2015 IL App (5th) 130256-U

NO. 5-13-0256

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Saline County.
	)	
v.	)	No. 10-CF-131
	)	
WINIFRED L. MOSS,	)	Honorable
	)	Walden E. Morris,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE SCHWARM delivered the judgment of the court.
Justices Welch and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant forfeited his claim that the trial court made improper remarks to the jury during *voir dire*; the sentence imposed on the defendant's conviction was not an abuse of discretion; and the defendant is entitled to credit against his fines for time spent in presentence incarceration.

¶ 2 BACKGROUND

¶ 3 In June 2012, a Saline County jury found the defendant, Winifred L. Moss, guilty of unlawful delivery of between 1 and 15 grams of cocaine within 1,000 feet of a church (720 ILCS 570/401(c)(2), 407(b)(1) (West 2010)), a Class X felony with a sentencing range of 6 to 30 years (730 ILCS 5/5-4.5-25(a) (West 2010)). The evidence adduced at

trial established that on the morning of December 22, 2009, using a cooperating buyer and $400 in "official advanced funds," agents of the Southern Illinois Drug Task Force conducted a controlled purchase of approximately one quarter ounce of cocaine from the defendant. The purchase occurred at the defendant's home less than 400 feet away from the Mezpaw General Baptist Church in Harrisburg and was captured by hidden recording devices that the buyer had been wearing at the time.

¶ 4 In August 2012, the trial court imposed a 20-year sentence on the defendant's conviction and assessed various fines and fees. In April 2013, the trial court denied the defendant's motion for a new trial and his motion to reduce sentence. In May 2013, the defendant filed a timely notice of appeal.

¶ 5 DISCUSSION

¶ 6 The defendant argues that remarks made by the trial court to the jury during *voir dire* denied him his right to be tried by an impartial jury, that the trial court abused its discretion in imposing a 20-year sentence on his conviction, and that the court erred in failing to order that he be given a $5 per day credit towards his fines for time spent in custody prior to sentencing. We will address each contention in turn.

¶ 7 The Trial Court's Comments

¶ 8 "A criminal defendant has a constitutional right to trial by an impartial jury." *People v. Belknap*, 2014 IL 117094, ¶ 83. *Voir dire* thus exists to ascertain whether a prospective juror harbors any bias or prejudice that might interfere with his or her ability to fairly determine the issues presented at trial. *Id*. The trial court is primary responsible for both initiating and conducting the *voir dire* examination. *People v. Metcalfe*, 202 Ill.

2d 544, 552 (2002). "[T]he manner and scope of the examination rests within the discretion of the trial court, and we review such decisions for an abuse of discretion." *People v. Rinehart*, 2012 IL 111719, ¶ 16. "An abuse of discretion occurs when the conduct of the trial court thwarts the purpose of *voir dire* examination–namely, the selection of a jury free from bias or prejudice." *Id.*

¶ 9 Here, at the commencement of *voir dire*, the trial court discussed the purpose of the process and noted that *voir dire* "literally means to tell the truth." The court also discussed the "*Zehr* principles" (see *People v. Zehr*, 103 Ill. 2d 472 (1984); *People v. McNeal*, 405 Ill. App. 3d 647, 661 (2010)), and advised the members of the venire that a juror must understand and accept them (see Ill. S. Ct. R. 431(b) (eff. July 1, 2012)). After further advising the potential jurors that they would be questioned by the prosecutor, defense counsel, and the trial court, the court stated the following:

> "The purpose of these questions [is] not to pry into your personal li[ves] or embarrass you. They are to allow the [c]ourt and the parties to determine or obtain information so as to make a decision as to whether or not for this particular case you would be a good juror. Okay[?]
>
> Well, what is a good juror? A good juror is someone who will listen to the evidence that's presented in this courtroom, apply the law to that evidence as the [c]ourt instructs you [what] is the law for this case, and then decide the issues, based upon the evidence and the law, without any interest, sympathy, [or] bias or prejudice to either side. In other words, a good juror is someone who will listen to

the evidence, apply the law[,] and decide this case fairly and honestly. That's what a good jury is or a good juror is."

¶ 10 Noting that a citizen's "fundamental right[ ]" to a jury trial would be frustrated without "people who are willing to come to court *** to serve as jurors," the court then stated:

"Everyone that works here, the attorneys, myself, everyone involved in this system understands that for a citizen to be summonsed to court, to have their lives disrupted, their routine changed, to miss work, to not be with their family or friends is an imposition. And we all understand that's an imposition. But possibly other than your right to vote, your right to serve on a jury is one of the few things that you as a citizen can do to directly influence the way our system works. And by that I mean our government and our judicial system.

