2016 IL App (1st) 140096-U

FIRST DIVISION
JUNE 6, 2016

No. 1-14-0096

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 7860
	)	
JATWUAN BRANCH,	)	Honorable
	)	Brian K. Flaherty,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the judgment of the circuit court over defendant's allegations that it failed to conduct a proper *Krankel* inquiry into his posttrial claim of ineffective assistance of counsel and that his sentence was excessive; we correct the mittimus to reflect an additional day of presentence custody credit.

¶ 2 Following a jury trial, defendant Jatwuan Branch was convicted of two counts of armed robbery and sentenced to two concurrent terms of 22 years' imprisonment. On appeal, defendant contends that the trial court failed to adequately inquire into his *pro se* claim that defense counsel was ineffective. He also contends that his 22-year prison sentence, which was one year above the

statutory minimum, was excessive. He finally maintains that the mittimus must be corrected to reflect the proper credit for time spent in pretrial custody. We affirm as modified.

¶ 3 The eighteen-year-old defendant was charged with two counts of armed robbery of convenience store clerks Mohd Alazzam and Mohammed Saleh. Defendant was represented by private counsel, who orally requested to withdraw before trial. The court denied the request, setting the case for trial. Defendant subsequently attempted to file a *pro se* document entitled "Motion to Dismiss Unconstitutionality of Statute," which the court refused to accept because defendant was represented by counsel. Defense counsel told the court he would put defendant's arguments into a motion and file it later, but no such motion was filed.

¶ 4 The evidence at trial showed that defendant and his codefendant Ira Edwards, who is not a party to this appeal, agreed to rob a convenience store at 169 West 144th Street in Riverdale, Illinois on April 18, 2011. Defendant was at Edwards' house when Edwards showed him a revolver. Edwards talked about the convenience store in question, noting that it would be easy to rob. Defendant agreed to rob the store with Edwards. In preparing for the robbery, Edwards cut up a t-shirt and gave defendant a sleeve from the shirt to put over his face and a black hoodie to wear. Edwards similarly wore a shirt sleeve over his face and a black hoodie. Edwards also had his revolver. Defendant and Edwards walked to the convenience store and stood outside of it for about 10 minutes to make sure that nobody else was nearby.

¶ 5 When they entered the store, Edwards pointed his gun at two employees, *i.e.*, Mohd Alazzam and Mohammed Saleh, and demanded money. He ordered them to remove the drawers of the cash and lottery registers, which they did. Defendant and Edwards took cash from the drawers. While Edwards and defendant were removing money, Edwards' gun accidentally went

off and a bullet struck defendant in the left hand. After being struck with a bullet, defendant exited the store while Edwards finished taking money. As defendant was exiting the store, he touched the front door and left blood stains on it. When Edwards joined defendant outside shortly thereafter, defendant asked him if he got everything, and Edwards responded positively. A surveillance video depicting the incident was entered into evidence.

¶ 6 Both men fled the store with $265 and ran back to Edwards' house where they told Edwards' mother that they were victims of a robbery and that defendant was shot during the robbery. Edwards' mother drove Edwards and defendant to pick up defendant's mother, and then they all went to the emergency room where defendant was treated.

¶ 7 Meanwhile, Alazzam called the police who arrived and documented the crime scene by photographing the store and collecting the blood stains from the front door. The police contacted local hospitals and requested that they call if a person with a gunshot wound to the hand enters the emergency room. After a hospital contacted the police, they went to the hospital and found defendant in a hospital bed and Edwards in the waiting room. Both men were taken into custody. Following an interview between Edwards and the police at the station, the police recovered $265 from the bushes outside of the hospital emergency room where defendant had been taken. Defendant was also interviewed at the station and confessed to the planning and execution of the armed robbery. His confession was memorialized in a typewritten statement, which defendant signed.

¶ 8 A buccal swab was obtained from defendant. The DNA from the blood swabs taken from the crime scene matched defendant's DNA.

¶ 9 The defense rested without presenting any evidence. Following closing arguments, the jury found defendant guilty of two counts of armed robbery with a firearm.

¶ 10 Defense counsel filed a motion for new trial, alleging that defendant drafted *pro se* legal motions that the court refused to accept because defendant was represented by counsel. Defense counsel claimed that defendant wanted to "represent himself and challenge the constitutionality of the charges against him among other things in his *pro se* motions." Counsel also pointed out that the attorneys representing defendant filed a motion to withdraw, but the court had denied the motion. During argument on the motion for a new trial, counsel reiterated that defendant wanted to represent himself and challenge the constitutionality of the statute with which he was charged. The court denied the motion, stating that it stood by its decision not to accept defendant's *pro se* motion while he was represented by counsel.

