2015 IL App (4th) 140300-U

NO. 4-14-0300

FILED
March 4, 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.	)	Livingston County
ARNOLD MUNZ,	)	No. 12CF75
Defendant-Appellant.	)	
	)	Honorable
	)	Robert M. Travers,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the trial court did not abuse its discretion in sentencing defendant to concurrent terms of five years' imprisonment because the court properly considered all relevant mitigating factors and the statutory presumption in favor of probation.

¶ 2 In March 2012, the State filed a six-count information against defendant, Arnold Munz. In October 2013, defendant pled guilty to two charges of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2010)) (counts II and III). In January 2014, the trial court entered judgment on counts II and III, sentencing defendant to concurrent terms of five years' imprisonment.

¶ 3 Defendant appeals, arguing the trial court (1) abused its discretion in sentencing him to five years' imprisonment; (2) imposed a double enhancement; and (3) denied him probation without finding probation was inconsistent with the ends of justice.

¶ 4 We disagree and affirm.

¶ 5 I. BACKGROUND

¶ 6 In March 2012, defendant was charged by information with multiple gun-related felony offenses stemming from an incident at the property of Wesley Johnson. On March 22, 2012, defendant went to Johnson's property and the two engaged in a verbal altercation. Defendant then got into his vehicle, proceeded to do "donuts" in Johnson's yard, and left. Johnson phoned Jack Montgomery, who came to the Johnson residence. Defendant returned to the property to find Johnson and Montgomery in Montgomery's vehicle. According to both Johnson and Montgomery, defendant pulled a shotgun out of the driver's side of his truck, approached Montgomery's van, and pointed the shotgun approximately six inches from Montgomery's face. As Montgomery and Johnson drove away, defendant fired the shotgun at the vehicle, leaving two 12-gauge shotgun casings which were later recovered by police.

¶ 7 A. Plea of Guilty

¶ 8 In October 2013, the State and defendant entered into an agreement providing defendant would enter an open plea to counts II and III, both alleging the Class 1 felony of aggravated discharge of a firearm in the direction of a vehicle defendant knew or should have known to be occupied. (720 ILCS 5/24-1.2(b) (West 2010)). Counts II and III related to defendant's conduct of firing a 12-gauge shotgun in the direction of a vehicle occupied by Johnson and Montgomery. Additionally, defendant agreed to forfeit any right, title, or interest he had in his truck, which was the subject of a related forfeiture case, and pay a $10,000 discretionary fine. In exchange for defendant's guilty plea, the State agreed to dismiss counts I, IV, V, and VI.

¶ 9 At the plea hearing, the trial court advised defendant of the nature of the charges and the range of possible penalties. Defendant faced a minimum possible sentence of probation

or conditional discharge, or 4 to 15 years in the Illinois Department of Corrections, to be served at 85%, with a two-year period of mandatory supervised release. The court also informed defendant of all rights given up upon a plea of guilty. Defendant persisted in entering his plea of guilty as agreed. The court determined defendant knowingly and voluntarily pleaded guilty to both counts, found there was a factual basis for the plea, and accepted the plea. In accordance with the agreement of the parties, the court dismissed the remaining charges. A presentence investigation was ordered and the matter was set for sentencing.

¶ 10 B. Sentencing Hearing

¶ 11 During defendant's January 2014 sentencing hearing, the State presented two witnesses, former Livingston County sheriff's department deputy Robert McGraw, and current Livingston County sheriff's department sergeant Chad Gragert. The State also submitted a written opinion from an expert witness regarding defendant's claim that he suffers from seizures.

¶ 12 According to the evidence, on March 22, 2012, at 7 p.m., officers from the Livingston County sheriff's department on routine patrol responded to defendant's rural address on a report of a subject with a gun. Deputy Robert McGraw arrived to serve as part of perimeter security. Deputy McGraw exited his vehicle, took his rifle, and started down the south portion of the property. As Deputy McGraw came around a clump of fir trees, he saw an individual (later identified as defendant) come around the corner of the house holding a shotgun. When defendant saw the deputy, he fired the shotgun in the deputy's direction.

