2016 IL App (1st) 141755-U

SIXTH DIVISION
August 12, 2016

No. 1-14-1755

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. 13 CR 16091
	)	
ANTONIO HAMILTON,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justice Hoffman and Delort concurred in the judgment.

O R D E R

¶ 1 *Held:* We affirmed defendant's convictions for aggravated battery to a merchant and retail theft where the challenges to his eight-year extended-term sentence for aggravated battery to a merchant were forfeited and not reviewable as plain error.

¶ 2 Following a bench trial, defendant Antonio Hamilton was convicted of aggravated battery to a merchant and retail theft. The trial court sentenced defendant to an eight-year extended term of imprisonment for the aggravated battery to a merchant conviction based on defendant's extensive criminal history, and a concurrent term of three years' imprisonment for the retail theft conviction. On appeal, defendant challenges his eight-year extended-term sentence as excessive

based on his argument that the trial court relied on improper factors in aggravation and demonstrated bias. We affirm.

¶ 3 Defendant was tried on charges of robbery, aggravated battery to a merchant, and retail theft. The evidence presented at trial established that at approximately 8:30 a.m. on August 9, 2013, defendant entered a Walgreen's store at 6315 South Kedzie Avenue in Chicago, removed security tags from several bottles of body wash, and concealed those bottles inside his jacket. As store manager Daniel Bednarz approached defendant, defendant ran toward the exit and removed his jacket, dropping some bottles of body wash.

¶ 4 Assistant store manager Ruben Coria, who is six feet, six inches tall, and weighs 265 pounds, was standing near the exit door. Mr. Coria held his hands out and told defendant to stop. Defendant punched Mr. Coria in the nose, with significant force, causing him to fall to the floor and lose consciousness for two to five seconds. Although Mr. Coria's nose was swollen and bleeding and he was in pain, he declined medical attention. Mr. Bednarz and another employee tackled defendant and detained him until police arrived. The police searched defendant and recovered two bottles of body wash from his pants pockets.

¶ 5 The trial court, after concluding that Mr. Bednarz's testimony was "very credible," found defendant guilty of robbery, aggravated battery of a merchant, and retail theft.

¶ 6 Pursuant to defendant's motion for a new trial, the trial court vacated only the robbery conviction as not supported by the evidence.

¶ 7 At sentencing, the State informed the court that defendant had a lengthy criminal history, with 13 felony and nine prior misdemeanor convictions, including violent and nonviolent offenses. The State also highlighted that the presentence investigation report (PSI), showed defendant had reported that, when he was using drugs, he lived on the streets with an unclean

lifestyle. The State argued that defendant could receive treatment for his mental illnesses and, possibly, learn a trade in prison. Based on defendant's criminal history and his conduct in this case, the State requested that he be sentenced to a term of six years' imprisonment.

¶ 8 In mitigation, defense counsel acknowledged defendant's extensive criminal history, but stated that defendant was diagnosed in 2010 with post traumatic stress disorder, bipolar disorder, and asthma, and was taking medications for his mental illnesses. Defense counsel remarked that many of defendant's convictions occurred prior to 2010. Defense counsel explained that defendant had participated in every program available to him while in pretrial custody, and presented the court with numerous certificates which defendant had received for attending workshops about substance abuse, changed behavior and attitude, life skills, and anger management.

¶ 9 Defense counsel further stated that defendant "had a horrible upbringing," never had a stable home, and first lived on the streets on his own when he was 12 or 13 years old. Defense counsel told the court that defendant had earned his GED while in prison in 1992, and had worked as a server at a restaurant for one month in 2011, until his substance abuse caught up with him.

¶ 10 In allocution, defendant stated that these charges were due to his drug abuse, but that since he had participated in the programs in the jail, he was a "changed man" with a different outlook on life. Defendant had rebuilt his relationship with his daughter and three granddaughters. His grandmother, who was 87 years old, needed his assistance. Defendant promised the court that he would never again be arrested and that he would continue to participate in the programs that are offered to him. Defendant had accepted religion into his life and no longer wished to live on the streets. Defendant asked for the mercy of the court.