¶ 11 Before the court proceeded to sentencing, the following colloquy occurred:

> "DEFENDANT: Your Honor, your honor, there's certain things that-the motion I put in, he never rewrote it up for you to –
>
> THE COURT: What kind of motion is it?
>
> DEFENDANT: The motion about the constitutionality of the gun. He never rewrote it, so I never had a chance to put it in, because –
>
> THE COURT: What's the basis for the constitutionality?
>
> DEFENDANT: I don't know if he still has it, but I wrote it out.

THE COURT: You tell me. What constitutional provision did it violate?

DEFENDANT: I have it written down somewhere. On top of that, for the motion for the retrial, insufficient representation from the lawyer, so I never really had a chance to do anything or put any motions in or to argue.

THE COURT: What was the ineff[ective] representation by the attorneys?

THE DEFENDANT: There was at a point in time when they wanted to withdraw, and you told them they could not withdraw from the case.

THE COURT: Correct.

DEFENDANT: We didn't have any money to give them, so I felt like I wasn't represented to the fullest.

THE COURT: [Defendant], I've been practicing law since 1980. I was an Assistant Public Defender. So this is not my first time through a jury trial. I've done probably a hundred jury trials. I've been practicing, doing felonies for six, seven years. Nowhere have I seen a more overwhelming case against an individual. It's that simple. It's on video. Your DNA is on the glass. You're caught a short time later in the hospital. The case is overwhelming, overwhelming. There's nothing, as far as I can tell, unless the jury

> was going to make a mistake, there's nothing that I can tell that either of your lawyers could have done that could have won this case.
>
> ***
>
> *** So your motion regarding ineffective assistance of counsel is denied."

¶ 12 At sentencing, the State argued that this was a violent crime against victims who were merely trying to run a business. The State indicated that the minimum sentence was 21 years based on the use of the gun during the robbery, and requested that defendant be sentenced to the statutory minimum, noting that he had no criminal background. In mitigation, defense counsel argued the minimum sentence was appropriate where he came from a strong family and made a bad decision stemming from his immaturity. Defendant's mother addressed the court, stating her son was not a menace to society, was raised without a father, and was easily influenced. She requested that the court have mercy on defendant as he did not understand the consequences of his actions. In allocution, defendant stated that he wanted to "apologize to everybody for this whole situation." He asked that the court show mercy on him so that he could have a second chance and be there for his family.

¶ 13 Following arguments in aggravation and mitigation, the court sentenced defendant to 22 years' imprisonment, awarding him 904 days' presentence custody credit. In sentencing defendant, the court stated that defendant knew what he was doing when he walked into the store with his friend who was carrying a gun and started stealing money. Defendant's conduct caused serious harm where he was shot, and a sentence was necessary to deter others from committing

the same crime. The court further stated that it took all of the sentencing factors into consideration, including that defendant had no criminal history. Defendant did not file a motion challenging his sentence, and this appeal followed.

¶ 14 On appeal, defendant first contends that the trial court failed to make an adequate inquiry into the factual basis of his *pro se* claim that defense counsel was ineffective, as is required under *People v. Moore*, 207 Ill. 2d 68 (2003) and *People Krankel*, 102 Ill. 2d 181 (1984). Defendant thus requests that his cause be remanded for further proceedings consistent with *Krankel* and its progeny.

¶ 15 The purpose of a *Krankel* proceeding "is to facilitate the trial court's full consideration of a defendant's *pro se* claims of ineffective assistance of trial counsel and thereby potentially limit issues on appeal." *People v. Jolly*, 2014 IL 117142, ¶ 29. When a defendant alleges a posttrial claim that he was denied effective assistance of his appointed counsel, the trial court must adequately inquire into the claim, and, under certain circumstances, appoint new counsel to argue the claim. *Krankel*, 102 Ill. 2d at 187-89. However, new counsel is not automatically required merely because the defendant presents such a claim. *Moore*, 207 Ill. 2d at 77. Instead, the trial court must first conduct a preliminary inquiry into the factual basis of the claim. *People v. Downs*, 2015 IL 117934, ¶ 9, n1.

