2016 IL App (4th) 140345-U

NO. 4-14-0345

FILED
April 22, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
ANDREW L. WHITE,	)	No. 13CF33
Defendant-Appellant.	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not impose an excessive sentence when it (1) declined to accept defendant's argument that his conduct was mitigated by the circumstances of his arrest, (2) considered the elevated risk of physical harm, and (3) declined to consider the death of the victim. The trial court erred by imposing extended-term sentences on counts II and III. However, relief pursuant to the plain-error rule is not merited.

¶ 2 In November 2013, a jury found defendant, Andrew L. White, guilty of aggravated battery to a police officer (count I), a Class 1 felony (720 ILCS 5/12-3.05(a)(3), (h) (West 2012)); aggravated fleeing or attempting to elude a peace officer (count II), a Class 4 felony (625 ILCS 5/11-204.1(a)(1)(b) (West 2012)); and aggravated reckless driving (count III), a Class 4 felony (625 ILCS 5/11-503(a)(1)(c) (West 2012)). Defendant was extended-term eligible based on a prior Class X conviction. 730 ILCS 5/5-5-3.2(b)(1) (West 2012). In January 2014, the trial court sentenced defendant to 29 years' imprisonment on count I, 6 years'

imprisonment on count II, and 6 years' imprisonment on count III, all to be served concurrently. At trial, defendant represented himself. Following sentencing, defendant filed a posttrial motion to reduce his sentence and a posttrial motion to reconsider the sentence. The trial court denied both of defendant's posttrial motions. Defendant appealed.

¶ 3 On appeal, defendant argues the trial court (1) imposed an excessive sentence when it failed to apply statutory mitigating factors presented at sentencing and utilized the subsequent death of the victim as an aggravating factor to elevate the seriousness of the offense; and (2) erred when it sentenced defendant to extended-term sentences on two Class 4 felonies (counts II and III), where the offenses were not of the most serious class of crime of which defendant was convicted. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On February 11, 2013, the State charged defendant by information with one count of aggravated battery to a police officer (count I), aggravated fleeing or attempting to elude a peace officer (count II), and aggravated reckless driving (count III). Defendant represented himself at trial.

¶ 6 We note at the outset that prior to defendant's trial, Officer Casey Kohlmeier passed away in an unrelated incident while on duty. In the case at hand, the evidence showed on the evening of February 8, 2013, Officer Kohlmeier observed defendant traveling on Interstate 55 in Livingston County with an inoperable rear license plate light on his vehicle. Subsequent to pulling the defendant over, Officer Kohlmeier asked defendant (who was driving) and two passengers (a teenage male and a woman) for their identification. Officer Kohlmeier called for backup and Officer Mark Scott arrived a short time later. Officer Scott arrived while Officer Kohlmeier was still speaking with the driver. Officer Kohlmeier proceeded to the passenger side

of the vehicle to speak with Officer Scott, and he informed Officer Scott the two male passengers were acting nervously. Officer Kohlmeier requested Officer Scott stay near the passenger-side window of the stopped vehicle. Officer Kohlmeier proceeded to verify the information defendant and the passengers provided. During this time, Officer Scott testified the occupants of the vehicle "started moving their hands to locations that [he] could not see." Each time they did so, Officer Scott ordered them to "put [their] hands where [he could] see them." Eventually, Officer Scott "put [his] hand on his gun and unsnapped [his] holster."

¶ 7 According to Officer Scott's testimony, he heard over his portable radio one occupant of the vehicle had a revoked license and another did not have a valid driver's license. Officer Kohlmeier then approached the vehicle and asked defendant to exit the vehicle, but defendant refused. Officer Scott testified defendant was ordered three more times to exit the vehicle. According to Officer Scott, Officer Kohlmeier stated he would remove defendant if defendant did not comply. Defendant refused to comply with each order and began rolling up his window. When Officer Scott ordered him to stop, defendant put the vehicle in gear. In response, Officer Kohlmeier stuck his hand in the window in an attempt to stop defendant. Officer Scott testified he witnessed "the [defendant's] head jerk to the right and *** saliva [come] flying from his mouth" as Officer Kohlmeier stuck his hand in the vehicle. Then, defendant proceeded to accelerate with Officer Kohlmeier on the running board on the driver's side of the vehicle. As the vehicle began to accelerate, Officer Scott unholstered his weapon and pointed it at the passengers. Officer Kohlmeier still had hold of the vehicle when defendant proceeded down Interstate 55 "going approximately 40 miles per hour." Officer Scott witnessed Officer Kohlmeier fall "off the side *** of the vehicle and tumble[] down the interstate." Officer Scott radioed for an ambulance. After radioing for an ambulance, Officer Scott witnessed

