SIXTH DIVISION
December 9, 2016

No. 1-14-3101

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. 13 CR 8950
	)	
DONALD TILLERY,	)	Honorable
	)	Thomas J. Hennelly,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

O R D E R

¶ 1 *Held*: We affirm defendant's sentence because he forfeited the arguments he presents on appeal. The plain-error doctrine does not apply because the trial court did not abuse its discretion in sentencing defendant.

¶ 2 Following a bench trial, defendant Donald Tillery was convicted of one count of delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2012)) and one count of possession of a controlled substance (720 ILCS 570/402(c) (West 2012)) and sentenced to concurrent terms of ten years' imprisonment and one year's imprisonment, respectively. On appeal, defendant argues

the trial court abused its discretion in imposing a ten-year prison term for the delivery of a controlled substance conviction. We affirm.

¶ 3 Defendant was charged by indictment with one count of delivery of a controlled substance and one count of possession of a controlled substance with intent to deliver stemming from a narcotics purchase by a Chicago police officer. Defendant proceeded to a severed, simultaneous bench trial with codefendant Steven Carr.

¶ 4 At trial, two Chicago police officers testified and established that, on April 14, 2013, defendant and Carr sold two small bags of suspect heroin to an undercover officer in exchange for a $20 bill of prerecorded "1505" funds. The parties stipulated that the items received by the officer tested positive for 0.2 grams of heroin and the items recovered from defendant tested positive for 0.2 grams of heroin.

¶ 5 The trial court found defendant guilty of one count of delivery of a controlled substance and one count of possession of a controlled substance, the lesser-included offense of possession of a controlled substance with intent to deliver. The trial court denied defendant's written motion for a new trial and proceeded to sentencing.

¶ 6 At sentencing, the evidence established that defendant had prior felony convictions for possession of a controlled substance (1988); manufacturing or delivery of a controlled substance with probation terminated unsatisfactorily (1989); possession of a stolen motor vehicle (1992); forgery (2001); residential burglary (2001); driving on a revoked or suspended license (2006 and 2008); and manufacturing or delivery of a controlled substance (2010).

¶ 7 The record indicates the trial court received several letters in support of defendant. Treatment Centers for Safe Communities (TASC) submitted a recommendation letter stating

defendant "demonstrates the likelihood for rehabilitation." The TASC letter references a letter from a church pastor highlighting defendant's involvement in youth programs. Department of Corrections superintendent T. Everhart submitted a letter indicating defendant is employed "with the Division V Sanitation Crew," and had been a "model inmate." A letter from Department of Corrections officer R. Ornelas informed the court defendant was employed in the "RCDC Old Clothing Room" and had "a very good work ethic." Two letters from Daniel Marquez, president of Aztec Supply Corporation, informed the court defendant had completed a custodial training program and had "continued to show progress in his desire to seek employment in the janitorial supply industry." Marquez was confident that, with defendant's "exemplary work record in Division 5," Aztec would have success finding him employment.

¶ 8 The State noted the defendant was a Class X offender because of his background and argued for a sentence in excess of the minimum. Defense counsel argued for the minimum, noting that defendant has 11 children, including an eight-month old baby who was present in court. Counsel argued defendant had a long-term drug addiction and never had the opportunity to receive treatment. Defendant then allocuted, noting he had "made mistakes in [his] life" but that he had "paid [his] debt to society for those mistakes." He further stated that he had never asked for help with his addiction and is a "victim of circumstance having been on drugs and alcohol since [he] was a teenager," which kept him "coming back to the courts." He mentioned his 11 children and asked for "TASK [*sic*]" probation so he could "deal with [his] addiction."