¶ 11 In announcing defendant's sentence, the circuit court made the following statement which we set forth in full as it is the subject of defendant's appeal:

"I have to tell you, sir, I'm unimpressed with your new found religion and your new found relationship with your grandmother and substance abuse understanding how it's affected your life. And the reason is that this [is] nothing [new] for you.

I suspect that the statement you just provided is probably the same statement you've given before your other 12 felony convictions, the same statement you've given for your nine misdemeanor convictions. Included in those convictions there is almost, I don't want to take the time to count up all the times that you have been constantly convicted of stealing other people's property, but you also have a history of acting in a very violent way, and early on after your first theft felony conviction in 1984, where you got two years in the department of correction, you quickly followed that up in '87 on an aggravated battery, three years Illinois Department of Corrections. Then unlawful use of [a] weapon by a felon in '88, 30 more months in the Illinois Department of Corrections. A burglary in the [McLean] County, it cost you 18 years in 1990, a long period of multiple thefts including 2002, three years out of this building.

And then a case I find very significant, in 2005 indictment with a 2006 conviction, aggravated battery, harm to a merchant. Same thing that you did here. The Judge gave you probation, probation, after all these other convictions, you got probation for an aggravated battery to a merchant, and then that was terminated unsatisfactorily. You continued that up with more thefts, another two years in the Department of Corrections on a retail theft, on an '08 case, an '09, two years Department of Corrections on another retail theft, in 2010, retail theft, a year. Some misdemeanors, a misdemeanor

theft, two years on an escape. In 2011, 100 days on a retail theft. And then last year, the same year as this case, one year IDOC retail theft, less than a year ago you were sentenced on that in front of me and you get another conviction apparently after that.

I've reviewed the other factors here trying to look for mitigation. You have no prior military service whatsoever, your substance abuse history is certainly not mitigating. It's aggravating, you started drinking when you were 12 years of age. At the time of your arrest you were drinking two tall six packs of beer a day plus a half pint of gin daily. You started marijuana at the age of 13, at the time of your arrest, $200 to $300 a day – actually strike that, $400 or $500 a day, heroin since 21 years of age, half a bag. There is hundreds of dollars a day you're spending on drugs and alcohol.

I look at your employment, the last job you had, decent job seems to be at Maggiano's, and you quit that job. So honest work wasn't for you, but yet somehow you're able to spend hundreds of dollars a day on drugs and alcohol.

The Government was giving you food stamps, you were eligible for food stamps to feed yourself, but so far they haven't decided to give out heroin stamps, marijuana stamps so you had to find the money for that somewhere else. And I think 12 felony and nine misdemeanor convictions is pretty indicative of where you found the money for your drugs. Somebody else, let somebody else pay for it, the little stores, the Walgreens, like in this case some little store, let them pay for your substance abuse.

And you had prior substance abuse treatment opportunities, you went through a couple different programs here in Cook County Jail in the past, all of these things were offered to you. And then you use your grandmother in front of me arguing that that's mitigation that she's back in your life. The presentence investigation points out how you

let your family down by stealing from your grandmother to obtain drugs. And you admit she could use your help. I'm sure she could. I'm sure she could have used your help for the last 40, 50 years rather than you just being a parasite on your grandmother. You took advantage of her love to you, you steal from her so that you could satisfy your own desires.

So I'm unimpressed with your statement, I don't think it's sincere at all. I'm glad you went through all the programs, hopefully they will help you. But I believe that after looking at everything in aggravation an[d] mitigation, to the theft charge I will sentence you to the three years, that's a Class 4, I will sentence you on the theft charge to three years in the Illinois Department of Corrections.

