

NOTICE

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2015 IL App (4th) 140430-U

NO. 4-14-0430

FILED

December 18, 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.)	Champaign County
MONEL S. BROWN,)	No. 13CF1766
Defendant-Appellant.)	
)	Honorable
)	Heidi N. Ladd,
)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Knecht and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not commit plain error in resentencing defendant following the revocation of probation.

¶ 2 Defendant, Monel S. Brown, pleaded guilty to one count of unlawful failure to register as a sex offender (with a prior failure to register) (730 ILCS 150/10(a) (West 2012)), and the trial court sentenced him to 24 months' probation. Two months later, the State filed a petition to revoke his probation, which the court granted, and the court resentenced defendant to seven years in prison. Defendant appeals, arguing the court deprived him of a fair sentencing hearing by punishing him in part for an alleged domestic battery. The State argues defendant forfeited his claim and has failed to establish plain error occurred. We affirm.

¶ 3

I. BACKGROUND

¶ 4 On December 11, 2013, defendant pleaded guilty to unlawful failure to register as a sex offender (with a prior failure to register) (730 ILCS 150/10(a) (West 2012)), a Class 2 felony, and the trial court sentenced him to 24 months' probation.

¶ 5

A. Revocation of Probation

¶ 6 On February 20, 2014, the State filed a petition to revoke defendant's probation, alleging the following violations: (1) defendant reported he was homeless and was directed to contact his probation officer nightly of his whereabouts for each evening, which he failed to report on December 11, 12, 13, 15, 16, 17, 18, 19, and 20, 2013; (2) defendant was directed to report to court services on December 19, 2013, and failed to report as directed; (3) defendant consumed cannabis without a physician's prescription as evidenced by his verbal admission to probation officer Jeremy Jessup; (4) defendant consumed cannabis without a physician's prescription as evidenced by a urine sample he provided on January 9, 2014, which tested positive for the presence of tetrahydrocannabinol; (5) defendant was directed to participate in sex-offender treatment, and on January 9, 2014, was directed to contact the Community Resource Counseling Center within 14 days to make treatment arrangements, and he failed to do so; (6) on December 23, 2013, defendant was directed to report to court services biweekly, every other Thursday, beginning January 9, 2014, and failed to report as directed on January 23, 2014, and February 6, 2014; and (7) on February 6, 2014, defendant possessed alcohol.

¶ 7

On April 7, 2014, and April 9, 2014, the trial court held a hearing on the State's petition to revoke probation. After the testimony of probation officer Jeremy Jessup and defendant, the court concluded the State had met its burden of proof for items (2), (3), (4), (5),

(6), and (7) in the State's petition to revoke.

¶ 8 B. Resentencing

¶ 9 On May 16, 2014, the trial court held a resentencing hearing and heard evidence presented in aggravation and mitigation. The State first presented Emily Erwine's testimony in aggravation. Erwine was defendant's ex-girlfriend and had lived with defendant for three months in 2013. Erwine testified to an incident that allegedly occurred on February 6, 2014, when defendant choked and slapped her. Defendant was subsequently charged with domestic battery in Champaign County case No. 14-CF-185. Erwine also testified that while defendant was released on bond for the domestic battery charge, he attempted to call her at least 50 times. The court took judicial notice of a no-contact order between Erwine and defendant entered on February 7, 2014.

¶ 10 The State also presented Jeremy Jessup's testimony in aggravation. Jessup testified about the domestic battery on February 6, 2014. Defendant claimed he was not at Erwine's address, where the dispute was reported to have occurred. However, Jessup was able to identify defendant's location that evening through defendant's electronic monitoring device. The device revealed defendant was indeed at Erwine's address during the day on February 6, 2014. Also, at the time of his arrest defendant was in possession of a 24-ounce can of beer.

¶ 11 Defendant presented evidence in mitigation. Defendant offered evidence of his attendance at a Moral Reconation Therapy program and completion of a substance-abuse workshop while he was incarcerated. Defendant also submitted a letter from Nancy Griffin, who was affiliated with the programs division at the jail, describing his involvement in the General Education Development program, participation in the black history month display at the jail

lobby, completion of a substance-abuse workshop, and participation in a classroom cleanup.