¶ 9 The trial court sentenced defendant to concurrent terms of 10 years' imprisonment on the delivery of a controlled substance conviction and one year's imprisonment on the possession of the controlled substance conviction. The court noted that defendant had previously received

felony probation twice "to straighten out [his] life" and one probation was terminated unsatisfactorily. The court also pointed out that defendant was an eight-time convicted felon and, thus, not a "very good candidate for Task [*sic*]" and was Class X mandatory because of his background. It found he "certainly" did not qualify for the maximum sentence but, with eight prior convictions, did not qualify for the minimum either. The trial court then imposed sentence, stating:

> "I have considered the evidence presented at trial. I've considered the presentence investigation. I've considered the evidence offered in aggravation/mitigation, the statutory factors in aggravation/mitigation, financial impact of incarceration, the arguments of the attorneys as to what they believe is the appropriate sentence, the defendant's statement in his own behalf, the possibility of the defendant returning to a productive member of society and rehabilitation."

¶ 10 Defendant did not file a motion to reconsider sentence. He filed a motion for leave to file a late notice of appeal, which was granted.

¶ 11 On appeal, defendant does not challenge his conviction. Instead, he challenges his 10-year sentence on the delivery of a controlled substance conviction, arguing the trial court failed to consider all the factors in mitigation. Specifically, he argues the trial court did not consider the seriousness of the offense, his drug addiction and efforts to rehabilitate himself, the effects of long sentences for minor drug offenders, and the financial impact of his incarceration. He asks that we reduce his sentence to six years' imprisonment or remand for resentencing. As a

threshold matter, the State contends defendant forfeited his sentencing argument on appeal as he did not file a motion to reconsider sentence.

¶ 12 In order to preserve a sentencing issue for appeal, a defendant must raise the issue in the trial court, including through a written motion to reconsider sentence. *People v. Heider,* 231 Ill. 2d 1, 14-15 (2008). This gives the trial court an opportunity to review the defendant's sentencing claim "and save the delay and expense inherent in appeal if the claim is meritorious." *Heider,* 231 Ill. 2d at 18.

¶ 13 Defendant did not file a motion to reconsider sentence. As he concedes, he did not raise the issue orally or through written motion in the trial court and it is thus forfeited on appeal. See *People v. Hillier*, 237 Ill. 2d 539, 544-45 (2010).

¶ 14 However, sentencing issues raised for the first time on appeal may be reviewed under the plain-error doctrine. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *People v. Sauseda,* 2016 IL App (1st) 140134, ¶ 11. The doctrine provides a narrow and limited exception to the rules of forfeiture. *People v. Bannister,* 232 Ill. 2d 52, 65 (2008). In order to obtain relief under the plain-error doctrine, the defendant must first show an obvious error occurred. *Hillier*, 237 Ill. 2d at 545. Next, in the sentencing context, the defendant must show "(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.* When a defendant fails to establish plain error, his procedural default must be honored. *Bannister,* 232 Ill. 2d at 65.

¶ 15 Defendant urges us to proceed under both prongs, arguing the evidence in mitigation and aggravation at sentencing was closely balanced and the error was so egregious as to deny defendant a fair sentencing hearing. Before we reach those prongs, however, we must first

determine whether error occurred at all. *People v. Sargent,* 239 Ill. 2d 166, 189 (2010). "This requires a 'substantive look' at the issue." *People v. Naylor,* 229 Ill. 2d 584, 593 (2008) (quoting *People v. Johnson,* 208 Ill. 2d 53, 64 (2003)).

¶ 16 The trial court has broad discretion in imposing an appropriate sentence. Where, as here, that sentence falls within the range provided by statute, a reviewing court cannot alter it absent an abuse of discretion. *People v. Jones,* 168 Ill. 2d 367, 373-74 (1995). An abuse of discretion exists 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. Stacey,* 193 Ill. 2d 203, 210 (citing *People v. Fern,* 189 Ill. 2d 48, 54 (1999)). Because of its personal observation of defendant and the proceedings, the trial court is in the superior position to determine an appropriate sentence. *People v. Alexander,* 239 Ill. 2d 205, 212-13 (2010). It must weigh the relevant sentencing factors, which include the defendant's demeanor, credibility, age, social environment, moral character and mentality. *Id.* at 213. It is presumed that when mitigating evidence is presented to the trial court, the court considered it absent some indication to the contrary, other than the sentence itself. *Sauseda,* 2016 IL App (1st) 140134, ¶ 19.