But on the aggravated battery to a merchant, which is, I find very inexcusable. You were caught, you know what happens on most of these case[s], most of these cases *** don't go away for a long time, most of them you get resolved, time served or even if you do go your sentences haven't been that long, but now all of a sudden you decided because you wanted to get away so you could have those drugs, that it was appropriate for you to just slug this guy, Ruben [Coria], literally knocking him out. And you could you [could] have killed him, people sometimes die from one punch [incident] because of the way they land on their head or their neck snapping if they're not ready for it. I've had cases in front of me where people have died, I mean, that's how dangerous it is to commit a battery like this. So you were the one who chose to escalate this.

So even though it's not a robbery, I think it's a serious offense such that given your background and there being virtually nothing in mitigation to outweigh the

aggravation, I think the appropriate sentence is an extended term of 8 years in the Illinois Department of Corrections."

¶ 12 The trial court subsequently denied defendant's motion to reconsider his sentence and this appeal followed.

¶ 13 On appeal, defendant's sole argument is that his eight-year extended-term sentence for aggravated battery of a merchant is excessive because the trial court relied on improper factors in aggravation and demonstrated bias against him when it imposed a sentence two years above the State's recommendation. Defendant argues that the court's comments that "people sometimes die from one punch," and "I've had cases in front of me where people have died," show that the court improperly considered its own personal opinion about what could have happened to the victim as a factor in aggravation. Defendant also argues that the court's comments about his drug use show that it was biased against him and that it improperly considered his drug use as an aggravating rather than a mitigating factor. Defendant asks this court to either reduce his sentence to the six-year term recommended by the State, or remand his case for a new sentencing hearing before a different trial judge.

¶ 14 The State first responds that defendant forfeited review of these sentencing issues because he did not object at the sentencing hearing and did not raise these issues in his motion to reconsider his sentence. The State further argues that as no error occurred, the issue cannot be reviewed under the plain error doctrine. The State asserts that the trial court, in entering sentence within the statutory range, properly considered the information contained in the PSI and the factors in aggravation and mitigation and that its remarks were based on the evidence presented at trial, not the court's personal opinions.

¶ 15 Defendant first replies that the issues are not forfeited because he argued in his postsentencing motion that the sentence was excessive.

¶ 16 It is well settled that, in order to preserve a sentencing error for review, both a contemporaneous objection during the sentencing hearing and a written postsentencing motion raising the issue, are required. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Here, the record shows that defendant made no objection at any time during the sentencing hearing. Furthermore, although defendant filed a motion to reconsider his sentence, that motion did not raise the issues he now raises before this court. In his motion, defendant argued that the sentence was excessive in view of his background and the charged offense, and that the court improperly considered in aggravation matters that are implicit in the offense. Defendant has not pursued these issues on appeal. As described above, defendant now claims that the trial court: improperly relied on its own personal opinion; was biased against him; and that it improperly considered his drug use as an aggravating factor rather than a mitigating factor. We find that defendant failed to preserve these issues for appeal and they are, therefore, forfeited. *Id*. at 544-45.

¶ 17 Defendant, in the alternative, argues that his claims may be reviewed under the second prong of the plain error doctrine. The plain error doctrine is a narrow exception to the forfeiture rule which may be invoked only after defendant first demonstrates that a clear or obvious error occurred. *Id*. at 545. Thereafter, defendant must show that the evidence at the sentencing hearing was closely balanced, or that the error was so egregious that he was denied a fair sentencing hearing. *Id*. The burden of persuasion is on defendant, and if he fails to meet that burden, the procedural default will be honored. *Id*.

¶ 18 As charged in this case, aggravated battery to a merchant is a Class 3 felony with an extended sentencing range of 5 to 10 years' imprisonment. 720 ILCS 5/12-3.05(d)(9), (h) (West

2012); 730 ILCS 5/5-4.5-40(a) (West 2012). Defendant was eligible for an extended-term sentence based upon his 2012 felony conviction for escape and his 2006 felony conviction for aggravated battery to a merchant. 730 ILCS 5/5-5-3.2(b)(1) (West 2012). The trial court has broad discretion in imposing an appropriate sentence, and where, as here, that sentence falls within the statutory range, it will not be disturbed on review absent an abuse of discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). An abuse of discretion exists where a sentence is at great variance with the spirit and purpose of the law, or is manifestly disproportionate to the nature of the offense. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010).

