2015 IL App (4th) 140337-U

NO. 4-14-0337

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 2, 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
TIMOTHY E. JACKSON,	)	No. 12CF274
Defendant-Appellant.	)	
	)	Honorable
	)	John C. Wooleyhan,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding defendant failed to demonstrate the trial court (1) considered improper sentencing factors in aggravation or (2) imposed an excessive sentence.

¶ 2 In July 2012, the State indicted defendant, Timothy E. Jackson, for numerous offenses, including armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)), aggravated robbery (720 ILCS 5/18-5(a) (West 2010)), and robbery (720 ILCS 5/18-1(a) (West 2010)). In February 2014, the case proceeded to trial, after which the jury convicted defendant of aggravated robbery and robbery. Following an April 2014 sentencing hearing, the trial court sentenced defendant to six years in the Illinois Department of Corrections (DOC).

¶ 3 Defendant appeals, asserting the trial court erred by (1) considering inappropriate sentencing factors in aggravation and (2) imposing an excessive sentence of six years in DOC. For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 Jackson does not raise any issues with regard to the evidence presented at trial, so we will briefly set forth the evidence relevant to this appeal. In May 2012, defendant and his codefendants, Joseph Teel, Gerald Utterback, and Zane Liggett, who were all members of a motorcycle club known as the Midwest Percenters, attended a charity event at Kelly's Restaurant in Liberty, Illinois. While at the event, defendant observed Michael Baehr, Joseph Cowman, Cowman's wife, and members of the Tunnel Rats motorcycle club ride by on their motorcycles. According to defendant, Baehr "flipped [defendant] off," though Baehr denied doing so.

¶ 6 In response to Baehr's purported action, defendant and his codefendants, along with several other Midwest Percenters, rode after Baehr and the Cowmans. The group eventually surrounded Baehr and the Cowmans, at which time defendant demanded their motorcycle vests. According to Baehr and the Cowmans, defendant said, "this isn't a fucking game, boys." Codefendant Teel then purportedly ordered Baehr and Cowman to hand over their vests to defendant or Teel would "blow [their] fucking heads off." No evidence suggested defendant had a firearm; rather, the issue was whether Teel possessed a firearm.

¶ 7 In July 2012, the State filed a four-count bill of indictment against defendant and his codefendants regarding the May 2012 incident. Count I alleged defendant committed an armed robbery in violation of section 18-2(a)(2) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/18-2(a)(2) (West 2010)), asserting he, or one for whose conduct he was legally responsible, while carrying a firearm on his person, knowingly took Tunnel Rats vests from Joseph Cowman and Michael Baehr by threatening the imminent use of force. Count II charged defendant with aggravated robbery pursuant to section 18-5(a) of the Criminal Code based on the same incident, but this time alleged defendant, or one for whose conduct he was legally

responsible, indicated verbally to Cowman and Baehr that he had a gun. Count III alleged defendant committed a robbery in violation of section 18-1 of the Criminal Code for taking Baehr's and Cowman's vests by threatening the imminent use of force. The State did not proceed to trial on count IV, which charged defendant with unlawful use of a weapon pursuant to section 24-1(a)(7)(ii) of the Criminal Code (720 ILCS 5/24-1(a)(7)(ii) (West 2010)) due to defendant's alleged possession of a shotgun with one or more barrels less than 18 inches in length. The codefendants' cases were all severed from one another.

¶ 8 In February 2014, the case proceeded to a jury trial. Following the presentation of evidence, the jury acquitted defendant on the armed-robbery charge but found defendant guilty of aggravated robbery and robbery. Because both counts arose out of the same act, the robbery charge merged with the aggravated-robbery charge for purposes of sentencing.

¶ 9 At the April 2014 sentencing hearing, the trial court considered evidence in aggravation and mitigation. In aggravation, the State asked the court to consider the presentence investigation report and the evidence at trial.

¶ 10 The presentence investigation report contained the following information. Defendant had four children, now in their 20s, with whom he remained close. He had worked as a correctional officer from 1983 to 1998, following which time he became self-employed from 1998 to 2011. He also served as a volunteer firefighter for 28 years. While on bond, defendant was employed by Schnepf Trucking as a truck driver, though he lost the job when his bond was revoked following the trial.

