FOURTH DIVISION
February 25, 2016

No. 1-14-0302

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 5688
	)	
JULIAN DAVIS,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's sentence of 14 years for aggravated discharge of a firearm affirmed over his forfeited sentencing claims where the sentence was justified by the circumstances of the offense and the sentencing court properly considered relevant sentencing factors.

¶ 2 Following a bench trial, defendant was found guilty of aggravated discharge of a firearm and sentenced to 14 years in prison. On appeal, defendant asserts that his sentence is excessive because the trial court (1) improperly considered in aggravation a factor inherent in the offense, and (2) improperly minimized a factor in mitigation. We affirm.

¶ 3 Defendant was charged by indictment with 14 felony counts, including attempted first-degree murder of two police officers, aggravated discharge of a firearm, and related weapons charges. He and codefendant Anthony L. Rollins were tried in a joint bench trial. The State presented the following evidence at trial.

¶ 4 Victoria Rojas testified that in the early morning hours of March 10, 2011, she drove to a bar at 46th and Washtenaw where she was introduced to defendant, who was called "Looney," and codefendant Rollins. After drinking several beers, she left the bar with defendant and Rollins and the three drove away in Rojas's Mercury Sable. Rollins was driving the Mercury, Rojas was in the front passenger seat, and defendant was in the back seat when the vehicle drove to the BZ gas station at 47th and Western Boulevard. Defendant climbed out of the car. Rojas heard gunshots "kind of close" and saw defendant standing about 30 to 50 feet from the car. He had a gun and was pointing it at a car she described as a dark blue "long Crown Victoria" that was traveling north on Western Boulevard. The Crown Victoria "took the red light to escape the gunshots." Other cars were on the street at that time. Rojas saw defendant run north across the street to a BP gas station. He was still holding the gun and pointing it to the north, down Western Boulevard. Rollins drove Rojas's Mercury to the BP station where he and Rojas picked up defendant and drove northbound on Western Boulevard in the direction taken by the Crown Victoria. Rojas saw the Crown Victoria coming back toward them. The two cars "were at a close range about to crash with each other" when someone in the Crown Victoria fired shots. The Mercury swerved and continued north on Western. Defendant threw his gun out of the car in the area of a Home Depot. The Mercury continued to 43rd Street, turned east, and crashed into a

parked vehicle. Defendant and Rollins exited the car and ran away. Rojas, who had injured her knee in the crash, waited in the vehicle until police arrived.

¶ 5 Jose Pineda testified that he was sitting in his car at the BP gas station when he heard gunshots coming from behind him. He looked in his side-view mirror and saw defendant holding a gun and firing three or four shots. Then a car pulled up, and defendant climbed inside the car which drove north on Western Boulevard. A vehicle with police officers came southbound on Western from the opposite direction. As the car with the gunman and the car with the officers passed each other, Pineda heard more shooting. Then the police car made a U-turn and drove northbound after defendant's car.

¶ 6 Two video recordings, one from a Chicago Police Department POD camera near the BZ gas station and another from a stationery video camera mounted on the BP gas station, captured events described by Rojas and Pineda. DVDs containing excerpts from those videos were shown at trial and are part of the record on appeal; this court has viewed the videos. The POD camera was located on the southeast corner of Western Boulevard and 47th Street, apparently mounted on a street light near the BZ gas station. The camera was constantly moving and recording, covering the area of the intersection in a 270-degree motion. At a moment when the POD camera faced north toward northbound Western, it recorded the Crown Victoria police car traveling north through the intersection. The video depicted the BP gas station across the street, in the upper right portion of the screen. At the bottom right corner of the screen, at the corner of the intersection and almost under the POD camera, the video shows an individual holding something in his hand and pointing it at the receding police car while he was slowly backing up.

¶ 7 The BP gas station stationary camera's video showed the same individual running from the direction of the BZ gas station past the BP gas station pumps. That man holds a firearm in his hands in front of him and shoots northward in the direction of the receding Crown Victoria. A light-colored car on Western Boulevard appeared in the camera's view and stopped slightly behind the individual, who ran back to the car and climbed into the back passenger seat. At trial, both Rojas and Pineda viewed the BP video and identified defendant as the man in the video firing a gun.