Officer Kohlmeier jump to his feet, indicating he was okay. Officer Scott pursued the vehicle, with his lights and siren on, as defendant proceeded toward Bloomington, Illinois, traveling at speeds in excess of 100 miles per hour. Officer Scott followed the vehicle to Lexington, Illinois, where an Illinois State Trooper took over the chase. Defendant drove into Bloomington, and after a few wrong turns and a police barricade, he entered a cemetery, where he ran over gravesites until striking a large tombstone. After coming to a stop, defendant exited the vehicle and ran through the cemetery. Officer Beverline, a McLean County sheriff's deputy, caught up with defendant and ordered him to the ground. Defendant complied.

¶ 8 Defendant testified he was in Bloomington to drop off his girlfriend. He also admitted he knowingly drove without a license because his girlfriend's license was suspended. Defendant testified that when Officer Kohlmeier asked for his and the passengers' identification, he told the officer he did not have a license but did have insurance. Defendant testified he was not actively attempting to hide anything from Officer Kohlmeier and was honest with him. Defendant testified Officer Scott's weapon was already drawn and aimed when Officer Kohlmeier approached the vehicle the second time. According to defendant, he did not believe he or any of his passengers had "done anything to have a gun drawn" on them. Defendant opined "[he would] be a damn fool" to move his hands or make "any false move at 12 o' clock at night" when an officer had his gun drawn.

¶ 9 According to defendant, Officer Kohlmeier approached the vehicle and asked defendant to step from the vehicle. Defendant did not comply because Officer Scott had his gun aimed at the passengers and "[he did not] want to be shot." Defendant testified Officer Kohlmeier ordered him out of the vehicle again. Officer Kohlmeir then warned he would "snatch [defendant] out" if he remained noncompliant. Defendant testified he repeatedly told

Officer Kohlmeier he was nervous and did not want to be shot. Defendant alleged Officer Kohlmeier attempted to open the door, but it was locked, so Officer Kohlmeier instead tried to pull defendant through the window. This is when, according to defendant, he was "pounded in the face." In defendant's view, "[he] had two options[:]" (1) "defend himself" after being assaulted, or (2) "get away from the scene" because, "as an American," he had the right to leave a location where he was being "harmed and assaulted." He was concerned when he was fleeing that if Officers Scott and Kohlmeier caught up with him they would "kick [his] butt" for fleeing. Defendant believed if he arrived "somewhere where a lot of people *** [could] see [him]," he would be safer.

¶ 10 As a result of the fall from the running board, Officer Kohlmeier suffered a bruised rib, a scaphoid fracture of the right wrist, and a fracture of his distal radius, which required a splint and time off work to heal. Officer Kohlmeier also received treatment for chest pain." Upon this evidence, the jury found defendant guilty on all counts.

¶ 11 During the January 2014 sentencing hearing, the State offered no evidence in aggravation and defendant offered no evidence in mitigation. Defendant was extended-term eligible based on a prior Class X conviction entered when defendant was 15 years old. In its sentencing recommendation, the State argued there were no mitigating factors and multiple factors in aggravation. In particular, the State argued the following factors in aggravation: the seriousness of the crime, as the legislature labeled it a Class 1 felony; defendant's prior history, which consisted of a 1998 aggravated vehicular hijacking conviction, a Class X felony, a 2009 theft conviction, and a 2010 possession of cannabis conviction; the fact defendant had shown no remorse for his actions; and deterrence. The State recommended a prison sentence of "25 to 30 years."

¶ 12 When called upon to make a sentencing recommendation, defendant began to argue what he believed certain evidence at trial demonstrated. Defendant believed the video evidence tended to show Officer Kohlmeier punched him in the face and Officer Scott had his weapon drawn and aimed at defendant and his passengers. In response, the trial court redirected defendant, indicating he could not present argument concerning trial evidence, but instead needed to suggest to the court what his sentence should be. Defendant then explained he lived a productive life following his conviction of the Class X felony; he was "working full-time, paying bills, lights, gas, rent, cable bill, [and] paying taxes," and he had been volunteering with at-risk children. Defendant believed his actions were justified because "[he] was just trying to get away from a bad situation" and never intended to harm anyone. Defendant argued the State's recommendation was excessive and argued for probation and community service.

