2016 IL App (4th) 140027-U

NO. 4-14-0027

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

March 4, 2016
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
THOMAS M. BARTHOLOMEW,	)	No. 12CF1062
Defendant-Appellant.	)	
	)	Honorable
	)	John C. Costigan,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Holder White and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court vacated defendant's sentence and remanded for a new sentencing hearing where the trial court's erroneous belief that defendant was subject to an extended-term sentence for a Class 3 felony was plain error.

¶ 2 I. BACKGROUND

¶ 3 On October 17, 2012, a bill of indictment was returned against defendant, Thomas M. Bartholomew, charging him with "conspiracy to commit the offense of forgery" (McLean County case No. 12-CF-1062). The bill of indictment stated as follows:

> "The defendant knowingly and unlawfully with intent to defraud agreed with co-conspirator defendant Brittany Caldwell and that an act in furtherance of the agreement was committed in that on August 24 of 2012 the defendant delivered a document specifically being Morton Community Bank check 35201 drawn on an account

purported to be with Subway in the amount of $767.30 with the document apparently capable of defrauding another in that it purports to have been made by or by authority of the Morton Community Bank[.]

Eligible for an extended term due to prior record[.]"

The indictment cited section 17-3(a)(2) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/17-3(a)(2) (West 2010)), the forgery statute, as the applicable statutory provision for the offense and noted the offense was a "Class 3 [f]elony."

¶ 4 On October 19, 2012, the trial court arraigned defendant on the charge, informing him that he had been indicted "on the felony offense of conspiracy to commit the offense of forgery." At a March 5, 2013, hearing, the court again referred to the charged offense as "conspiracy to commit the offense of forgery."

¶ 5 During a May 28, 2013, sentencing hearing on unrelated charges, the trial court recessed to allow defendant to speak with his attorney and determine whether an agreement could be reached regarding the offense at issue here. Following the recess, defense counsel announced a partial agreement had been reached with the State and that defendant would make an open plea of guilty in this case in exchange for the State's dismissal of three other charges. The court then addressed defendant as follows:

"In 12[-]CF[-]1062, where the charge is conspiracy to commit the offense of forgery, it is my understanding that you are going to plead guilty to [c]ount [o]ne of the bill of indictment that alleges that you knowingly and unlawfully with the intent to defraud agreed with the a [*sic*] coconspirator defendant, Brittany

Caldwell, and that an act in furtherance of the agreement was committed in that on August 24th, 2012[,] you delivered a document, specifically being Morton Community Bank check number 35201, drawn on an account purported to be with Subway in the amount of 767 dollars and 30 cents, with the document apparently capable of defrauding another in that it purports to have been made by or by authority of the Morton Community Bank, a Class [t]hree [f]elony.

That carries a possible term of up to two to five years in the Department of Corrections. Based upon your prior record, you are extended[-]term eligible. So that could be up to a ten-year—ten years in the Department of Corrections, up to a 25 thousand dollar fine, with one year of mandatory supervised release.

It is my understanding that you and the State are unable to reach a full agreement on what the penalty should be for that case, and you would like for me to go ahead and make that decision as to what the penalty should be for the guilty plea in that case.

As part of the agreement that you have reached, it is my understanding that two traffic cases would be dismissed, one which alleges you committed the offense of driving on a revoked license and the other which alleges that you were driving 26 to 30 miles an hour above the speed limit, and a felony case would be dismissed that alleges that you committed the offense of obstructing justice.

Those are the only agreements that you have, and it's my understanding that you would ask the court to issue the sentence in 12[-]CF[-]1062 as part of the guilty plea. Is that the process that you wish to follow, sir?

DEFENDANT BARTHOLOMEW: Yes, Your Honor. I didn't discuss with the State as far as the specifics of that—of that forgery, but I don't know if anything could have been charged or on that right bringing it down any less or whatnot but I guess, like I say, I didn't discuss anything else with them as far as the specifics of that but I am willing to [plead] guilty of [*sic*] the charge.

THE COURT: And this is a Class [t]hree [f]elony.

DEFENDANT BARTHOLOMEW: We didn't discuss anything."

Defense counsel agreed the court could consider the presentence investigation report, prepared for the unrelated offenses set for sentencing that day, in sentencing defendant in this case.

¶ 6 Thereafter, defendant asked the trial court whether a charge in a separate case would be dismissed. The court responded as follows:

"No, sir, *** the obstructing justice count is the one being dismissed, and the conspiracy to commit the offense of forgery, it is my understanding the one you're pleading guilty to pursuant to an open plea, where the court will sentence you on that."