¶ 8 Chicago Police Officers John Sego and Michael Alaniz testified that they were in plain clothes in an unmarked police car, a blue Crown Victoria, in the early morning hours of March 10, 2011. Alaniz was driving. At about 4 a.m., the police car was traveling north on Western Boulevard where gas stations were located on the northeast (BP) and southeast (BZ) corners. While driving through the intersection of Western and 47th Street, the officers heard a loud bang and Sego felt a thump hitting his front passenger seat door. Sego asked Alaniz, "What is that?" and Alaniz replied, "I think a gun shot." Alaniz looked in the rearview mirror and saw somebody holding a firearm and shooting at the police vehicle. Over his shoulder, Sego also saw the individual, who was about 50 feet away standing on the southeast corner of the intersection. The individual fired another shot. A short distance past the intersection, Alaniz made a U-turn on Western Boulevard to face southbound. At that point the individual fired once more, and Alaniz radioed for help. Alaniz stopped the police car, Sego got out, raised his gun, and said, "Police." A tan four-door sedan pulled up to the shooter, who climbed into the back passenger side of that vehicle. Sego re-entered the unmarked police car and Alaniz employed its emergency equipment: flashing turn signals and a siren. The tan car drove north approaching the police car, which began

to move southbound. The two vehicles were driving slowly in adjacent lanes, about 5 to 10 feet apart, when the tan car slowed down and began to cross the center line. Alaniz swerved to avoid a collision, stuck his 9-millimeter firearm out the police car window, and shot three rounds at the tan car, which went back into its lane and continued northbound, picking up speed. Alaniz made another U-turn into the northbound lanes to chase after the tan car. The rear passenger door of the tan car opened, and a hand came out and slid a gun across the street. Alaniz transmitted a flash radio message that the offenders had just "pitched a pistol" at 4600 South Western.

¶ 9 The chase continued to 43rd Street, where the tan car turned eastbound, and the police car followed. The tan car struck a parked van a few blocks east on 43rd Street. The driver (Rollins) and the rear-seat passenger (defendant) exited the vehicle, ran east on 43rd Street, and were apprehended by police officers from an assisting unit.

¶ 10 Another police officer, who overheard Alaniz's radio message of a gun thrown out the window, went to the indicated location and recovered the gun, a Cobra semi-automatic .380 caliber pistol, and a magazine; they were lying in the street near 46th Street. Police forensic investigators went to 47th and Western Boulevard. At the southeast corner of the intersection they recovered three .380 caliber cartridge cases in the driveway and one .380 caliber live cartridge on the sidewalk corner. They recovered three 9-millimeter shell cases on the west side of Western Boulevard across the street and a little bit north of the BP gas station. The forensic investigators went to 1827 West 43rd Street where they observed Alaniz and Sego's blue unmarked police vehicle. At trial, photographs of Rojas's tan Mercury and the Crown Victoria police car were introduced. The police car photographs depicted the vehicle with "M" plates and disclosed a bullet hole in the front passenger door. Rojas's Mercury had extensive damage to the front of the

car and an apparent gunshot hole in the front driver's side wheel well area. The investigators also found a live unfired .380 caliber cartridge on the back seat of the Mercury behind the front passenger's seat.

¶ 11 The parties entered into several stipulations, including that defendant had prior convictions in case No. 08 CR 07643-01 for unlawful use of a weapon by a felon (UUWF) and case No. 04 CR 16403-01 for aggravated unlawful use of a weapon (AUUW) for defendant under the name of Pedro Dominguez. Defendant's motion for acquittal at the close of the State's case was denied. The defense rested.

¶ 12 The court found defendant not guilty of attempted murder, but guilty of being an armed habitual criminal and two counts of weapons violation by a felon, which merged into the armed habitual criminal count. The court also found defendant guilty on four counts of aggravated discharge of a firearm, two of which merged into the other two counts, and one count of defacing a firearm. Subsequently, the court vacated the guilty findings on the armed habitual criminal count and the two counts of weapons violation by a felon on the basis of *People v. Aguilar*, 2013 IL 112116. The only remaining counts were aggravated discharge of a firearm and defacing a firearm.

¶ 13 At the sentencing hearing, the court announced it had read the presentence investigation (PSI) report. Defense counsel's argument in mitigation included the representation that defendant had two small children whom he was supporting and a job delivering phone books. The PSI report included the statement that prior to defendant's incarceration "he resided with and supported his wife and children."