¶ 12 The State recommended the trial court sentence defendant to seven years in prison because his past indicated he was "terrible at complying with the terms of previous community-based sentences." In support of its recommendation, the State pointed to defendant's criminal history. In 2008, defendant was sentenced to conditional discharge for domestic battery in Champaign County case No. 08-CM-39, and he did not complete any of the required public-service work or anger-management classes. Also in 2008, defendant was placed on 12 months' probation for unlawful consumption of alcohol in Champaign County case No. 08-CM-1228, and he did not complete any of the required public-service work. Later in 2008, defendant was convicted of criminal sexual abuse in Champaign County case No. 08-CF-1706 and sentenced to 30 months' probation, which required his compliance with the requirements of the Sex Offender Registration Act (730 ILCS 150 (West 2008)). During that time, defendant failed to complete treatment requirements and violated a no-contact order. In 2009, defendant was sentenced to prison for three years for unlawful failure to register as a sex offender in Champaign County case No. 09-CF-322.

¶ 13 Defendant requested a community-based sentence or a minimal prison term.

¶ 14 In imposing its sentence, the trial court stated it had considered defendant's criminal history and consistent failure to comply with the law and court orders. The court stated, "it's very difficult to have [defendant] do even the most basic things when he's on probation, and unfortunately then that undermines any attempts that the court has made to try and put those services in place that would help him be successful, particularly given his age." The court emphasized the importance of the mandatory counseling imposed on defendant, which he failed

to initiate. The court also considered defendant's \$14,000 child-support debt, lack of initiative or motivation, short periods of employment, and illegal cannabis use.

¶ 15 The trial court further found that a community-based sentence would be inappropriate as defendant had failed to abide by the terms of his previous community-based sentences. The court noted the danger presented to the community when a sex offender fails to obtain counseling or satisfy his sex-offender-registration requirements. Commenting on the issue of public safety, the court stated: "[t]he original conviction was for living with a different woman and a one-year-old. This is a pattern with [defendant]. He won't get treatment. He won't stay where you can keep track of him, and he keeps moving in with young children, and that's a dangerous situation, so protection of the public now has to be a factor for the court as well."

¶ 16 The trial court also found Erwine's testimony, regarding both the alleged domestic battery and the 50 or more phone calls in violation of the no-contact order, to be credible.

¶ 17 Last, the trial court considered defendant's lack of candor with Jessup regarding his presence at Erwine's residence on February 6, 2014, where the court believed defendant was present and committed the domestic battery.

¶ 18 The trial court resentenced defendant to seven years in prison, the maximum possible period of incarceration. The court stated its sentence was based on "the nature and circumstances of the offense, and the character, and rehabilitative potential of the defendant, that at this point there's very little rehabilitative potential other than his youth, and that's been attenuated by his attitude, his lack of initiative, and the fact that he continues to violate the law and violate court orders." The court found imprisonment was necessary for the protection of the public because "a community-based sentence would deprecate the seriousness of the defendant's

conduct, be inconsistent with the ends of justice, and be an absolute waste."

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 On appeal, defendant argues the trial court deprived him of a fair sentencing hearing following probation revocation by punishing him in part for a domestic battery alleged to have occurred while he was on probation. The State argues defendant forfeited his claim by failing to assert it in the trial court, and he has failed to establish plain error to overcome the forfeiture. We agree with the State.

¶ 22 A. Forfeiture

¶ 23 For an issue to be preserved for review on appeal, the record must show (1) a contemporaneous objection to the trial court's error was timely made and (2) the issue was contained in a written posttrial motion. *People v. Rathbone*, 345 Ill. App. 3d 305, 309, 802 N.E.2d 333, 336 (2003). The forfeiture rule is intended to bar claims from review when they are not first considered by the trial court. *Id.* at 310, 802 N.E.2d at 337. Defendant acknowledges he has forfeited the sentencing issue by not filing a motion to reconsider the sentence in the trial court or objecting at the sentencing hearing. However, he argues for plain-error review.

