not more than six years. Defendant stated he understood the terms of the agreement and the rights he would give up with his guilty plea. Nothing in the record indicates otherwise and the errors in *Davis* are not present here. *People v. Marshall*, 381 Ill. App. 3d 724, 733, 886 N.E.2d 1106, 1114 (2008).

¶ 43 We finally note, defendant does not explain how and the record contains no evidence as to how the possibility of TASC probation had any impact on his decision to plead guilty. See *People v. Mendoza*, 342 Ill. App. 3d 195, 202, 795 N.E.2d 316, 322 (2003) (noting one of the reasons prejudice did not exist was the defendant never alleged he would not have pleaded guilty if he had known he was receiving a minimum sentence of six years' imprisonment instead of three). Defendant's case of buyer's remorse is no basis for allowing him to withdraw his guilty plea. In light of defendant's confession and his stipulation to the State's offer of proof, we have no doubt defendant committed the offense charged in this case and, thus, justice likewise does not require reversal. In short, we find no "manifest injustice" in this case. Defendant entered an open guilty plea and was admonished of his eligibility for an extended-term sentence of up to six years in prison. That sentence was thus on the table when defendant entered his guilty plea. The court entered a sentence less than the maximum. Accordingly, we conclude that the trial court did not abuse its discretion when it denied defendant's motion to withdraw his guilty plea.

¶ 44 III. CONCLUSION

¶ 45 For the reasons stated, we affirm defendant's conviction of unlawful possession of cannabis with intent to deliver. 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 (West 2012).

¶ 46 Affirmed.