¶ 17 We find the trial court did not abuse its discretion in imposing a 10-year prison sentence. Because of his prior felony convictions, defendant was a Class X offender, and faced a term of 6 to 30 years' imprisonment. 730 ILCS 5/5-4.5-95(b)(1), (2), (3) (West 2012); 730 ILCS 5/5-4.5-25(a) (West 2010). The 10-year sentence falls within this statutory range and we therefore presume it is proper. *People v. Knox,* 2014 IL App (1st) 120349, ¶ 47.

¶ 18 Defendant argues his 10-year prison sentence does not reflect the seriousness of the offense and its non-violent nature. Specifically, he argues the trial court did not "consider the

minimal amount of harm caused by this offense, which was the delivery of $20 worth of heroin." A sentence must reflect both the seriousness of the offense and the objective of restoring the offender to useful citizenship. *People v. Wilson,* 2016 IL App (1st) 141063, ¶ 11. The seriousness of the offense, and not mitigating evidence, is the most important sentencing factor. *People v. Kelley,* 2015 IL App (1st) 132782, ¶ 94. However, the defendant "must make an affirmative showing the sentencing court did not consider the relevant factors." *People v. Burton,* 2015 IL App (1st) 131600, ¶ 38. Defendant makes no such showing here. Further, the trial court noted that it considered the evidence presented at trial, which necessarily includes the amount of heroin. The court also noted defendant's prior criminal history, stating "with eight prior convictions, I don't think you qualify for the minimum as well." Thus, the trial court was aware of the amount of heroin but decided to give more weight to defendant's prior criminal history in imposing a sentence four years above the minimum and 20 years below the maximum. There is no basis on which to overturn that determination. See *Wilson,* 2016 IL App (1st) 141063, ¶ 13 (affirming 15-year prison sentence where the defendant "was not deterred by previous, more lenient sentences").

¶ 19 Defendant argues the trial court did not adequately consider his drug addiction and efforts to rehabilitate himself. Specifically, defendant argues the trial court failed to consider that defendant has not previously received any treatment for his addictions. However, the record indicates the trial court was made aware of these facts. Defendant told the court that he was "a victim of circumstance having been on drugs and alcohol since [he] was a teenager." Both defendant and defense counsel had told the court defendant never had the opportunity to receive treatment for his addiction. Moreover, the presentence investigation report, which the court

stated it had considered, mentioned defendant's drug and alcohol "problem," dating back to his teenage years. Further, the trial court noted that defendant, as an "eight-time convicted felon *** is not someone who is a very good candidate for Task [*sic*]." The trial court thus was well aware of defendant's addiction to alcohol and drugs, but was not required to give it the weight defendant urges. See *People v. Montgomery,* 192 Ill. 2d 642, 674 (2000) ("[T]estimony about a defendant's history of alcohol and drug abuse is not necessarily mitigating. Although a defendant might urge this evidence is mitigation, as an explanation for his misconduct, the sentencer is not required to share the defendant's assessment of the information").

¶ 20 Defendant also relies on the letters written on his behalf. The trial court stated it had considered all evidence in mitigation as well as defendant's rehabilitative potential. It had the discretion to weigh this mitigating evidence as it saw fit. See *People v. Pace,* 2015 IL App (1st) 110415, ¶ 92. Further, because the letters were presented to the trial court, we must presume it considered them, absent some indication to the contrary. *People v. Benford,* 349 Ill. App. 3d 721, 735 (2004). Defendant fails to point to any evidence that the trial court failed to consider these letters. *Pace,* 2015 IL App (1st) 110415, ¶ 92 ("The presumption that the trial court considered all mitigating evidence may be rebutted, but to do so the defendant must point to evidence other than the sentence which the court imposed").

¶ 21 As defendant has not affirmatively shown the trial court did not adequately give proper weight to this evidence, we cannot say the court abused its discretion in its consideration of his rehabilitation potential and efforts. See *Burton,* 2015 IL App (1st) 131600, ¶¶ 37-38 (finding no abuse of discretion where the defendant failed to make an affirmative showing that the trial court failed to consider his rehabilitative potential in mitigation).