So when you are asked questions on *voir dire*, I'm going to ask you to remember the oath that you have taken to tell the truth. And then I'm going to ask you to weigh the inconvenience that you are suffering here today with the sacrifices that are being made by other people who are citizens of this county, and by that I'm talking about our military personnel. I am confident while I have been talking to you there have been several who have either been killed or injured in the line of service for this country, which service allows us to come and have jury trials.

So I would ask that you listen to the questions, answer them truthfully and answer them in such a manner so as to reveal that you would be a good juror

rather than not a good juror. Without you, without jurors, our system doesn't work for the State or [the defendant]."

¶ 11 Before individually questioning the potential jurors, the trial court reminded them that the questions posed by the court and the attorneys were "not designed to pry into [their] lives" but were rather intended to determine who "would be a fair and impartial juror to hear this particular case." During subsequent questioning, the trial court asked relevant questions of each potential juror, including whether they understood and accepted the *Zehr* principles and whether they personally knew anyone involved in the case. The trial court also asked the prospective jurors questions such as, "If you were selected to be a juror on this case, would you be able and willing to listen to the evidence, to apply the law the [c]ourt tells you[,] and decide the issues without any interest, sympathy, bias[,] or prejudice?"

¶ 12 Notably, one prospective juror acknowledged that she knew the defendant's family and was "afraid" that she "would be prejudiced" as a result. Another indicated that although he lived next door to the defendant's "son or nephew," he did not believe that he would be biased against "either side." A prospective juror who stated that he was familiar with the defendant, defense counsel, and two of the State's witnesses indicated that he could still be fair to both the defendant and the State. Prospective jurors who stated that they knew the defendant, the State's Attorney, or defense counsel indicated the same. Several venire members stated that despite having previously been the victim of a crime, they could be fair. Three members indicated that serving on the jury might present problems with respect to their jobs. One indicated that she takes medication that makes

her "really tired." All of the potential jurors agreed that they understood and accepted the *Zehr* principles, and when questioned by defense counsel, all indicated that they would find the defendant "not guilty" if the State failed to meet its burden of proof. The defense and the State both used peremptory challenges to remove several potential jurors, but none were removed for cause. The prospective juror who acknowledged that she was possibly prejudiced was never tendered.

¶ 13 On appeal, the defendant challenges the trial court's use of the term "good juror" in conjunction with its statements regarding the "inconvenience" that serving on a jury might entail. The defendant suggests that the court's comments discouraged the members of the venire from honestly answering the questions that they were asked during *voir dire* and thus thwarted the purpose of the process. The defendant specifically asserts:

> "[T]he trial judge intimated that venire members who were unable to serve were a disgrace to dead and injured Amercian soldiers, and explicitly instructed the venire to give him the answers he wanted to hear during *voir dire*: answers that indicated 'that you would be a good juror rather than not a good juror.' "

¶ 14 The defendant further contends that "the trial court made its instructions explicit: while the venire was under a duty to answer questions truthfully, members were also obligated to say that they were not biased or prejudiced."

¶ 15 In response, the State maintains that the defendant's claim of error stems from "a complete misinterpretation of the trial court's comments" and that in context, "the trial court's statements to the venire were not improper." While we tend to agree with the

State's position, we need not resolve the parties' dispute because the defendant has forfeited his claim that the complained-of remarks denied him a fair trial.

¶ 16 Defense counsel lodged no objections during *voir dire*, and no issues with respect to the jury selection process were raised in the defendant's motion for a new trial. The defendant has therefore forfeited his present argument. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). On appeal, however, acknowledging his forfeiture of the claim, the defendant asks that we address it under the second prong of the plain-error test, which bypasses normal forfeiture principles and allows review of an unpreserved error that is "so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). It is well established, however, that where a defendant asserts that the trial court's comments thwarted the purpose of *voir dire* or otherwise "tainted the jury pool," to "establish plain error under the second prong, the defendant must show the selected jury was biased." *People v. Morales*, 2012 IL App (1st) 101911, ¶¶ 53, 59; see also *People v. Trzeciak*, 2014 IL App (1st) 100259-B, ¶¶ 82-85; *People v. Ingram*, 409 Ill. App. 3d 1, 13-18 (2011); *People v. Brown*, 388 Ill. App. 3d 1, 4-11 (2009).