¶ 19 Here, we find no error by the trial court in sentencing defendant to an extended term of eight years' imprisonment, which falls within the statutory range. The record shows that in imposing that sentence, the trial court placed great emphasis on defendant's extensive criminal history, detailing his 12 prior felony convictions and sentences, and noting that he had "a history of acting in a very violent way." The court expressly stated that, the fact that defendant had been convicted in 2006 for the same offense of aggravated battery to a merchant was "very significant." Further, the court pointed out that, although defendant had numerous felony convictions before 2006, he was sentenced to probation on that charge but the probation was terminated unsatisfactorily. Thereafter, defendant had several more felony and misdemeanor convictions, including a retail theft conviction before the same trial judge less than a year before the sentencing in this case.

¶ 20 Further, the trial court explicitly stated that it had "reviewed the other factors here trying to look for mitigation," but concluded that defendant's substance abuse history was aggravating and "certainly not mitigating." The court noted that the PSI showed that defendant reported spending $400 to $500 a day for his alcohol and drug use, and yet he was not employed. The

court then commented that defendant's numerous convictions were indicative that his drug use was financed from illicit gains.

¶ 21 We reject defendant's contention that the trial court showed bias against him when it considered his drug and alcohol use in aggravation rather than mitigation. Although a defendant may offer this type of evidence as mitigation to explains his misconduct, the trial court is not required to share that assessment and may conclude, under the circumstances, that defendant's drug abuse is an aggravating factor. *People v. Montgomery*, 192 Ill. 2d 642, 674 (2000) (citing *People v. Shatner*, 174 Ill. 2d 133, 160 (1996) ("a defendant's history of alcohol and drug abuse is not necessarily mitigating")). Here, the trial court's finding that defendant's drug and alcohol use was aggravating rather than mitigating was based on its consideration of defendant's substantial criminal history and the extent of his use of drugs and alcohol which defendant reported in the PSI. We find no error with the court's conclusion.

¶ 22 The record also shows that the court stated that it considered "everything in aggravation an[d] mitigation," but found that the aggravated battery offense in this case was "very inexcusable." The court found that defendant hit Mr. Coria, "literally knocking him out," because defendant wanted to get away. The court then remarked that defendant could have "killed him, people sometimes die from one punch," and that the court previously heard cases "where people have died."

¶ 23 Contrary to defendant's contention, we find that these remarks do not reflect the court's bias against defendant or its consideration of its own personal opinion, but instead, were based on the evidence presented at trial. That evidence showed that when defendant punched Mr. Coria, who was six feet, six inches tall, and weighed 265 pounds, Mr. Coria fell to the floor and was unconscious for a few seconds. Mr. Bednarz testified that Mr. Coria "got hit so hard that he

actually got knocked out." The trial court's remarks reflect its concern with the violent and forceful nature of defendant's act, which is clear from its further statement: "that's how dangerous it is to commit a battery like this."

¶ 24 The record shows that the trial court properly based defendant's sentence on its consideration of the seriousness of the offense, defendant's extensive criminal history, and the court's weighing of the factors in aggravation and mitigation. This court will not reweigh the sentencing factors or substitute our judgment for that of the trial court (*Alexander*, 239 Ill. 2d at 213). We cannot say that the sentence imposed by the court is excessive, manifestly disproportionate to the nature of the offense, or that it departs significantly from the intent and purpose of the law. *People v. Fern*, 189 Ill. 2d 48, 56 (1999). Since no error occurred, we conclude that the plain error doctrine does not apply and we honor defendant's forfeiture of this issue. *Hillier*, 237 Ill. 2d at 545-46.

¶ 25 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 26 Affirmed.