¶ 16 In conducting the examination, the court may (1) ask defense counsel about the defendant's claim and allow counsel to "answer questions and explain the facts and circumstances surrounding the defendant's allegations;" (2) have a "brief discussion" with the defendant about his claim; or (3) base its evaluation "on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face." *Moore*,

207 Ill. 2d at 78-79. As this court recently observed, "[t]here is no set format for how an initial inquiry into a defendant's *pro se* allegations of ineffective assistance of counsel should be conducted." *People v. Flemming*, 2015 IL App (1st) 111925-B, ¶ 85. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, it need not appoint new counsel and may deny the *pro se* motion. *Moore*, 207 Ill. 2d at 78. If possible neglect is revealed, new counsel should be appointed and a hearing on the defendant's claims conducted. *Id*. Both parties agree that because defendant is challenging the adequacy of the trial court's preliminary *Krankel* inquiry, we review this issue *de novo*. See *Jolly*, 2014 IL 117142, ¶ 28 (stating that "[t]he issue of whether the circuit court properly conducted a preliminary *Krankel* inquiry presents a legal question that we review *de novo*").

¶ 17 As an initial matter, we note that the State, relying on *People v. Pecoraro*, 144 Ill. 2d 1 (1991), argues that "defendant's privately retained representation may nullify his *Krankel* claim." See *Id*. at 14-15 (holding that the trial court was not required to appoint new counsel pursuant to *Krankel* and alter the attorney-client relationship where the defendant had retained private counsel to represent him both at trial and during posttrial hearings). However, following *Pecoraro*, our supreme court has implicitly rejected the notion that *Krankel* only applies to appointed counsel. See *People v. Taylor*, 237 Ill. 2d 68, 78 (2010) (Burke, J. specially concurring) ("the majority assumes, without deciding, that *Krankel* applies to privately retained counsel since it addresses the merits of defendant's claim on a factual basis"). We will thus address the merits of defendant's *Krankel* claim.

¶ 18 Here, after the court denied defendant's motion for a new trial, defendant complained about his trial counsel's performance. In particular, he asserted that counsel never rewrote a *pro*

se pretrial motion he attempted to file that contested the constitutionality of the statute with which he was charged. The court asked defendant for the basis of his constitutional challenge and for the provision that he felt violated his rights. Defendant replied that he "had it written down somewhere." When defendant stated that he received "insufficient representation from the lawyer," the court asked "[w]hat was the ineff[ective] representation by the attorneys?" Defendant responded that counsel did not represent him to the fullest of their abilities because counsel's motion to withdraw from the case was denied and he could not afford to pay them. After questioning defendant, the trial court denied defendant's motion regarding ineffective assistance of counsel, finding that the evidence against him was overwhelming, and there was "nothing that I can tell that either of your lawyers could have done that could have won this case." The record thus shows that the court fully considered defendant's *pro se* claim of ineffective assistance of counsel where it discussed the claim with defendant, and evaluated the claim based on its knowledge of the defense counsel's performance and the insufficiency of the claim on its face. *Moore*, 207 Ill. 2d at 78-79. We thus find that the court did not err in denying defendant's claim without appointing new counsel to investigate it.

¶ 19 Nevertheless, defendant criticizes the trial court for failing to inquire about the "other things that he wanted raised in the *pro se* motions." However, the challenged statement was in counsel's motion for a new trial, which was denied before defendant made his *pro se* oral allegation of ineffective assistance triggering the need for a *Krankel* inquiry. Even if the contested allegation in counsel's motion necessitated a *Krankel* inquiry, or if defendant "orally alluded to these 'other things' " as maintained by defendant in his reply brief, the court's inquiry was sufficient where it questioned defendant and counsel about defendant's *pro se* motions

before it concluded that defendant had no colorable claims of ineffective assistance that warranted the appointment of new counsel. Defendant also complains the trial court neglected to adequately inquire about his oral complaint that "he never had the opportunity to do anything or put any motions in or argue." However, a fair reading of the entire colloquy between defendant and the court showed that the court adequately questioned him about why his counsel was ineffective.

¶ 20 In so finding, we distinguish *People v. Barnes*, 364 Ill. App. 3d 888 (2006), relied upon by defendant from *Moore*; which defendant claims requires that this cause be remanded. In *Barnes*, the defendant alleged that his trial counsel was ineffective where he requested but did not receive transcripts or interviews from alleged alibi witnesses. *Id*. at 898. Without inquiring into his claims, the trial court responded that the defendant's complaints were a matter of trial strategy and advised the defendant that the issue "was between you and your lawyers, and I don't have anything to do with that." *Id*. We held that the trial court's "brief conclusory review" did not satisfy the requirement for factual assessment as described by *Moore*. *Id*. at 899. Instead, the trial court should have conducted some inquiry such as what transcripts the defendant had requested, the identities of the claimed alibi witnesses, the substance of their proposed testimony, and the extent to which defense counsel was made aware of and acted upon any knowledge of their existence. *Id*.