¶ 14 Before pronouncing sentence, the court observed that defendant was lucky he was not dead and that "the two people in the car that he shot at are lucky they're not dead either." The court commented:

> "I've read the PSI. I'm aware about the situation with his family situation. I'm not overly impressed with it either about married with a couple of children. When you're out there on the street like in this case, the car that the officers were in, unmarked car was driving I think it was north on Western Boulevard. Davis in a gas station, comes out of a gas station, ups with the piece and just starts shooting, no reason whatsoever why he's shooting at people in that car.
>
> So he's out there at the gas station with that gun in hand, sees a car going by, decides to shoot at it. Before that happened somebody says, hey, Julian, how's your wife and kids doing tonight? His response would be what wife and kids? I got a wife and kids somewhere? It's only now when he's going to prison for a while or at least faces that possibility, God damn, I got to take care of those wife and kids of mine.
>
> You're out there shooting at a car with people in it, you don't care about your wife and kids at all. It's only now, only with the thought of going to prison for quite a while, God, I got to take care of those wife and kids of mine. When you're out there doing bad things, Mr. Davis, as I said a minute ago, I'll try not to bore you, someone says, hey, man, how your kids doing? Your response would be what wife and kids? Out there shooting at a car with people in it you don't think about your wife and kids one bit at that time. All you think about is Julian Davis. I want to shoot at that car with those people in it. Now

the wife and kids bit. I'm not impressed with that at all. I feel sorry for your wife and kids, I don't feel sorry for you one bit.

You've earned that spot you're standing in right now. You take that piece and go out there and start shooting at a car with people in it, you got to realize there's only bad consequences if you get caught. ***.

***

As I said before, Mr. Davis, I feel sorry for your wife and kids, that's unfortunate for them that they've got to deal with your situation. They're not the ones in front of me, you are. They didn't shoot at a car with people in it, you did. They didn't try to get away from the police that night, you did. So when you're away and they come and visit you, tell them how sorry you are for them, not how sorry you are for yourself, Julian Davis ***."

¶ 15 The court said it did not consider defendant's prior convictions, either those involving gun charges or other convictions. In imposing sentence for aggravated discharge of a firearm, the court stated:

"The sentence as far as Julian Davis is concerned, he's the main protagonist in this situation. Decide you want to shoot at people in a car, for whatever reason only known to Julian Davis, the sentence will be 14 years in the Department of Corrections plus 2 years MSR once he's out. On a 14-year bit, Mr. Davis, you'll do approximately 11 years, 10 months and 24 days. So that's what you have in right now. You're so concerned about your kids, they'll be waiting for you once you get out."

¶ 16 The court also awarded presentence credit of 980 days. Defendant filed a motion to reconsider sentence which argued that the sentence was excessive considering his lack of background, and that the sentence violated due process. At the hearing on the motion, defense counsel argued that the sentence was unwarranted given defendant's lack of criminal history, his age, and the fact he would be required to serve 85 percent of the sentence. The court denied the motion, stating: "Mr. Davis was very lucky he didn't kill somebody. He was shooting at a car with people in the car, and I think 14 years I think [*sic*] is well earned."

¶ 17 On appeal, defendant does not contest his conviction but argues that the trial court abused its discretion in sentencing him to 14 years in prison. He contends the trial court improperly considered a factor implicit in the charged offense as a factor in aggravation, and also erroneously disregarded a factor in mitigation (hardship of imprisonment on dependents).

¶ 18 The trial court has broad discretion in imposing a sentence, and its sentencing decisions are entitled to great deference. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010); *People v. Rogers*, 197 Ill. 2d 216, 223 (2001). We defer to the trial court's judgment on sentencing because the lower court, "having observed the defendant and the proceedings, has a far better opportunity to consider [sentencing] factors that the reviewing court, which must rely on the 'cold' record." *Alexander*, 239 Ill. 2d at 212-13 (quoting *People v. Fern*, 189 Ill. 2d 48, 53 (1999)). "A trial court has wide latitude in sentencing a defendant, so long as it neither ignores relevant mitigating factors nor considers improper factors in aggravation." *People v. Roberts*, 338 Ill. App. 3d 245, 251 (2003). Where the sentence imposed by the trial court falls within the statutory range for the offense of which defendant is convicted, it may not be disturbed unless it constitutes an abuse of discretion. *People v. Gutierrez*, 402 Ill. App. 3d 866, 900 (2010). A trial court's sentencing order

will not be overturned on appeal "unless the court abused its discretion and the sentence is manifestly disproportionate to the nature of the case." *People v. Grace*, 365 Ill. App. 3d 508, 512 (2006).

¶ 19 The State asserts as a threshold matter that defendant has forfeited his sentencing issues by failing to raise them at the sentencing hearing or in his motion to reconsider sentence. To preserve a sentencing issue for review, a defendant must raise the error in a written post-sentencing motion in the trial court. *People v. Reed*, 177 Ill. 2d 389, 393-95 (1997). Here, defendant filed a written motion to reconsider sentence but did not raise the claims he now advances. Defendant concedes he did not preserve the issues in his motion, but he argues that they are reviewable under plain-error analysis. In the alternative, defendant argues that the alleged errors are reviewable under *Strickland v. Washington*, 466 U.S. 668 (1984), as a claim of ineffective assistance of counsel for failing to preserve the issues.