¶ 13 Sergeant Chad Gragert arrived at defendant's residence a little after 7 p.m. to find several deputies under his command in tactical positions around the home. Numerous methods, including the telephone, a blow horn, and threats of releasing a canine into the home, were used to attempt to establish communication with defendant. At some point, defendant's wife arrived

on the scene and gave the officers permission to enter the home. Around 10 p.m., officers entered the home and found defendant sleeping in his bed. Defendant did not resist arrest once the officers entered the home. Sergeant Gragert recovered a loaded shotgun and another officer recovered a pistol from the home. Sergeant Gragert also testified as to his belief that, based on defendant's lack of response to the police presence outside his home and the fact defendant was sleeping in his clothes, defendant was intoxicated at the time the police entered the home. On cross-examination, he testified no chemical testing was requested and there was no other evidence of defendant's inebriation.

¶ 14 The State retained an expert, Dr. Erhan Ergene, to review defendant's medical records and provide an opinion as to whether Dr. Ergene believed defendant suffered a seizure and acted during the postictal state. Dr. Ergene expressed his belief that no evidence showed that defendant suffered a seizure back in 2007. Further, Dr. Ergene expressed his opinion that someone suffering the aftereffects of a seizure might appear confused or have behavioral changes, such as agitation or undirected violence. However, Dr. Ergene believed defendant's actions were inconsistent with typical effects in that his actions were directed at specific people with whom he had a relationship. Further, the typical effects cause reduced cognitive ability, precluding actions like driving a car, loading a gun, making phone calls, or writing notes. The State's exhibit also included Dr. Ergene's *curriculum vitae*.

¶ 15 Defendant did not call any witnesses; however, defendant submitted five exhibits in mitigation. One of these exhibits contained information from a ballistics expert showing the distance from defendant to Deputy McGraw (296 feet) and describing the expert's belief that the birdshot from the shotgun could not have caused any actual harm, even to a piece of paper, when

fired from that distance. Another exhibit contained a letter from defendant and 12 character-reference letters from various friends, family members, and others in the community.

¶ 16 Defendant's remaining exhibits showed defendant suffered a seizure in 2007 and has been receiving treatment for his seizure disorder since that time. Defendant takes a daily medication to control his seizures and had not suffered another seizure until the day of the events at issue here. A letter from one of defendant's doctors, Dr. Edward Pegg, describes Dr. Pegg's belief that defendant suffered a breakthrough seizure on the day of the events and that defendant had no recollection of the events because they took place during the postictal state following the seizure. Information on what the postictal state is and common side effects, such as drowsiness and confusion, was also presented to the trial court.

¶ 17 Commenting on defendant's actions, the trial court observed defendant's conduct involved the threat of serious harm. Upon finding probation would deprecate the seriousness of the offense, the court sentenced defendant to concurrent terms of five years' imprisonment on each count. Defendant subsequently filed a motion to reconsider. In denying the motion to reconsider, the court expressed concern about the potential for something of this nature to occur again.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 Defendant argues the trial court (1) abused its discretion in sentencing defendant to five years' imprisonment; (2) imposed a double enhancement; and (3) denied probation without finding probation inconsistent with the ends of justice. Specifically, defendant argues the court failed to properly consider all the mitigating factors and mitigating evidence, resulting in an excessive sentence of five years' imprisonment. Further, defendant argues the court

imposed a double enhancement by taking into consideration the threat of serious harm that resulted from defendant's conduct, a factor defendant argues is implicit in the crime of aggravated discharge of a firearm. Finally, defendant argues the court improperly denied his request for probation without finding probation "would deprecate the seriousness of [defendant's] conduct and would be inconsistent with the ends of justice." 730 ILCS 5/5-6-1(a)(2) (West 2010). We disagree.