¶ 13 In reciting what matters are proper for consideration at sentencing, the trial court referenced the presentence investigation report (PSI), evidence adduced at trial, statutory factors in mitigation and aggravation, the cost of imprisonment, the rehabilitative potential of defendant, and the statutory presumption in favor of probation. The court rejected defendant's suggestion that defendant's belief the officers were going to harm him was the impetus for his conduct. Instead, the court concluded deterrence, defendant's record, and the fact probation would deprecate the seriousness of the offense not only ruled out probation, but warranted extended-term sentences. Thus, the court imposed on count I a period of 29 years' imprisonment, 6 years on count II, and 6 years on count III, all to be served concurrently.

¶ 14 In January 2014, defendant filed a motion for reduction of his sentence, and in February 2014, a motion to reconsider the sentence. In his motions, defendant argued the sentence should be corrected to "reflect[] a balanced decision proportionate [with] the factors and

information" presented by the PSI and defendant during sentencing. The court denied both of defendant's motions.

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 On appeal, defendant argues the trial court (1) imposed an excessive sentence when it failed to apply statutory mitigating factors presented at sentencing and utilized the death of the victim as an aggravating factor to elevate the seriousness of the offense; and (2) erred when it sentenced defendant to extended-term sentences on two Class 4 felonies (counts II and III), where the offenses were not of the most serious class of crime of which defendant was convicted. The State maintains defendant has forfeited the issues he raises on appeal because he failed to include them in a written postsentencing motion. *People v. Reed*, 177 Ill. 2d 389, 390, 686 N.E.2d 584 (1977). In reply, defendant seeks plain-error review on any claim this court finds forfeited. We begin with defendant's contention the court imposed an excessive sentence when it failed to apply statutory mitigating factors presented at sentencing and utilized the death of the victim as an aggravating factor to elevate the seriousness of the offense.

¶ 18 A. Forfeiture of Mitigating and Aggravating Factors Argument

¶ 19 "[F]orfeiture is the failure to make the timely assertion of the right ***." *People v. Blair*, 215 Ill. 2d 427, 444 n.2, 831 N.E.2d 604, 615 n.2 (2005) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). "Forfeiture applies to issues that could have been raised but were not ***." *People v. Phipps*, 238 Ill. 2d 54, 62, 933 N.E.2d 1186, 1191 (2010). A defendant must file a written postsentencing motion in the trial court to preserve sentencing issues for appellate review. *People v. Rathbone*, 345 Ill. App. 3d 305, 309, 802 N.E.2d 333, 336 (2003). The trial court is entitled to the opportunity to correct a sentencing error, thereby avoiding the

delay and expense of an appeal. *People v. Heider*, 231 Ill. 2d 1, 15, 896 N.E.2d 239, 247 (2008). In addition, litigants are not allowed to assert on appeal an objection different than the one asserted below. *Id*.

¶ 20 Defendant argues his overreaction to his impending arrest, in light of his fear that he was being assaulted and the situation would escalate, could be seen as a mitigating factor under subsection (a)(3) of the Unified Code of Corrections (730 ILCS 5/5-5-3.1(a)(3) (West 2012)). He also asserts he acted under a strong provocation, his fear of police brutality, as a factor under subsection (a)(4). He contends the trial court should have found that there were substantial grounds tending to excuse or justify his criminal conduct. 730 ILCS 5/5-5-3.1(a)(3)-(4) (West 2012). A review of defendant's motion to reconsider, as well as his motion to reduce sentence, reveals an absence of any complaint that the court failed to consider applicable statutory factors in mitigation. Also absent is any allegation the court considered improper evidence in aggravation, such as Officer Kohlmeier's death in an unrelated incident. Finally, in his postsentencing motions, defendant did not complain regarding the court's consideration of an increased risk of physical harm in defendant's conduct.

¶ 21 Defendant argues pursuant to *Heider*, the trial court had an opportunity to review these issue based on defendant's argument at sentencing. *Heider* is of no help to the defendant. In *Heider*, the majority of the supreme court found the defendant raised, in his postsentencing motion, the same issue he raised on appeal. *Heider*, 231 Ill. 2d at 18, 896 N.E. 2d at 249. Thus, there was no forfeiture. *Id.* Such is not the case here. Although defendant argued at sentencing that his fear of being "harmed and assaulted by the police *** [was] a perception of danger *** influenced by his experiences as a black man *** growing up in Chicago" that mitigated his actions, he failed to include, in his postsentencing motion, any claim the court failed to apply, or

improperly applied, statutory factors in mitigation or aggravation. Thus, we find defendant has forfeited these issues. Given our finding of forfeiture, we next determine whether plain-error review is appropriate.