The trial court then admonished defendant of his rights pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 2012). Following admonishments, the State provided the following factual basis for the plea:

> "In that case specifically a conspirator, Brittany Caldwell, opened an account, deposited several checks that were purported to be drawn on the Subway account on the Morton Community Bank. It turned out that those checks were fraudulent. The defendant did, in fact, draw on those checks with two being on August 24th, two on August 25th and two on August 29th, with a total slightly over five thousand dollars. Specifically, one of those checks for the Morton Community Bank was 35201, as alleged in the indictment, purported to have been a Subway check in the amount of 767 and 30 cents, and specifically that Morton Community Bank confirmed that they did not and have not issued it. It was, as noted, a fraudulent check.
>
> Brittany Caldwell was interviewed and implicated defendant, co[-]conspirator ***, as the individual who provided the checks to cash, and they would split the money that came from those fraudulent checks out of that account before they shut it down when they realized it was, in fact, a fraudulent checks [*sic*] that were being deposited that funds were being drawn on."

The court then announced it would "further find that [defendant] understands the nature of the charges pending against him, the possible penalties, his legal rights, and that he's voluntarily

entered in the plea of guilty on cause number 12[-]CF[-]1062." The plea-agreement form filed on May 28, 2013, indicates defendant pleaded guilty to "forgery."

¶ 7 The sentencing hearing was continued to June 5, 2013, due to time constraints. At the June 5, 2013, sentencing hearing, the State argued, in relevant part, that defendant "went out, recruited Brittany Caldwell, the co[-]defendant, to do his dirty work for him and present the fake checks." The State then asked for a 10-year prison sentence "on [the] forgery case" and defense counsel asked for a 2-year prison sentence. Prior to sentencing defendant, the trial court noted, "[i]n 12-CF-1062 [the case at issue here] you were charged and pled guilty to a Class 3 felony. You were extended[-]term eligible on that case based upon your prior record which carries a possible penalty of up to 2 to 10 years in [prison]." The court then sentenced defendant to 6 years' imprisonment in this case and ordered the sentence to run concurrently with an unrelated 13-year prison sentence. The sentencing judgment indicates defendant was sentenced to 6 years' imprisonment for "forgery," a "Class 3 [f]elony," and cites to the forgery statute (720 ILCS 5/17-3(a)(2) (West 2010)).

¶ 8 On July 8, 2013, defendant filed a *pro se* "motion to withdraw guilty plea and sentence." At a September 13, 2013, hearing, defense counsel stated she would adopt defendant's *pro se* motion but "would like to amend it to a motion to reconsider sentence." Later that day, counsel filed a motion to reconsider the sentence, alleging defendant's sentence was excessive.

¶ 9 At a December 6, 2013, hearing on defendant's motion to reconsider the sentence, defense counsel argued the six-year sentence was "too harsh." The trial court disagreed and denied the motion, noting the offense was defendant's thirteenth felony. The court further stated its sentence "only went into the extended term by one year," and based on defendant's prior

criminal history, as well as his conduct in jail between the time of the guilty plea and sentencing, "it was perfectly appropriate to go into the extended term on this case."

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 On appeal, defendant argues his extended-term six-year prison sentence must be vacated and the cause remanded for a new sentencing hearing because, at the time of sentencing, the trial court incorrectly believed he was eligible for a Class 3 felony extended-term sentence rather than a Class 4 felony extended-term sentence.

¶ 13 The underlying issue in this case is whether defendant was charged with, and pleaded guilty to, forgery (720 ILCS 5/17-3(a)(2) (West 2010)), a Class 3 felony, or conspiracy to commit forgery (720 ILCS 5/8-2 (West 2010)), a Class 4 felony. This issue presents a question of law, which we will review *de novo*. *People v. Espinoza*, 2015 IL 118218, ¶ 15, 43 N.E.3d 993.