¶ 24 B. The Plain-Error Doctrine

¶ 25 The forfeiture rule is not absolute and Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967) provides that a court of review may review plain errors that affect substantial rights. "[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear and obvious error occurs 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 occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged integrity of the judicial process, regardless of the closeness of the evidence." *People v. Lewis*, 234 Ill. 2d 32, 42-43, 912 N.E.2d 1220, 1226-27 (2009) (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007)). However, the first step of plain-error review is to determine whether any error occurred at all. *Id.*

¶ 26 Citing *People v. Bouyer*, 329 Ill. App. 3d 156, 161, 769 N.E.2d 145, 149 (2002), defendant contends the trial court's consideration of the alleged domestic battery was error, therefore depriving him of a fair sentencing hearing. In *Bouyer*, the defendant pleaded guilty to two counts of burglary, agreed to pay restitution, and was placed on 30 months' probation. *Id.* at 158, 769 N.E.2d at 147. The State petitioned to revoke the defendant's probation, alleging he had tested positive for cannabis and committed disorderly conduct, which the court granted. *Id.* at 158-59, 769 N.E.2d at 147. The parties agreed to postpone the sentencing hearing for three months, during which the defendant was required to pay \$300 per month toward restitution. *Id.* at 159, 769 N.E.2d at 148. The court expressly stated if the defendant paid all of his obligations, it would consider the case terminated. *Id.* at 161, 769 N.E.2d at 150.

¶ 27 The defendant in *Bouyer* failed to make the required payments. The trial court subsequently sentenced him to a seven-year prison term. *Id.* at 158-60, 769 N.E.2d at 148-49. The reviewing court found it was clear that in sentencing the defendant, the trial court had punished him for falling behind on his restitution payments rather than for the underlying burglary charges because (1) the sentencing hearing was conditional on the defendant's payment toward restitution; and (2) the court only considered the defendant's failure to pay restitution at

the sentencing hearing and did not mention the underlying offense or the violations that led to his probation revocation. See *id.* at 162, 769 N.E.2d at 150.

¶ 28 The State cites to *People v. McMann*, 305 Ill. App. 3d 410, 415, 712 N.E.2d 935 (1999), in support of its position. In *McMann*, the defendant pleaded guilty to stalking and was placed on two years' probation. *Id.* at 411, 712 N.E.2d at 936. The State petitioned to revoke the defendant's probation due to allegations of a battery, failure to pay fees, and intoxication, which the court granted, and it resentenced the defendant to three years in prison. *Id.* The defendant argued the trial court sentenced him for the battery rather than for the underlying stalking charge, in violation of the general rule that a court may not impose a sentence to punish the defendant for activity that triggered the revocation of probation. *Id.* at 414, 712 N.E.2d at 937-38.

¶ 29 The reviewing court in *McMann* rejected the defendant's argument and stated: "[W]hen sentencing a defendant after revocation of probation, the trial court may consider the defendant's conduct while on probation, and criminal offenses committed by defendant while on probation may be considered in aggravation." *Id.* at 414, 712 N.E.2d at 938. The court noted a sentence within the statutory range for the underlying offense will not be set aside unless the reviewing court is strongly persuaded the sentence imposed was imposed as a penalty for other conduct, rather than for the underlying offense. *Id.* at 414-15, 712 N.E.2d at 938. The court held it was proper to consider the battery in determining the defendant's sentence upon revocation of probation and "any responsible court would," because it reflected adversely on the defendant's rehabilitative potential. *Id.* at 415, 712 N.E.2d at 938.

¶ 30 In the present case, the transcript from the resentencing hearing reflects the trial court considered many factors in resentencing defendant, such as his age, criminal history,

failure to follow through with previous community-based sentences, probation violations, conduct while on probation (including the alleged domestic battery), all in light of the underlying offense itself. This case more closely resembles *McMann* than *Bouyer*. It does not appear the court placed improper weight on the alleged domestic battery or sought to punish defendant for it in resentencing him on the underlying offense. Instead, it appears the court conscientiously considered multiple appropriate factors in arriving at its sentence.

¶ 31 Therefore, we find the trial court did not err in its consideration of defendant's alleged domestic battery in resentencing defendant for unlawful failure to register as a sex offender.

¶ 32 III. CONCLUSION

¶ 33 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.

¶ 34 Affirmed.