¶ 22 B. Plain-Error Review of Mitigating and Aggravating Factors Argument

¶ 23 Generally, the first step in plain-error analysis is to determine whether a clear or obvious error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 411 (2007). Thus, we first examine whether the court committed a clear or obvious error in its determination and utilization of mitigating and aggravating factors. The applicable standard of review with respect to a claim of excessive sentencing is whether the trial court abused its discretion. *People v. O'Neal*, 125 Ill. 2d 291, 297-98, 531 N.E.2d 366, 368 (1988). "Generally, where, as here, a sentence imposed by the trial court is within the statutory limits permitted for the felony of which defendant was convicted [citation], we will not disturb the sentence absent an abuse of discretion by the court." *People v. Calhoun*, 404 Ill. App. 3d 362, 385, 935 N.E.2d 663, 683 (2010). An abuse of discretion occurs when no reasonable person would agree with the sentence imposed. *People v. Alexander*, 239 Ill. 2d 205, 212, 940 N.E.2d 1062, 1066 (2010). Whether a court relied on an improper factor during sentencing is a question of law to be reviewed *de novo*. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8, 973 N.E.2d 459 (citing *People v. Chaney*, 379 Ill. App. 3d 524, 527, 884 N.E.2d 783, 786 (2008)).

¶ 24 In particular, defendant argues, "[his] overreaction to his impending arrest, in light of his fear that he was being assaulted and the situation would escalate, could be seen as mitigating factor (a)(3), that he acted under a strong provocation, his fear of police brutality, as factor (a)(4), that there were substantial grounds tending to excuse or justify his criminal conduct, although not sufficient to provide him with a legal defense." Defendant provided little

case law in support of the contention his actions were excused or justified or that he was provoked. In substantiation, defendant provides a colloquy from Illinois Supreme Court Justice Robert Thomas, where the justice described the very real distrust some communities have of law enforcement and the criminal justice system. President's Message, Justice Robert Thomas, DuPage County Bar Association, 27 DCBA Brief 5, 6 (Feb. 2015) (excerpts from keynote address at the ISBA/IJA Joint Midyear Meeting). According to defendant, although his fear and provocation did not rise to the level of a legal defense, it did mitigate his intent to harm Officer Kohlmeier and provided insight "into his motivations for this incident."

¶ 25 In crafting an appropriate sentence, a trial court must consider all applicable statutory factors in aggravation and mitigation. *People v. McWilliams*, 2015 IL App (1st) 130913, 26 N.E.3d 488. Factors in mitigation include whether "[t]he defendant acted under a strong provocation" or whether "[t]here were substantial grounds tending to excuse or justify *** defendant's criminal conduct, though failing to establish a defense." 730 ILCS 5/5-5-3.1(a)(3)-(4) (West 2012). The trial court is required to consider any relevant mitigating factors. *People v. Ryan*, 336 Ill. App. 3d 268, 274, 783 N.E.2d 187, 192 (2003). Yet, "[t]he sentencing court need not accept the defendant's allegations regarding mitigating matters at face value in the presence of evidence to the contrary." *People v. Matzker*, 115 Ill. App. 3d 70, 75, 450 N.E.2d 395, 399 (1983).

¶ 26 The trial court took note of "situations" where there may be police misconduct regarding improper stops or false impersonations. Yet, the court went on to state, defendant had "no good reason" for his actions and the truth was "contrary to what [defendant was] saying." The court believed defendant "got pulled over, and then *** proceeded to make a series of very, very, very bad judgments." After consideration, the court found defendant's arguments that he

feared the officers or was provoked into taking action were not supported by the evidence and rejected them. See 730 ILCS 5/5-5-3.1(a)(3)-(4) (West 2012). The court has wide latitude in fashioning a sentence and may reject a defendant's arguments if they are not supported by any actual evidence. *People v. Matzker*, 115 Ill. App. 3d 70, 75, 450 N.E.2d 395, 399 (1983). The court found the testimonial and video evidence did not substantiate defendant's claims he was afraid, provoked, justified, or that his actions were excused. By doing so, the court, as is within its discretion, rejected defendant's arguments. Thus, the court did not abuse its discretion by finding there were no statutory factors in mitigation applicable to defendant's case.

¶ 27 Defendant briefly argues the "perception of seriousness was elevated by [O]fficer Kohlmeier's death just prior to trial." According to defendant, "the trial court's comments regarding *** the possibility of great harm to [O]fficer Kohlmeier from this incident, hint at the pall that [O]fficer Kohlmeier's untimely death, caused by a drunk driver while conducting a roadside stop just three weeks prior to [defendant's] trial, cast over these proceedings." This fact, according to defendant, should not have been allowed to "elevate the seriousness" of defendant's actual conduct "to the point that all mitigating factors are disregarded."