¶ 17 Here, nothing supports the defendant's intimations that the trial court's comments "chilled the responses" of the prospective jurors. *Brown*, 388 Ill. App. 3d at 9. The record indicates that the venire members were candid in their responses, and the defendant's claim of error "rests on nothing more than speculation." *Trzeciak*, 2014 IL App (1st) 100259-B, ¶ 84. Moreover, nothing suggests that the venire members who

were ultimately selected to serve as jurors were not fair and impartial, and the defendant does not contend otherwise.

¶ 18 We note that all of the selected jurors stated that they understood and accepted the *Zehr* principles and would decide the case by applying the law to the evidence without sympathy, bias, or prejudice. All of the selected jurors were also questioned and approved by defense counsel, and all agreed that they would find the defendant "not guilty" if the State failed to meet its burden of proof. "Most telling is the fact that defense counsel did not object to the swearing of the jury, which indicates to us counsel believed the jury as impaneled could be fair and impartial." *Trzeciak*, 2014 IL App (1st) 100259-B, ¶ 84.

¶ 19 Because there is no evidence to support a claim that the defendant did not receive a fair trial by a fair and unbiased jury, there is no basis to find plain error. *Morales*, 2012 IL App (1st) 101911, ¶ 60; *Ingram*, 409 Ill. App. 3d at 18. The defendant's argument regarding the trial court's comments to the jury is thus forfeited. *Id*.

¶ 20 The Defendant's 20-year Sentence

¶ 21 The defendant's second argument on appeal is that the 20-year sentence imposed on his conviction is excessive in light of his age, his lack of violent criminal history, and the nature of the crime itself. We disagree.

¶ 22 At the defendant's sentencing hearing, the State noted that the defendant's criminal history "dates back to 1977," that many of his charges and convictions were for drug-related offenses, and that despite his prior stints in prison, "[h]e continues to violate the law." Maintaining that Saline County's drug problem "seems to be getting worse," the

State also argued that a "significant sentence" was needed to deter others from participating in the community's illegal drug trade. Noting that the sentencing range for the defendant's present conviction was 6 to 30 years, the State urged the trial court to impose a sentence of 29½ years.

¶ 23 In response, defense counsel emphasized that the defendant was almost 55 years old, had a family, and was employed as an automobile mechanic. Counsel argued that the defendant was a productive and active member of society and noted that while incarcerated, the defendant would "not be able to continue to work and to help provide for family members." Counsel also argued that although the defendant's crime had been committed within 1,000 feet of a church, "[i]t was done inside his home" when church services were not in session. Counsel thus maintained that there was "nothing about the nature of [the] crime" that had anything to do with the church.

¶ 24 In allocution, the defendant apologized for what he had done and asked that the court be fair. The defendant also took issue with the State's request for a lengthy sentence.

¶ 25 After taking a brief recess, the trial court stated that it had considered the defendant's presentence investigation report, the evidence adduced at trial, the arguments of the parties, the defendant's statement in allocution, and the "rehabilitation potential of the defendant." The court further stated that it had "considered[,] weighed[,] and balanced" the statutory factors in mitigation and aggravation set forth in the Unified Code of Corrections. See 730 ILCS 5/5-5-3.1(a), 5-5-3.2(a) (West 2010). The court then entered judgment on the jury's verdict and sentenced the defendant to 20 years in prison.

¶ 26 The defendant subsequently filed a motion to reduce sentence. The motion alleged that the 20-year sentence he received was "unjust" and "disproportionate" and that the trial court did not properly consider the applicable factors in mitigation and aggravation when imposing it. The trial court later denied the motion following a hearing at which the court "reiterate[d]" that it had considered "each of the factors in mitigation and aggravation set forth in the statute."

¶ 27 "A trial court's sentencing decisions are entitled to great deference and weight." *People v. Streit*, 142 Ill. 2d 13, 18 (1991). "Although the legislature has prescribed the permissible ranges of sentences, great discretion still resides in the trial judge in each case to fashion an appropriate sentence within the statutory limits." *People v. Fern*, 189 Ill. 2d 48, 53 (1999).

¶ 28 "A trial judge is in a far better position than an appellate court to fashion an appropriate sentence, because such judge can make a reasoned judgment based upon firsthand consideration of such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age[,] whereas the appellate court has to rely entirely on the record." (Citations and internal quotations omitted.) *Streit*, 142 Ill. 2d at 19.

¶ 29 "A reviewing court must not substitute its judgment for that of a sentencing court merely because it would have weighed the factors differently." *Id*.