¶ 14 "[A] defendant has a fundamental right to be informed of the nature and cause of criminal accusations made against him." *Id*. Accordingly, section 111-3(a) of the Code of Criminal Procedure of 1963 (Criminal Procedure Code) (725 ILCS 5/111-3(a) (West 2012)) requires, in relevant part, that "[a] charge *** be in writing and allege the commission of an offense by: (1) [s]tating the name of the offense; (2) [c]iting the statutory provision alleged to have been violated; [and] (3) [s]etting forth the nature and elements of the offense charged." The offense of conspiracy to commit forgery and the offense of forgery differ considerably in terms of the elements that the State must prove as well as the sentence ranges for each. The offense of conspiracy to commit forgery, which carries a possible prison sentence of one to three years (and an extended-term sentence of three to six years), requires the State to prove the defendant (1)

with the intent that an offense be committed (2) agreed with another to the commission of that offense and (3) committed an act in furtherance of the agreement. 720 ILCS 5/8-2(a) (West 2010); 730 ILCS 5/5-4.5-45 (West 2010). On the other hand, the offense of forgery, which carries a possible prison sentence of 2 to 5 years (and an extended-term sentence of 5 to 10 years), requires the State to prove the defendant (1) with the intent to defraud (2) knowingly (3) issued or delivered a false or altered document. 720 ILCS 5/8-2(a) (West 2010); 730 ILCS 5/5-4.5-40 (West 2012).

¶ 15 In this case, the information contained in the indictment was internally inconsistent. Specifically, while the indictment alleged defendant committed the offense of "conspiracy to commit the offense of forgery," it cited the forgery statute (720 ILCS 5/17-3(a)(2) (West 2010)) as the statute having been violated, and it denoted the offense a Class 3 felony, the class of offense for forgery. In addition, the factual allegations contained in the indictment reflect elements of both offenses. In particular, the indictment asserts that "defendant knowingly and unlawfully with intent to defraud agreed with [a] co-conspirator *** and that an act in furtherance of the agreement was committed *** [when] defendant delivered a document *** with the document apparently capable of defrauding another."

¶ 16 On appeal, the State asserts that "the language of the charge expressly targets the complete offense of forgery" because the indictment states defendant "delivered" a forged check to Morton Community Bank. Further, the State contends that defendant pleaded guilty to the offense of forgery as indicated on the plea-agreement form. We disagree. We find that a fair reading of the indictment reveals—whether intended by the State or not—it charged defendant with conspiracy to commit forgery, rather than the offense of forgery. Importantly, we note the indictment refers to the "deliver[y]" of the check only in the context of the "act committed in

furtherance of the agreement," an element of conspiracy to commit forgery. We find further support for our determination in the trial court's multiple references to defendant having been charged with "conspiracy to commit the offense of forgery." In fact, immediately before accepting defendant's guilty plea, the court addressed defendant by stating it understood defendant was going to plead guilty to "the charge [of] conspiracy to commit the offense of forgery." Despite the court's numerous references to the offense of conspiracy to commit forgery, the State never informed the court that the charge was forgery, as it now suggests, and defendant was never informed in open court that the offense to which he was pleading guilty was the offense of forgery. Based on the above, we find that the charged offense in this case—the offense to which defendant pleaded guilty—was conspiracy to commit forgery, a Class 4 felony. Therefore, defendant was subject to an extended-term sentence of three to six years in prison, as opposed to the longer extended-term sentencing range indicated by the trial court.

¶ 17 Defendant recognizes his six-year prison sentence falls within the extended-term statutory range for a Class 4 felony, and therefore, it cannot be challenged as void. See *People v. Brown*, 225 Ill. 2d 188, 205, 866 N.E.2d 1163, 1173 (2007) ("a sentence *** is void only to the extent that it exceeds what the law permits"). Nonetheless, he argues that his sentence should be vacated because, at the time of his sentencing, the trial court erroneously believed that he was subject to an extended-term sentence of 5 to 10 years for a Class 3 felony. While defendant recognizes this issue has not been preserved for appeal, he contends this court can reach the issue under the plain-error doctrine or by finding trial counsel was ineffective for failing to raise the issue below.

¶ 18 "The plain-error doctrine permits a reviewing court to by-pass normal rules of forfeiture and consider '[p]lain errors or defects affecting substantial rights *** although they

were not brought to the attention of the trial court.' " *People v. Eppinger*, 2013 IL 114121, ¶ 18, 984 N.E.2d 475 (quoting Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)). To obtain relief under the plain-error doctrine, a defendant must first show that a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184, 1187 (2010). "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*.