¶ 21 A. Abuse of Discretion

¶ 22 A reviewing court will not disturb a sentence within the statutory limits for the offense absent an abuse of discretion. *People v. Flores*, 404 Ill. App. 3d 155, 157, 935 N.E.2d 1151, 1154 (2010). A trial court abuses its discretion only when imposing a sentence "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 210, 737 N.E.2d 626, 629 (2000). The sentence imposed was neither greatly at variance with the spirit and purpose of the law nor manifestly disproportionate to the nature of the offense. Defendant pleaded guilty to two charges of aggravated discharge of a firearm—Class 1 felonies that carry a statutory sentencing range of not less than 4 years and not more than 15 years in prison. 730 ILCS 5/5-4.5-30(a) (West 2010). These charges resulted from an incident in which defendant pointed a loaded shotgun at another individual's face from six inches away, fired two shots in the direction of a vehicle he knew to be occupied, and fired shots in the direction of a police officer. The trial court sentenced defendant to five years' imprisonment on each count, to run concurrently, and the sentence is an 85% sentence, meaning defendant may serve less than five years. The statutory minimum is four years' imprisonment. Given the nature of defendant's actions, a sentence at the lower end of the statutory guidelines is not "greatly at variance with the spirit and purpose of the law, or

manifestly disproportionate to the nature of the offense." *Stacey*, 193 Ill. 2d at 210, 737 N.E.2d at 629. We now turn to defendant's claim the trial court failed to properly apply the factors in mitigation and the evidence presented in mitigation.

¶ 23 A reviewing court affords substantial deference to a trial court's sentencing decision. *People v. Snyder*, 2011 IL 111382, ¶ 36, 959 N.E.2d 656. A trial court must base that sentencing decision "on the particular circumstances of each case, considering such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *People v. Fern*, 189 Ill. 2d 48, 53, 723 N.E.2d 207, 209 (1999). The trial court must not ignore relevant mitigating factors, nor may it consider improper factors in aggravation. *Flores*, 404 Ill. App. 3d at 157, 935 N.E.2d at 1154. 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. See also *People v. Meeks*, 81 Ill. 2d 524, 534, 411 N.E.2d 9, 14 (1980). This presumption "will not be overcome without explicit evidence from the record that the trial court did not consider" those factors. *Flores*, 404 Ill. App. 3d at 158, 935 N.E.2d at 1155. The trial court, having observed the defendant and the proceedings, is better able to consider these factors, and a reviewing court must not substitute its judgment for that of the trial court simply because it would have balanced the factors differently. *Fern*, 189 Ill. 2d at 53, 723 N.E.2d at 209.

¶ 24 Having reviewed the record, we conclude the trial court did not abuse its discretion by ignoring relevant mitigating factors or evidence in mitigation. To the contrary, the trial court expressly stated that it had taken note of the mandatory considerations, the presentence investigation report, the evidence presented at the hearing, and the statement in allocution. The

trial court acknowledged defendant's lack of serious criminal history as a factor in mitigation. The trial court also read and considered the character-reference letters and the medical records submitted in mitigation. While the trial court stated that it found defendant's lack of serious criminal history a factor in mitigation, that does not mean that it ignored or failed to consider all the evidence submitted in mitigation. The trial court need not explicitly outline every single aspect of the mitigating factors it considered, and there is no affirmative evidence that the trial court ignored any mitigating evidence. *Jones*, 2014 IL App (1st) 120927, ¶ 55, 8 N.E.3d 470. On this record, we cannot say the trial court abused its discretion by ignoring any relevant mitigating factors or mitigating evidence.

¶ 25 Defendant also argues the trial judge erroneously "supplement[ed] his opinion for that of a [n]eurologist." We disagree. As the trier of fact at the sentencing hearing, it is within the province of the trial court to determine what evidence to credit. *People v. Mann*, 27 Ill. 2d 135, 139, 188 N.E.2d 665, 667 (1963). Here, the trial judge expressly stated that he weighed the evidence from defendant's doctors and the report from the State's expert witness who reviewed those medical records. The court stated, "Dr. Ergene's report is much better founded and it is much more consistent with what we know. If I look at Dr. Pegg's report and I look through there and I say, okay, fine, what was found of an objective nature by the doctor that is consistent with what the defendant claims happened ***. There isn't anything there. The reports are replete with references to normal, normal." In finding the State's expert evidence more credible than defendant's, the trial court did not err.