¶ 11 The presentence investigation report indicated defendant joined the Midwest Percenters in 2007, but he became inactive shortly thereafter due to his father's illness and subsequent death. He became active once again in 2011 and gained the status of "warlord,"

which defendant described as "more of a counselor position." Defendant denied any mental-health or substance-abuse issues, and his prior criminal record consisted only of minor traffic violations. As part of the presentence investigation report, the probation department attached Baehr's victim-impact statement, in which Baehr stated defendant was the aggressor and had "the highest involvement" in the crime. Though Baehr stated he did not fear defendant personally, he feared defendant's "capabilities" to use the "larger collective" to effect retaliation, causing Baehr to limit his socializing and frequenting of establishments where defendant was a patron. Defendant also included a statement in which he stated his intention in confronting Baehr and the Cowmans was to teach them a lesson in manners.

¶ 12 The presentence investigation report also contained several recommendation letters submitted on defendant's behalf. Defendant's sister, Pat Lendennie, asked the trial court to consider probation as an appropriate sentence due to the family and financial struggles defendant experienced while caring for his ill father and following his father's death in 2008. Defendant's cousin also asked the court to consider probation, stating defendant "is a good man and no threat to his or any other community." The mayor of Roodhouse submitted a character reference requesting leniency for defendant, explaining defendant, a personal friend for 50 years, "was a good guy that would lend a hand to anyone he knows." Ronald Martin, a longtime friend of defendant, requested probation for defendant, describing defendant's contributions to his community as a plumber, firefighter, and community volunteer. Rick Graham, a retired sheriff, echoed those sentiments in his letter.

¶ 13 After the trial court considered the presentence investigation report, defendant presented his evidence in mitigation. John Schnepf, the owner of Schnepf Trucking, testified defendant was dependable and trustworthy, whether he was delivering products locally or out of

state. Schnepf recalled an occasion when the truck defendant was driving ended up in a ditch, and defendant asked that any repair costs be taken from his paycheck. If defendant received probation, Schnepf said he would rehire defendant as one of his drivers.

¶ 14 Russell Iverson testified he had been friends with defendant since 1983, when they worked together at DOC. While defendant was employed at DOC, a period of approximately 15 years, Iverson described him as dependable and trustworthy. The two maintained regular contact after defendant left DOC until approximately 2000, at which time their contact became more sporadic due to defendant's employment in the trucking business. Iverson was not involved with the Midwest Percenters and did not interact with defendant in that context.

¶ 15 Michael Wendell testified defendant is his uncle. Wendell had been an active member of the United States Army for 14 years and had obtained the rank of staff sergeant. Prior to joining the army at age 22, Wendell had regular contact with defendant, which influenced his life. For example, defendant was a firefighter, and one of Wendell's duties with the Army was as a firefighter. Defendant, who was the assistant chief of the Roodhouse fire department, often took Wendell to the fire station to ride on the fire trucks. Additionally, defendant helped teach Wendell the difference between right and wrong.

¶ 16 Donna Feltner, defendant's sister, testified she moved from the area in the late 1970s, but she returned every month or two to visit their mother in a nursing home. She would see defendant two to three times a year but they corresponded regularly on Facebook, a social-media website. According to Feltner, in 2008, their father became ill, which caused a great hardship because he was the primary caretaker for their mother, who suffered from dementia and Alzheimer's disease. At the request of his father, defendant quit his job and became actively

involved in caring for his parents. When his mother entered an assisted-living facility, defendant visited her frequently. According to Feltner, when their father passed away, defendant "became the rock of the family." He tried to keep the family connected and provided updates as to his mother's health. Feltner helped resolve defendant's lingering financial and business issues arising from his incarceration so he could return to his home and his business if given probation. She also testified that he had a great deal of community support.

¶ 17 Defendant's daughter, Brittany Smith, testified defendant has always been her role model. He also ensured her younger brother graduated high school despite numerous obstacles. Defendant helped his older brother by providing financial support for his wife and newborn child. Additionally, he took in grandchildren and other relations for brief periods of time when their parents were financially unable to care for them. Smith stated if defendant received a DOC sentence, it would be devastating to the family because he was so much a part of their daily lives.

¶ 18 Defendant exercised his right to make a statement in allocution, at which time he explained he spent his life trying to serve and promote harmony in his community because that was the drive his father instilled in him. He then acknowledged his father would not be proud of him now. Defendant apologized for his actions and bad decisions in May 2012, asserting he would never repeat those decisions in the future. If given probation, he said the trial court would not regret its decision. Defendant then explained his "foolish" decision to follow Baehr and the Cowmans was based on an insult to his ego and something that he would not allow to happen again.