¶ 19 Here, the record shows that the trial court erroneously believed defendant was subject to an extended-term sentence of 5 to 10 years in prison. Prior to accepting defendant's guilty plea for conspiracy to commit forgery, the court twice referred to the offense as a Class 3 felony and informed defendant a Class 3 felony "carries a possible term of up to two to five years in the Department of Corrections. Based upon your prior record, you are extended[-]term eligible. So that could be up to *** ten years in the Department of Corrections." At the sentencing hearing, the court noted that defendant had pleaded guilty to a Class 3 felony and was eligible for an extended-term sentence of "2 to 10 years in [prison]." Finally, the court denied defendant's motion to reconsider his sentence after finding his six-year sentence was not excessive and noting the sentence "only went into the extended term by one year" and "it was perfectly appropriate to go into the extended term on this case" based on defendant's prior criminal history and conduct in jail. Thus, as an initial matter, we find the trial court's statement that defendant was eligible for a Class 3 extended-term sentence of up to 10 years was error.

¶ 20 Next, we must determine whether the error rises to the level of plain error such that defendant's forfeiture of the issue should be excused. Defendant does not assert the evidence

at the sentencing hearing was closely balanced. Accordingly, we limit our review to whether the error in this case was so fundamental that it deprived him of a fair sentencing hearing.

¶ 21 Defendant cites *People v. Hausman*, 287 Ill. App. 3d 1069, 679 N.E. 867 (1997), for the proposition that a trial court's misapprehension of the proper sentencing range cannot be dismissed as harmless error. In *Hausman*, the defendant was convicted of aggravated battery and obstructing a peace officer. *Id*. at 1070, 679 N.E.2d at 868. At the sentencing hearing, the trial court noted that the defendant was subject to a maximum sentence of seven years in prison for aggravated battery, but after taking the relevant mitigating factors into consideration, the court announced, "even though I think your record mandates a much longer sentence, I am going to impose the *minimum sentence of three (3) years* in [prison]." (Emphasis in original.) *Id*. at 1071, 679 N.E.2d at 868. The sentencing range for aggravated battery was actually two to five years in prison. *Id*. at 1072, 679 N.E.2d at 869. On appeal, this court vacated the defendant's sentence and remanded for a new sentencing hearing, finding that "the record must establish the sentence is based upon a proper understanding of applicable law" and "[w]hether [the court's reference to a minimum sentence of three years] was an inadvertent misstatement or a mistaken belief, it arguably influenced the judge's sentencing decision." *Id*.

¶ 22 Similar to *Hausman*, we find the trial court's erroneous belief that defendant was subject to an extended-term sentence of up to 10 years in prison for a Class 3 felony, rather than 3 to 6 years in prison for a Class 4 felony, arguably influenced the judge's sentencing decision and deprived defendant of a fair sentencing hearing. In particular, the court's comments at the hearing on defendant's motion to reconsider his sentence, *i.e.*, the sentence "only went into the extended term by one year," arguably indicate that it might not have sentenced defendant to six

years in prison had it known six years was the maximum sentence available for the charged offense.

¶ 23 We note that recent decisions of our supreme court have compared the second prong of plain-error review to a structural error and have concluded that " 'automatic reversal is only required where an error is deemed "structural," *i.e.*, a systemic error which serves to "erode the integrity of the judicial process and undermine the fairness of the defendant's trial." ' " *People v. Thompson*, 238 Ill. 2d 598, 613-14, 939 N.E.2d 403, 413 (2010) (quoting *People v. Glasper*, 234 Ill. 2d 173, 197-98, 917 N.E.2d 401, 416 (2009), quoting *People v. Herron*, 215 Ill. 2d 167, 186, 830 N.E.2d 467, 479 (2005)). We find that the error here, *i.e.*, the trial court's sentencing of defendant for a Class 3 felony when defendant pleaded guilty only to a Class 4 felony, amounts to a structural error. Accordingly, we vacate defendant's sentence and remand for a new sentencing hearing for the Class 4 offense of conspiracy to commit forgery. In doing so, we express no opinion as to the appropriate sentence here.

¶ 24 Because we find a new sentencing hearing is appropriate under the doctrine of plain error, we need not determine whether trial counsel was ineffective.

¶ 25 Finally, we take this opportunity to note that trial judges in busy criminal courtrooms must be aided by both the prosecutor and defense counsel to prevent errors such as this from occurring. In making a similar observation, this court stated in *Hausman*, "[i]f the prosecutor and defense counsel had given this matter the needed attention, the unnecessary expenditures for this appeal would have been avoided." *Hausman*, 287 Ill. App. 3d at 1072, 679 N.E.2d at 869.

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we vacate defendant's sentence and remand for a new sentencing hearing.

¶ 28 Vacated and remanded.