2016 IL App (2d) 140571-U
No. 2-14-0571
Order filed September 12, 2016

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 12-CF-634
DARWEN SAWTELLE,	)	Honorable Randy Wilt,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not commit plain error in considering in aggravation that defendant, in committing aggravated discharge of a firearm, threatened serious harm: although a threat of harm is arguably inherent in the offense, a threat of serious harm is not; (2) defendant's successive (and thus unauthorized) DNA analysis fee is vacated.

¶ 2 Defendant, Darwen Sawtelle, appeals his sentence for aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2012)), contending that the trial court committed plain error when it considered a threat of serious harm as a factor in aggravation, which defendant argues is

also a factor inherent in the crime. He also contends that a $250 DNA analysis fee must be vacated. We affirm the sentence of incarceration but vacate the DNA analysis fee.

¶ 3 I. BACKGROUND

¶ 4 Defendant pleaded guilty to one count of aggravated discharge of a firearm, which alleged that he knowingly or intentionally fired a gun in the direction of a person, Michael Powless. The factual basis for the plea was that defendant fired shots at Powless, at least one of which struck his truck.

¶ 5 At sentencing, the State showed that defendant had a criminal history with multiple juvenile and adult offenses. He had a history of drug use and gang membership and was not eligible for a firearm owner's identification card. Among additional factors, the State argued in aggravation that the crime "did threaten serious harm against an individual whose simple act was to drive down the street[]." The State argued that the threat of serious harm could be considered because it was not part of the statute. Defendant presented mitigating evidence that he came from a broken home, had given up gang membership, attended drug treatment, earned his GED, and had steady employment.

¶ 6 The trial court discussed the aggravating and mitigating circumstances at length, with particular focus on defendant's criminal history, especially weapons offenses. The court also stated that "he hit a truck with a bullet, but he easily could have hit the person in the truck or other people in the area. So it didn't cause seriously bodily harm, but it certainly threatened serious bodily harm or death ***. He fired a gun, and he fired a gun in the direction of a vehicle that was occupied by another individual." There was no objection.

¶ 7 The court sentenced defendant to 10 years' incarceration and ordered that defendant provide a DNA sample. Defendant was assessed a $250 DNA analysis fee. However, it was

later learned that he had previously provided a DNA sample. Defendant moved to reconsider the sentence but did not make any argument concerning the court's consideration of the threat of serious harm or the DNA analysis fee. The motion was denied, and defendant appeals.

¶ 8 II. ANALYSIS

¶ 9 Defendant argues that it was plain error for the court to consider the threat of serious harm as a factor in aggravation. Defendant concedes that the issue was forfeited when he did not object at sentencing. "To preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion." *People v. Thompson*, 238 Ill. 2d 598, 611 (2010). "The plain-error rule bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error in specific circumstances." *Id.* at 613. We apply the plain-error doctrine when:

> "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence [Citation.]." (Internal quotation marks omitted.) *Id.*

"The first step of plain-error review is determining whether any error occurred." *Id.*

¶ 10 "[T]he imposition of a sentence is a matter within the trial court's discretion, and its decision will not be reversed on appeal absent an abuse of that discretion." *People v. Torres*, 269 Ill. App. 3d 339, 350 (1995). "[T]he trial court's decision regarding sentencing is to be given great deference and weight." *Id.*

¶ 11 "Although a trial court has broad discretion when imposing a sentence, it may not consider a factor implicit in the offense as an aggravating factor in sentencing." *People v. Ellis*, 401 Ill. App. 3d 727, 730 (2010). However, one of the statutory factors in aggravation that shall be considered in favor of imposing a more severe sentence is whether "the defendant's conduct caused or threatened serious harm." 730 ILCS 5/5-5-3.2(a)(1) (West 2012).

¶ 12 A person commits aggravated discharge of a firearm when he knowingly or intentionally "[d]ischarges a firearm in the direction of another person or in the direction of a vehicle he or she knows or reasonably should know to be occupied by a person." 720 ILCS 5/24-1.2(a)(2) (West 2012). Whether the threat of serious harm is a factor inherent in the crime was decided in *Torres* and *Ellis.*

¶ 13 In *Torres*, we held that the threat of serious harm is not inherent in the offense of aggravated discharge of a firearm, because the crime requires only that the defendant fire in the direction of a person or occupied car. *Torres*, 269 Ill. App. 3d at 350. In *Ellis*, the third district, relying on *Torres*, further explained: "Implicit in every offense of aggravated discharge of a firearm is the threat of harm. 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." *Ellis*, 401 Ill. App. 3d at 731. There, the court found that it was not inherent in the offense that the defendant's conduct threatened the driver of a vehicle and his passenger with serious harm, nor was it inherent in the offense that the bullets actually struck the vehicle or struck near a window of the vehicle. Thus, the trial court acted within its discretion by considering the relative threat of harm caused by the defendant's conduct. *Id.*; see also *People v. Brewer*, 2013 IL App (1st) 072821, ¶ 57 (the fact that conduct threatened or caused serious harm is not a factor inherent in

the crime but is a proper aggravating factor to be considered during sentencing even in cases where serious bodily harm is implicit in the offense).

¶ 14 Curiously, in this case, neither party cited nor discussed *Ellis* or *Torres* in its briefs. Instead, they relied on cases involving other crimes such as aggravated arson. See, *e.g.*, *People v. Abdelhadi*, 2012 IL App (2d) 111053. We ordered the parties to be prepared to address the two cases at oral argument. In the context of aggravated discharge of a firearm, *Ellis* and *Torres* are on point and controlling. As those cases illustrate, the threat of harm can vary based on how the shots were aimed, such as whether they were aimed directly at a person as opposed to fired in the air as a warning. Likewise, there is a difference in the threat of harm when firing shots on a city street as opposed to firing shots in a rural location. Again, while the threat of harm may be inherent; the threat of *serious* harm is not.

¶ 15 Much like in *Ellis*, the trial court here considered that defendant shot at an occupied vehicle on a city street and actually struck the vehicle, presenting a threat of serious harm or death to the occupants of the vehicle or others who might be in the area. Defendant points to the court's additional statement that he fired the gun "in the direction of a vehicle" to argue that the court considered only that factor. But the court's comments as a whole show that it considered the threat of harm to anyone inside of that vehicle, based on the fact that shots were fired directly at it and hit the car, and not the mere fact that the gun was fired in its general direction. That defendant fired the shots on a city street and hit the vehicle shows a threat of serious harm, which was not inherent in the offense, and the trial court did not err when it considered it as a factor in aggravation. Accordingly, there was also no plain error.

¶ 16 Defendant next contends that his $250 DNA analysis fee must be vacated and refunded because he previously provided a DNA sample. The State agrees that the fee should be vacated,

but asks that any refund be applied to any other unpaid fines and fees. We accept the State's concession. Accordingly, we vacate the DNA analysis fee and order that it be applied to any unpaid fines and fees.

¶ 17 III. CONCLUSION

¶ 18 The trial court did not err when it considered the threat of serious harm as an aggravating sentencing factor. However, the DNA analysis fee was improperly imposed. Accordingly, the judgment of the circuit court of Winnebago County is affirmed in part and vacated in part. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 19 Affirmed in part and vacated in part.