¶ 20 Sentencing errors raised for the first time on appeal are reviewable as plain error if (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was sufficiently grave that it deprived the defendant of a fair sentencing hearing. *People v. Ahlers*, 402 Ill. App. 3d 726, 734 (2010). The first step in plain-error review is to determine whether error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Accordingly, we first determine whether any error occurred here in the trial court's pronouncement of sentence. The question of whether a court relied on an improper factor when imposing a sentence ultimately presents a question of law that we review *de novo*. *People v. Cervantes*, 2014 IL App (3d) 120745, ¶ 44. For the following reasons, we conclude no error occurred in the imposition of defendant's sentence.

¶ 21 Defendant was sentenced on one count of aggravated discharge of a firearm for firing at a vehicle he knew to be occupied. The offense was a Class 1 felony (720 ILCS 5/24-1.2(a)(2), (b) (West 2010)), punishable by a prison term of not less than 4 years and not more than 15 years (730 ILCS 5/5-8-1(a)(4) (West 2010)). Defendant does not contest that the 14-year sentence imposed by the trial court was within the statutory range for the offense. He contends, however, that the trial judge's comments at sentencing clearly indicated he considered the fact that someone could have been killed as a result of defendant's conduct. Defendant concludes that the court erroneously considered a factor implicit in the offense of aggravated discharge of a firearm, namely, the threat of harm, as a factor in aggravation of sentence.

¶ 22 In imposing a sentence, a trial judge may not consider in aggravation a factor implicit in the underlying offense for which defendant was convicted. *People v. Rissley*, 165 Ill. 2d 364, 390 (1995); *People v. Brewer*, 2013 IL App (1st) 072821, ¶ 55. However, one of the statutory factors in aggravation that shall be considered in favor of imposing a term of imprisonment or a more severe sentence is whether "the defendant's conduct caused or threatened serious harm." 730 ILCS 5/5-5-3.2 (West 2010). The fact that a defendant's conduct threatened or caused serious harm is not a factor inherent in the crime itself but is a proper aggravating factor to be considered in imposing sentence, even in cases where serious bodily harm is implicit in the offense. *Brewer*, 2013 IL App (1st) 072821, ¶ 57, citing *People v. Saldivar*, 113 Ill. 2d 256, 269 (1986).

¶ 23 Both parties refer us to *People v. Ellis*, 401 Ill. App. 3d 727 (2010), where the defendant raised the same issue before us now, *i.e.*, that the court erred when, in imposing sentence for aggravated discharge of a firearm, it considered the aggravating factor that the defendant caused or threatened serious harm. Defendant in the instant case relies on the following statement in

Ellis: "Implicit in every offense of aggravated discharge of a firearm is the threat of harm." *Id*. at 731. However, the *Ellis* court concluded that the threat of *serious* harm is not an inherent element of aggravated discharge of a firearm, which requires only that a defendant fire in the direction of a person or occupied car. *Id.* The State refers us to the *Ellis* opinion's next statement:

> "However, not every aggravated discharge of a firearm threatens the same amount of harm. Compare the 'warning shot' that is intended to go and does go six feet over someone's head to a shot that sends a bullet flying within an inch of someone's ear. Equal threats of serious harm? In this case, it was not an inherent element of the offense that defendant's gunshots threaten two people, although defendant's conduct threatened both Morris and his passenger with serious harm. It was also not inherent in the offense that the bullets actually strike the vehicle or that the bullets strike near a window of the vehicle." *Id.*

¶ 24 Defendant argues that this portion of the *Ellis* decision should not be followed because it conflicts with other cases cited by defendant. However, those decisions involve aggravated arson prosecutions and are not analogous to the instant case. In other decisions of this court affirming convictions for aggravated discharge of a firearm, we have held that the threat of serious harm is an aggravating factor not inherent in the offense (*People v. Torres*, 269 Ill. App. 3d 339, 350 (1995)), and that it is not an inherent element that the bullets actually strike the vehicle or near the window of the vehicle (*People v. Daheya*, 2013 IL App (1^{ST}) 122333, ¶ 64).