¶ 30 A trial court is not required "to recite, and assign a value to, each fact presented in evidence at the sentencing hearing." *People v. Meeks*, 81 Ill. 2d 524, 534 (1980). Where the record reveals that the trial court was aware of and considered the relevant factors in

aggravation and mitigation, a reviewing court will not disturb a sentence falling within the permissible sentencing range absent an abuse of discretion. *People v. Murphy*, 322 Ill. App. 3d 271, 287 (2001). "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.' " *People v. Alexander*, 239 Ill. 2d 205, 212 (2010) (quoting *People v. Stacey*, 193 Ill. 2d 203, 210 (2000)).

¶ 31 As previously indicated, the defendant maintains that the sentence he received is excessive in light of his age and lack of violent criminal history. He further suggests that the trial court should have given more weight to that fact that his crime did not exploit or pose a danger to any members of the Mezpaw General Baptist Church.

¶ 32 With respect to the defendant's claims regarding his age and the church, the defendant essentially raises arguments that were made at his sentencing hearing and asks that we substitute our judgment for the trial court's, which we cannot do. *Streit*, 142 Ill. 2d at 19. As for the defendant's criminal history, although only a few of his prior convictions are for crimes of violence, his criminal history is extensive and includes numerous charges and convictions for felony drug offenses. We note that two of those convictions involved possessing or delivering a controlled substance in a penal institution, and that at the time of sentencing, the defendant had six unlawful delivery charges still pending in Saline County. The defendant's criminal history also includes convictions for deceptive practices, burglary, and theft. We further note that in 1982, the defendant was convicted on federal charges of interstate shipment of firearms by a convicted felon. Under the circumstances, the trial court could have readily concluded

that the defendant is a career criminal with little rehabilitative potential. See *People v. Ramos*, 353 Ill. App. 3d 133, 138 (2004); *People v. Buress*, 259 Ill. App. 3d 217, 229-30 (1994).

¶ 33 Citing two journal articles in support of his otherwise unsupported assertion that "drug crimes are remarkably resistant to systemic deterrence," the defendant also suggests that it was improper for the trial court to consider deterrence as a factor in aggravation. Deterrence is always "an intended goal of punishment" (*People v. Munson*, 171 Ill. 2d 158, 189-90 (1996)), however, and is one of the intended purposes of the statute under which the defendant was convicted (*People v. Falbe*, 189 Ill. 2d 635, 647 (2000)). Moreover, the Unified Code of Corrections mandates that a trial court consider deterrence as an aggravating factor and makes no exceptions for violations of the Illinois Controlled Substances Act (720 ILCS 570/100 *et seq*. (West 2010)). See 730 ILCS 5/5-5-3.2(a)(7) (West 2010). As the State observes on appeal, "[a]lthough [the defendant] might see no deterrent effect in incarcerating drug dealers, the Illinois legislature disagrees." Because it is not a judge's role to make public policy (*Clark v. Children's Memorial Hospital*, 2011 IL 108656, ¶ 79), the defendant's debate on this point accordingly "lies with the legislature, not the courts" (*People v. Johnson*, 2013 IL 114639, ¶ 12).

¶ 34 "In determining a sentence, the trial court must balance the interests of society against the ability of a defendant to be rehabilitated." *People v. Weatherspoon*, 394 Ill. App. 3d 839, 862 (2009). Here, after considering all relevant factors in aggravation and

mitigation, the trial court did so and did not abuse its discretion by imposing a 20-year sentence on the defendant's conviction.

¶ 35 Presentence Credit

¶ 36 The defendant lastly argues that he is entitled to a $2,805 credit towards his fines for the time he spent in custody prior to sentencing. We agree.

¶ 37 By statute, "[a]ny person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated upon application of the defendant." 725 ILCS 5/110-14(a) (West 2010). The right to receive the statutorily-mandated credit "is not waived despite any failure to raise the 'issue' at the trial level" and "is cognizable on appeal as a matter of course subject to a defendant's application for it." *People v. Woodard*, 175 Ill. 2d 435, 456-57 (1997).

¶ 38 Here, the State concedes that the defendant spent a total of 561 days in presentence custody and that he is entitled to the $5 per day credit that he seeks on appeal. We accordingly modify the mittimus to reflect a $2,805 credit toward the defendant's fines. See *People v. McCreary*, 393 Ill. App. 3d 402, 409 (2009).

¶ 39 CONCLUSION

¶ 40 For the foregoing reasons, we hereby affirm the defendant's conviction and sentence and modify the mittimus to reflect a $2,805 credit toward his fines.

¶ 41 Affirmed as modified.