¶ 19 In pronouncing defendant's sentence, the trial court noted, "[t]here is a statutory presumption in favor of probation, unless that presumption is overcome by the evidence and

other factors in the case." The court acknowledged the witnesses and letters provided by defendant demonstrated "many good qualities" defendant "has had in the past."

¶ 20 The trial court remarked that three of the four codefendants proceeded to trial and were found guilty to some extent for the events in May 2012. The fourth codefendant entered into a plea agreement. The court said it looks for two red flags in sentencing—the use of controlled substances and the presence of a weapon. Nothing in the record demonstrated defendant used controlled substances; however, the question for the jury surrounded the presence of a weapon. The court then went through the jury instructions for aggravated robbery, the charge of which the jury convicted defendant. The court noted the instruction required the jury to find defendant, or one for whose conduct he was legally responsible, took items by force "while indicating verbally or by his actions to the victim that he was at the time armed with such a firearm." Immediately thereafter, the court stated, "the jury found that the offense by [defendant] had been proven beyond a reasonable doubt, so on the record in this case there is the existence of a weapon being used in a forcible felony."

¶ 21 The trial court stated the events in May 2012 involved defendant and a group of his friends riding their motorcycles to chase down a group of individuals, then blocked those individuals so they could not leave. Though defendant regretted his actions and said it would not happen again, the court found that excuse was more appropriate for someone in junior high school, not an adult. The court found the offense constituted a violent crime. While imposing the sentence, the court said it considered the evidence in mitigation in reaching its sentencing but ultimately determined probation would deprecate the seriousness of the offense. Accordingly, the court determined a six-year DOC sentence would be appropriate due to the "nature and violence of the offense."

¶ 22 The next day, defendant filed a motion to reconsider his sentence, asserting probation was a more appropriate sentence given the evidence presented at sentencing. Later that month, the trial court denied the motion, noting defendant had been properly sentenced for the Class 1 felony of aggravated robbery.

¶ 23 This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 On appeal, defendant argues the trial court erred by (1) considering inappropriate sentencing factors in aggravation and (2) imposing an excessive sentence of six years in DOC. We begin by addressing whether the court improperly considered whether a firearm was used in the commission of the offense.

¶ 26 A. Aggravating Factor

¶ 27 Defendant first asserts the trial court erred by considering a firearm was used in the commission of the offense, despite the jury acquitting defendant of armed robbery. Initially, the parties dispute the standard of review. Defendant asserts we should review the court's sentencing errors for an abuse of discretion, citing *People v. Tye*, 323 Ill. App. 3d 872, 887, 753 N.E.2d 324, 339 (2001). The State, on the other hand, asserts defendant has forfeited the issue by failing to raise it before the trial court, citing *People v. Hillier*, 237 Ill. 2d 539, 544, 931 N.E.2d 1184, 1187 (2010).

¶ 28 1. *Forfeiture*

¶ 29 Although defendant filed a motion to reconsider his sentence in which he challenged the length of his sentence and argued the trial court did not properly consider the factors in mitigation, defendant never challenged the court's statement the jury found "the existence of a weapon being used in a forcible felony" as an indication the court (1) sentenced

defendant for armed robbery or (2) applied a double enhancement in sentencing defendant for aggravated robbery.

¶ 30 Section 5-4.5-50(d) of the Unified Code of Corrections (730 ILCS 5/5-4.5-50(d) (West 2012)) requires a defendant to preserve any sentencing issues in a postsentencing motion. Had defendant properly raised these issues in a postsentencing motion as required by statute, "[the] court could have answered the claim by either (1) acknowledging its mistake and correcting the sentence, or (2) explaining that the court did not improperly sentence [the] defendant." *People v. Rathbone*, 345 Ill. App. 3d 305, 310, 802 N.E.2d 333, 337 (2003). We would then have no need to speculate as to whether the court considered the "existence" of a firearm in sentencing defendant. Therefore, we agree with the State that these issues have been forfeited by defendant.