¶ 21 Here, in contrast to *Barnes*, the trial court engaged in a colloquy with defendant and asked him about the nature of his claims. The court inquired into the basis of defendant's claims of ineffectiveness, and defendant's responses were non-specific and vague. Defendant's responses were thus unlike the detailed complaint alleged by the defendant in *Barnes*, *i.e.*, that

counsel never provided him transcripts or interviews from alibi witnesses. Moreover, the court explained to defendant why, in light of the particular facts of his case, and the overwhelming evidence he had failed to set forth a viable claim of ineffective assistance of counsel. *Barnes* is thus inapposite to this case.

¶ 22 Defendant next contends that his sentence is excessive given that he was 18 years old at the time of the offense, had no prior convictions, had great rehabilitative potential, and the State did not request that he be sentenced to more than the minimum 21-year sentence.

¶ 23 Initially, defendant forfeited this issue on appeal by failing to file a motion to reconsider his sentence. *People v. Enoch*, 122 Ill. 2d 176, 186-87 (1998). A forfeited argument regarding sentencing, however, may be reviewed for plain error. *People v. Freeman*, 404 Ill. App. 3d 978, 994 (2010), citing *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). In order to obtain relief under the plain error doctrine, a defendant must first establish that a clear or obvious error occurred. *Hillier*, 237 Ill. 2d at 545. "In the sentencing context, a defendant must then show either that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *Id*. The defendant has the burden of persuasion under both prongs of the doctrine. *Id*. Here, defendant fails to satisfy his burden to establish a clear and obvious error occurred in sentencing.

¶ 24 A trial court has broad discretion to determine an appropriate sentence, and a reviewing court may reverse only where the trial court has abused that discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). The reviewing court should not substitute its judgment for that of the trial court simply because it would have balanced the appropriate sentencing factors differently. *People v. Alexander*, 239 Ill. 2d 205, 214-15 (2010). A sentence within the statutory range does

not constitute an abuse of discretion unless it varies greatly from the purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Stacey*, 193 Ill. 2d 203, 210 (2000). Where mitigating evidence is presented to the trial court, it is presumed, absent some indication to the contrary, other than the sentence itself, that the court considered it. *People v. Benford*, 349 Ill. App. 3d 721, 735 (2004). The trial court is not obligated to reduce a sentence from the maximum allowed simply because mitigating factors are present. *People v. Pippen*, 324 Ill. App. 3d 649, 653 (2001).

¶ 25 Defendant's sentence falls within the sentencing range for his offenses. We note that although we may have imposed a different sentence, it is not the purview of this court to second guess the trial court where the sentence clearly falls within the sentencing range. Further, in this case, defendant's sentence was only one year above the statutory minimum. Here, defendant was convicted of the Class X felony of armed robbery. 720 ILCS 5/18-2(a)(2) (West 2010). The sentencing range for a Class X felony is 6 to 30 years in prison. 730 ILCS 5/5-4.5-25 (West 2010). Additionally, because a firearm was used in the commission of the offense, defendant was subject to a 15-year sentencing enhancement (720 ILCS 5/18-2(b) (West 2010)), making his sentencing range 21 to 45 years in prison. Accordingly, the 22-year sentence imposed was well within the applicable sentencing range for committing armed robbery while being armed with a firearm.

¶ 26 The trial court's statements at sentencing showed that it thoughtfully weighed the appropriate mitigating and aggravating factors when it sentenced defendant to a term one year above the statutory minimum. The court stated:

> "So I take all the factors in consideration. I've reviewed the presentence investigation, the factors in aggravation that the defendant's conduct caused or threatened serious harm. It certainly threatened serious and it caused serious harm, because he got shot. It's a sentence that's necessary to deter others from committing the same crime. I will take into consideration that the defendant does not have any history of prior delinquency or criminality at this time."

¶ 27 Nevertheless, defendant maintains that his sentence is excessive as (1) he was only 18 at the time of the offense, (2) had considerable rehabilitative potential, (3) no criminal history, (4) and the State did not argue for anything greater than the minimum sentence. In listing these factors, however, defendant fails to point to anything in the record rebutting the presumption that the court considered them. *Benford*, 349 Ill. App. 3d at 735. The court heard argument regarding all of these points at sentencing, and we presume the court considered them in sentencing defendant to only one year above the minimum.