¶ 26 B. Forfeited Arguments

¶ 27 Defendant further argues the trial court imposed a double enhancement and denied him probation without finding probation was inconsistent with the ends of justice. 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 5/5-4.45-50(d) (West 2010). To preserve sentencing issues for appellate review, those issues must be raised in a defendant's written motion to reconsider the sentence before the trial court. *People v. Reed*, 177 Ill. 2d 389, 393, 686 N.E.2d 584, 586 (1997). (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.) 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). Additionally, "[u]nder Rule 604(d), any issue not raised in a motion to withdraw a guilty plea or to reconsider a sentence after a guilty plea is forfeited." *People v. Thompson*, 375 Ill. App. 3d 488, 492, 874 N.E.2d 572, 575-76 (2007). Adherence to this rule allows the trial court to first address any "contention of sentencing error and save the delay and expense inherent in appeal if they are meritorious." *Reed*, 177 Ill. 2d at 394, 686 N.E.2d at 586. See also *People v. Hanson*, 2014 IL App (4th) 130330 ¶ 17; *People v. Ahlers*, 402 Ill. App. 3d 726, 731-32, 931 N.E.2d 1249, 1254 (2010).

¶ 28 Defendant's motion to reconsider his sentence omitted any contention the trial court imposed a double enhancement. Nor did defendant contend the court erred in failing to find probation would both deprecate the seriousness of the offense *and* be inconsistent with the ends of justice. Defendant's sole contention before the court stated: "Defendant contends that this sentence did not reflect a proper balancing of the substantial mitigation provided to the [c]ourt, especially for a defendant facing his first felony, and for which there is a legislative preference for community-based sentencing." At the hearing on the motion to reconsider,

defendant argued he was a good candidate for probation and emphasized the fact he did not physically harm anyone.

¶ 29 Defendant did not explicitly or implicitly raise an argument regarding either the imposition of a double enhancement or the court's failure to find probation would be inconsistent with the ends of justice in his motion to reconsider his sentence. Because defendant failed to raise these issues before the trial court, he has forfeited appellate review.

¶ 30 C. Plain Error

¶ 31 First, we note defendant did not argue for plain-error review of his double enhancement argument. "The legislative purpose behind this statutory forfeiture provision *** creates a presumption that sentencing errors not raised in the trial court are *actually* forfeited for review." (Emphasis in original.) *Hanson*, 2014 IL App (4th) 130330 ¶ 37. Thus, we decline to address the merits of the double-enhancement argument, as defendant failed to meet his burden in establishing this argument merits plain-error review.

¶ 32 Defendant argues that the trial court committed plain error in failing to find probation would both deprecate the seriousness of the offense *and* be inconsistent with the ends of justice. The trial court made an express finding that probation would deprecate the seriousness of the offense. Defendant asserts the failure to make both findings amounts to an "error *** so egregious as to deny the defendant a fair sentencing hearing." *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184, 1187 (2010). Defendant contends the absence of both findings demonstrates the court did not properly apply the statutory presumption in favor of probation. See 730 ILCS 5/5-6-1(a)(2) (West 2010).

¶ 33 The first step in plain-error analysis is to determine whether there was reversible error. *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 411 (2007); *People v. Herron*,

215 Ill. 2d 167, 187, 830 N.E.2d 467, 480 (2005). "[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Piatkowski*, 225 Ill. 2d at 565, 870 N.E.2d at 410-11. However, "[t]o obtain relief under this rule, a defendant must first show that a clear or obvious error occurred." *Hillier*, 237 Ill. 2d at 545, 931 N.E.2d at 1187.

¶ 34 This court has held there is no magic language a court must use to comply with this requirement. *People v. Monk*, 174 Ill. App. 3d 528, 540, 528 N.E.2d 1063, 1071 (1988). All that is required is substantial compliance. *People v. Cox*, 82 Ill. 2d 268, 281, 412 N.E.2d 541, 548 (1980). Moreover, "recitation of the precise words of the statute is not required if the record indicates that the sentencing court substantially complied, *i.e.*, that the court reviewed and considered all relevant factors presented at the sentencing hearing." *People v. Binkley*, 176 Ill. App. 3d 539, 543, 531 N.E.2d 164, 167 (1988). A review of the trial judge's comments in their entirety as he pronounced defendant's sentence make it clear the court reviewed all relevant factors and reached the conclusion that probation would deprecate the seriousness of the offense and be inconsistent with the ends of justice. The failure to include the words "inconsistent with the ends of justice" was not error. Because the trial court substantially complied with the statutory finding needed to deny probation, defendant's plain-error argument fails.

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we grant the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 37 Affirmed.