¶ 31 2. *Plain-Error Review*

¶ 32 Defendant next asserts we can review this forfeited issue for plain error. Under the plain-error doctrine, "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). Plain-error review is a narrow exception to the forfeiture rule, intended to protect a defendant's rights and the integrity of the judicial process; it is not a general saving clause allowing for review of all forfeited issues. *People v. Allen*, 222 Ill. 2d 340, 353, 856 N.E.2d 349, 356 (2006). To allow plain-error review on every forfeited issue would cause the exception to consume the general rule of forfeiture. *Rathbone*, 345 Ill. App. 3d at 311, 802 N.E.2d at 338. Thus, to demonstrate the necessity of plain-error review, it is insufficient for a defendant to assert the court's sentencing affected his fundamental right to liberty because, arguably, all

sentencing errors affect a defendant's fundamental right to liberty. *Id.* Rather, a more in-depth analysis is necessary. *Id.*

¶ 33 "[B]efore declaring that an alleged sentencing error raised for the first time on appeal is reviewable as plain error, the reviewing court should consider whether the evidence was closely balanced and whether the error was sufficiently grave that the defendant was deprived of a fair sentencing hearing." *Id.* at 312, 802 N.E.2d at 339. As to this issue, defendant has not asserted (1) the evidence at sentencing was closely balanced or (2) the alleged error deprived him of a fair sentencing hearing. See *id.* Because defendant failed to address either prong of the test at to this issue, we conclude plain-error review is inappropriate here. See *Hillier*, 237 Ill. 2d at 545, 931 N.E.2d at 1187 (the defendant bears the burden of persuasion).

¶ 34 B. Length of Sentence

¶ 35 Defendant next asserts the trial court erred by imposing an excessive sentence. We review the court's sentence for an abuse of discretion. *People v. Alexander*, 239 Ill. 2d 205, 212, 940 N.E.2d 1062, 1066 (2010). "A sentence will be deemed an abuse of discretion where the sentence is 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *Id.* (quoting *People v. Stacey*, 193 Ill. 2d 203, 210, 737 N.E.2d 626, 629 (2000)). In reviewing the trial court's decision, it is not the role of this court to substitute its judgment for that of the trial court merely because we would have reached a different conclusion. *Id.* at 213, 940 N.E.2d at 1066.

¶ 36 In this case, the trial court sentenced defendant to 6 years in DOC, well within the 4- to 15-year range prescribed for a Class 1 felony. See 730 ILCS 5/5-4.5-30(a) (West 2012). In determining defendant's sentence, the court specifically stated it took into consideration the evidence in mitigation and found it lacking in comparison to the evidence in aggravation.

Though defendant presented numerous witnesses and letters attesting to his character, most of the information pertained to defendant's good behavior in the past. The court then outlined the nature of the offense, in which defendant led 8 to 14 members of his motorcycle club in a chase on public roadways to stop Baehr and the Cowmans for allegedly "flipping [him] off." Once the group caught Baehr and the Cowmans, defendant and the others physically impeded Baehr from leaving the scene because, as defendant explained in his statement to probation, defendant wanted to deliver a lecture on respect and manners. Defendant apologized for his role in the offense and his "bad decision"; however, the court found that reasoning insufficient. The court noted defendant was no longer in junior high school, where such an excuse may suffice, but was an adult who could not simply attribute his actions to a "bad decision." The court then stated, "the bottom line in all these things is that this was a crime of violence."

¶ 37 Defendant asserts probation was the appropriate sentence in this case given the evidence in mitigation and a presumption that favors probation. *People v. Daly*, 2014 IL App (4th) 140624, ¶ 28, 21 N.E.3d 810. However, the trial court is not required to impose a sentence of probation where the evidence demonstrates it would deprecate the seriousness of the offense and be inconsistent with the ends of justice. See 730 ILCS 5/5-6-1(a) (West 2012).

¶ 38 In reaching its decision, the trial court found probation would deprecate the seriousness of the offense due to the "nature and violence of the offense." The court found defendant's actions on the day of the offense were markedly different from the man described by his witnesses as someone who was a role model and sought to serve his community. Moreover, most of the witnesses had no regular contact with defendant in recent years, and none of the witnesses observed defendant's actions as a member of the Midwest Percenters.

¶ 39 Defendant's six-year DOC sentence is in the lower range for Class 1 sentencing, indicating the trial court considered defendant's lack of criminal history and the other evidence in mitigation. Accordingly, we conclude the court did not abuse its discretion by sentencing defendant to six years in DOC.

¶ 40 III. CONCLUSION

¶ 41 For the foregoing reasons, 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. 55 ILCS 5/4-2002 (West 2012).

¶ 42 Affirmed.