¶ 28 As noted by the State, in responding to defendant's remarks at sentencing regarding Kohlmeier's death, the trial court indicated it was not allowed to consider such information in imposing sentence. Moreover, the court did not "elevate the seriousness" of defendant's actual conduct "to the point that all mitigating factors are disregarded." As previously noted, the court simply rejected what defendant asserts should have been considered as factors in mitigation. The court's comment regarding the possibility of great harm to the officer went to the nature and circumstances of defendant's criminal activity. The court was struck by the brazen nature of defendant's conduct: driving down the road at 40 miles per hour

with a police officer clinging to the side of the vehicle. Each crime carries with it varying degrees of threatened harm. The sentencing court is allowed to consider these varying degrees. Thus, the elevated risk of physical harm was an appropriate consideration. *People v. Holman*, 2014 IL App (3d) 120905, ¶ 69, 20 N.E. 3d 450. Having decided the court did not (1) fail to apply applicable statutory mitigating factors; (2) consider in aggravation the death of the victim; or (3) improperly consider the elevated risk of physical harm, we find no error upon which to conduct plain-error review.

¶ 29 C. Forfeiture of Extended-Term Sentence Argument

¶ 30 Next, we turn to defendant's argument the trial court erred by imposing extended-term sentences on counts II and III, where the offenses were not of the most serious class of crimes of which defendant was convicted. The State asserts defendant forfeited his argument on this issue in light of defendant's failure to properly preserve the argument in his postsentencing motion. *Heider*, 231 Ill. 2d at 15, 896 N.E.2d at 247. Initially, defendant argued the sentences on counts II and III were void. However, in light of the *Castleberry* decision, defendant appears to recognize voidness is no longer a viable argument in this case. See *People v. Castleberry*, 2015 IL 116916, ¶ 1, 43 N.E.3d 932 (abolishing the rule that a sentence which does not conform to a statutory requirement is void). Thus, in the alternative, defendant seeks plain-error review. The State concedes a clear or obvious error occurred. The State argues, however, defendant cannot show (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny him a fair sentencing hearing. *Piatkowski*, 225 Ill. 2d at 565, 870 N.E.2d at 410-411.

¶ 31 D. Plain-Error Review of Extended-Term Sentences

¶ 32 Under the plain-error doctrine, a reviewing court may consider an unpreserved error where:

> "(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." *Id.*

The second prong of plain-error analysis should apply only where the error is so serious that review "is necessary to preserve the integrity of the judicial process." *People v. Herrett*, 137 Ill. 2d 195, 210, 561 N.E.2d 1, 8 (1990). The purpose of this rule is to redress serious injustices and should not be treated as a general saving clause for this court to address all alleged errors. *People v. Rathbone*, 345 Ill. App. 3d 305, 311, 802 N.E.2d 333, 338 (2003) (quoting *People v. Baker*, 341 Ill. App. 3d 1083, 1090, 794 N.E.2d 353, 359 (2003)). As to both prongs of the plain-error rule, the defendant bears the burden of persuasion, and if he fails to meet his burden, the procedural default will be honored. *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184, 1187 (2010).

¶ 33 In support of his argument the evidence at sentencing was so closely balanced that the error alone threatened to tip the scales of justice against him, regardless of the seriousness of the error, defendant relies on his prior argument that the trial court failed to consider as mitigating his perception he was being assaulted. Given our finding the court was entitled to

reject defendant's version of events, defendant fails to establish relief is appropriate under the closely balanced prong of the plain-error rule.

¶ 34 Similarly, defendant has failed to establish he is entitled to relief pursuant to the second prong of the plain-error rule. In this matter, although the trial court improperly imposed extended-term sentences on counts II and III, the length of defendant's imprisonment will be not be impacted. Defendant received the most severe sentence on count I—29 years. All of defendant's sentences were ordered to run concurrently with one another. While we do not condone the error made here, we are mindful the error must be sufficiently grave that the defendant was deprived of a fair sentencing hearing. *People v. Fuller*, 205 Ill. 2d 308, 343, 793 N.E.2d 526, 548-49 (2002). Here, that showing has not been made.

¶ 35 III. CONCLUSION

¶ 36 For the foregoing reasons, we affirm the judgment of the trial court. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 37 Affirmed.