¶ 22 Defendant next argues the trial court failed to consider his prior criminal history in the context of his drug addiction and that his criminal history shows "someone struggling to support a drug addiction" and should be viewed as a mitigating factor. The trial court noted defendant's prior criminal history, stating, "I understand that these things are in your past, but our past we always carry with us *** You certainly probably don't qualify for 30 years, given what I heard. But, with eight prior convictions, I don't think you qualify for the minimum as well." Criminal history alone may warrant a sentence substantially above the minimum. *People v. Evangelista,* 393 Ill. App. 3d 395, 399 (2009). Additionally, the trial court noted, "[y]ou had two opportunities going back into the 80's to straighten out your life." Here, a reduced sentence was not mandated where, as the trial court noted, defendant did not take advantage of prior probation sentences to rehabilitate himself. See *People v. Starnes,* 374 Ill. App. 3d 329, 337 (2007) (previous drug-related convictions showed the defendant did not take advantage of rehabilitation opportunities).

¶ 23 Defendant argues the trial court should have considered the effects of long sentences for minor drug offenders, including the mass incarceration of African-American men. Defendant cites to several secondary materials including remarks by the former Attorney General of the United States and various articles and studies to support his arguments regarding the prison sentence imposed. We decline to consider these secondary materials as they are not relevant authority on appeal. See *People v. Heaton,* 266 Ill. App. 3d 469, 477 (1994). Further, to the extent these materials seek to insert expert opinion testimony into the record which was not presented to the trial court, we are not allowed consider them. See *People v. Mehlberg,* 249 Ill. App. 3d 499, 531-32 (1993).

¶ 24 Additionally, defendant notes he is a "family man" and that lengthy sentences for minor drug offenses are weakening the community. However, the trial court heard about defendant's children from both defendant and his attorney. To the extent defendant is arguing his incarceration would entail an excessive hardship on his dependents, the trial court stated that it considered all factors in mitigation, which includes the excessive hardship on defendant's dependents. See 730 ILCS 5/5-5-3.1(a)(11) (West 2010); see *People v. Hambrick,* 2012 IL App (3d) 110113, ¶ 23 ("We note *** that any prison sentence entails hardship to the defendant and the defendant's family").

¶ 25 Defendant finally argues the trial court failed to consider the financial impact on the State of Illinois for his incarceration. The court is required to consider the financial impact of defendant's incarceration on the State based on the financial impact statement filed by the Department of Corrections with the clerk of the court. 730 ILCS 5/5-4-1(a)(3) (West 2010). But, the court has no obligation to recite and assign a value to every factor that it considers (*People v. Perkins,* 408 Ill. App. 3d 752, 763 (2011)) and, absent evidence to the contrary, we presume the trial court considered the financial impact prior to sentencing defendant. *People v. Acevedo,* 275 Ill. App. 3d 420, 426 (1995).

¶ 26 In sum, we find that the trial court did not abuse its discretion in imposing a 10-year prison sentence for the delivery of a controlled substance conviction. Having found no error, there can be no plain error and defendant's argument is forfeited. See *People v. Williams,* 193 Ill. 2d 306, 349 (2000).

¶ 27 Defendant contends that any forfeiture was the result of ineffective assistance of counsel, because counsel's failure to file a motion to reconsider sentence was "objectively unreasonable"

and prejudiced him. A defendant has a constitutional right to the effective assistance of counsel. See *Strickland v. Washington,* 466 U.S. 668, 685-86 (1984). To establish that counsel is ineffective, a defendant must show both that (1) counsel's representation was deficient and (2) that deficiency prejudiced him. *People v. Petrenko,* 237 Ill. 2d 490, 496 (2010) (citing *Strickland,* 466 U.S. at 694). Having already determined that no error occurred in sentencing defendant, he cannot establish the requisite prejudice, and thus cannot succeed on his ineffective assistance of counsel claim. See *People v. Caffey,* 205 Ill. 2d 52, 106 (2001).

¶ 28 For the reasons set forth above, we affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.