¶ 28 We also note that defendant has cited to brain development studies in support of his contention that his youthfulness must be considered as a significant mitigating factor. However, secondary sources are not relevant authority in support of defendant's arguments on appeal. *People v. Magee*, 374 Ill. App. 3d 1024, 1029-30 (2007). The reviewing court is confined to the record on appeal (*People v. Heaton*, 266 Ill. App. 3d 469, 476-77 (1994)), and the studies cited to by defendant were not before the trial court. Insofar as the sources cited to by defendant are an attempt to insert expert opinion evidence into the record, which was not subject to cross-

examination by the State or considered by the trial court, we will not consider them on appeal. *Id*. at 478.

¶ 29 Defendant further argues that the court improperly took into consideration factors inherent in the offense of armed robbery when sentencing him. Defendant faults the court for stating that his conduct threatened and caused serious harm, and for referencing the fact that a gun was used during the robbery, particularly where the possession of a gun during the offense is inherent in the 15-year firearm enhancement that he received. Defendant also asserts that because the need for deterrence in the case at bar was no greater than in most other instances of armed robbery with a firearm, the trial court could not properly consider it in aggravation.

¶ 30 In fashioning a sentence, the court cannot consider a factor that is an element of the offense as an aggravating factor. See *People v. Phelps*, 211 Ill. 2d 1, 11-12 (2004). However, " '[t]he rule that a court may not consider a factor inherent in the offense is not meant to be applied rigidly, because sound public policy dictates that a sentence be varied in accordance with the circumstances of the offense.' " *People v. Spicer*, 379 Ill. App. 3d 441, 468 (2008) (quoting *People v. Cain*, 221 Ill. App. 3d 574, 575 (1991)). Moreover, "[i]n determining the correctness of a sentence, the reviewing court should not focus on a few words or statements made by the trial court, but is to consider the record as a whole." *People v. Reed*, 376 Ill. App. 3d 121, 128 (2007).

¶ 31 When read in context, the trial court's comments do not show the court improperly imposed defendant's sentence based on factors inherent in the offense of armed robbery. Instead, the court based its decision on the nature and circumstances of this case, including that Edwards fired his gun and shot defendant in his hand during the robbery. The fact that the court mentioned factors inherent in the offense of armed robbery, by itself, is not reversible error. See *People v.*

Jones, 299 Ill. App. 3d 739, 746 (1998) (stating that a trial court is not required to refrain from any mention of sentencing factors that constitute elements of the offense). Moreover, as defendant received nearly the minimum sentence, defense counsel's arguments in mitigation ostensibly succeeded as the court clearly employed them in sentencing defendant.

¶ 32 Finally, defendant contends that his mittimus should be amended to reflect the proper amount of time he spent in presentence custody. He initially maintained that his mittimus, which shows he is entitled to 904 days of presentence custody, should be amended to reflect 906 days' credit, a total which reflected his sentencing date of January 3, 2014. The State responded, and defendant conceded in his reply brief, that pursuant to the supreme court decision in *People v. Williams*, 239 Ill. 2d 503 (2011), the date of sentencing is excluded from presenting credit calculations, and he is thus entitled to 905 days of presentence custody credit.

¶ 33 A sentencing order may be corrected at any time. *People v. Latona*, 184 Ill. 2d 260, 278 (1998). The right to receive *per diem* credit is mandatory, and normal waiver rules do not apply. *People v. Williams*, 328 Ill. App. 3d 879, 887 (2002). A defendant is statutorily entitled to credit for all time "spent in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5-4.5-100(b) (West 2014); *Latona*, 184 Ill. 2d at 270. A defendant held in custody for any part of a day should be given credit against his sentence for that day. *People v. Smith*, 258 Ill. App. 3d 261, 267 (1994). However, a defendant is not entitled to presentence custody credit for the date of sentencing. *Williams*, 239 Ill. 2d at 510. Therefore, we award defendant presentence custody credit from the date of his arrest on April 18, 2011, until bail was posted on May 16, 2011 (28 days), and from the date he reentered custody August 10, 2011, until he was sentenced on January 3, 2014 (877 days), which amounts to 905 days.

¶ 34 For the foregoing reasons, we amend the mittimus to award defendant 905 days of presentence custody credit, and affirm the judgment of the trial court in all other respects.

¶ 35 Affirmed; mittimus corrected.