¶ 25 We reject defendant's argument that the circumstances of the offense did not warrant near-maximum punishment or that the potential harm here was "no different than one would expect in a typical case" of aggravated discharge of a firearm. The trial evidence demonstrated

that defendant's wanton act of firing numerous rounds at a moving vehicle on a public street created a threat of serious harm to himself and others. A bullet fired by defendant struck the front passenger door of the police car. Officer Sego was sitting in the front passenger seat when defendant fired the shot and might have been killed or seriously injured. The trial evidence also indicated defendant's actions could have caused serious harm to Rojas, who was in the passenger seat of her vehicle throughout the exchange of gunfire and the police chase. Pineda was also at risk. When he viewed the BP camera video at trial, he noted the location of where he was seated in his car in relation to where defendant was firing his weapon. He was also in the vicinity when Officer Alaniz returned defendant's gunfire. Rojas testified that other cars were on the street at the time defendant began firing at the police car. Additionally, our viewing of the POD camera video revealed that, despite the fact the events took place at about 4 a.m., many vehicles were traveling in both directions on Western Boulevard and on 47th Street at about the time gunshots were exchanged. Patently, defendant's conduct threatened serious harm to others. We conclude that the trial court did not err in considering the nature and circumstances of defendant's actions in determining that the events he set in motion by his discharge of a firearm at the police car posed a serious threat of harm to himself or others.

¶ 26 Defendant also contends that the trial court abused its discretion in sentencing him because the court considered facts not in evidence when giving allegedly minimal consideration to defendant's status as a provider of financial support for his family.

¶ 27 The trial court has a statutory duty to consider mitigating evidence in crafting a just sentence. *People v. Burnette,* 325 Ill. App. 3d 792, 808 (2001). A statutory factor in mitigation of

sentence is that "[t]he imprisonment of the defendant would entail excessive hardship to his dependents." 730 ILCS 5/5-5-3.1(11) (West 2010).

¶ 28 As a preliminary matter we note that any prison sentence entails hardship to a defendant and his family. See *People v. Hambrick*, 2012 IL App (3d) 110113, ¶ 23. Here, given that defendant's family would be deprived of his income, he has made no claim in the trial court or on appeal that any resulting financial hardship to his dependents was excessive. Defendant contends, however, that the trial court improperly speculated that his claim of family hardship was no more than "feigning love for his family to avoid prison time." We do not agree that the court believed defendant's affection for his family was a pretense, but the court's comments showed its conclusion that defendant's concern for his dependents was suspended when he began firing at the police car. The court did consider the factor of hardship to defendant's family and, at separate occasions during sentencing, it expressed its sympathy for defendant's wife and children. The court did not denigrate the situation in which his dependents found themselves but commented that defendant alone was the cause of their quandary. The court noted that any hardship defendant's family experienced would result not from the court's order of imprisonment but from defendant's own unjustifiable and reckless actions. The court's comments emphasized that defendant ignored his responsibility to his family when he initiated a gunfight on a public street and put others and himself at great risk. The court reasonably concluded that any hardship of defendant's imprisonment on his dependents was not a mitigating factor.

¶ 29 A trial judge is allowed to make reasonable inferences from the evidence when sentencing a defendant. *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 92, citing *People v. Chapman*, 194 Ill. 2d 186, 253 (2000). In *Chapman*, the supreme court held: "This is not a case

where the trial court refused to consider the mitigating evidence offered by defendant [his early discharge from the military to care for his brother]. The trial court merely disagreed with defendant's assessment of that evidence as mitigating. *** Consequently, we find no plain error and no basis to excuse defendant's procedural default of this argument." *Id.* at 253. Here, the trial court did consider defendant's representation that, prior to committing the offense, he contributed financially to the support of his family. The court did not abuse its discretion when it formed a reasonable inference that defendant abandoned the interests of his dependents at the time when he undertook his wanton and reckless action that threatened harm to the two officers he targeted, himself and those riding with him, and innocent individuals in the general vicinity.

¶ 30 As we have found no error either in the trial court's consideration of the circumstances of the offense as an aggravating factor or in the court's rejection of hardship to defendant's family as a mitigating factor, plain-error analysis is not warranted. *People v. Willhite*, 399 Ill. App. 3d 1191, 1197 (2010); *People v. Pelo*, 404 Ill. App. 3d 839, 880 (2010). Moreover, because there was no error as to either sentencing issue, defendant was not prejudiced by his counsel's failure to raise the meritless claims in the motion to reconsider sentence, and such failure did not constitute ineffective assistance of counsel. *People v. Bailey*, 364 Ill. App. 3d 404, 409 (2006). "An attorney will not be deemed ineffective for a failure to file a futile motion." *People v. Rucker*, 346 Ill. App. 3d 873, 886 (2003).

¶ 31 Where the trial court properly considered factors in mitigation and aggravation of sentence and the sentence imposed was less than the maximum sentence allowable, we are unable to conclude that the court abused its discretion in sentencing defendant to a prison term of

14 years for aggravated discharge of a firearm. Accordingly, the judgment of the circuit court is affirmed.

¶ 32 Affirmed.