

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).

2016 IL App (4th) 140409-U
NOS. 4-14-0409, 4-15-0055 cons.

FILED
June 14, 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. |) | Champaign County |
| YVONNE K. DORIAN, |) | No. 14CF171 |
| Defendant-Appellant. |) | |
| |) | Honorable |
| |) | Heidi N. Ladd, |
| |) | Judge Presiding. |

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Knecht and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding the trial court did not err in sentencing defendant.

¶ 2 In February 2014, defendant, Yvonne K. Dorian, pleaded guilty to domestic battery with a previous domestic battery, a Class 4 felony (720 ILCS 5/12-3.2(a)(2), (b) (West 2014)). The trial court sentenced defendant to 18 months' probation. In March 2014, the State filed a petition to revoke probation, alleging defendant had violated the terms of probation. In April 2014, a hearing was held on the State's petition. The court found defendant violated the terms of her probation and revoked her probation. In May 2014, the court resentenced defendant to 2 1/2 years' imprisonment, followed by 4 years' mandatory supervised release (MSR).

Defendant appeals, arguing remand for resentencing is appropriate because the trial court (1) erred by improperly punishing defendant for the conduct that led to the revocation of probation,

not for the underlying offense; and (2) considered improper factors in aggravation. We disagree and affirm.

¶ 3

I. BACKGROUND

¶ 4

In February 2014, the State charged defendant, by information, with domestic battery with a prior domestic battery conviction, a Class 4 felony, indicating she was eligible for an extended-term prison sentence. 720 ILCS 5/12-3.2(a)(2), (b) (West 2014). Defendant struck and scratched Ronald Pellizzaro, with whom she was living. The State offered a factual basis for the guilty plea, stating police officers arrived at the scene of a domestic dispute and found Pellizzaro's right cheek and shoulder scratched and his shirt ripped from the neck to his waist. Defendant was found "lying face down on the floor intoxicated" after drinking multiple beers. Before pleading guilty, the trial court admonished defendant she could face a term of between one to six years in prison based upon her previous felony conviction. Defendant indicated she understood and pleaded guilty. The trial court sentenced defendant to 18 months' probation, with conditions including 23 days in jail, with credit for 23 days served, and ordered her to pay fines and fees. The terms of probation required defendant to "have no contact, directly or indirectly, in person[,] by telephone[,] or electronically with [Ronald Pellizzaro]." The terms of probation also directed defendant not to violate any criminal statutes and abstain from drugs and alcohol. The court admonished defendant of her right to appeal. Defense counsel, before the proceedings closed, requested the court allow defendant to return with a police officer to Pellizzaro's residence to retrieve her property. The State had no objection, and the court granted defendant's request.

¶ 5

In March 2014, the State filed a petition to revoke defendant's probation. The State alleged defendant violated the terms of her probation by (1) consuming alcohol, (2)

having contact with Pellizzaro, and (3) committing the offense of criminal damage to property (720 ILCS 5/21-1(a)(1) (West 2014)). In April 2014, the trial court held a hearing on the State's petition to revoke. During the hearing, Pellizzaro testified on March 14, 2014, defendant had been drinking "[a] [24]-ounce can of Ice House" beer, had been "off-track of mind and thoughts," and began accusing Pellizzaro of infidelity. Pellizzaro testified he fled to the bathroom and locked the door, but defendant pursued him. Pellizzaro testified defendant kicked through the door to the bathroom, destroying wood "rafters" on the bottom of the door. Pellizzaro testified he left the home but returned later. Testimony from Pellizzaro also indicated defendant had lived with him after the initial sentencing because "it was freezing cold [and] she had nowhere else to go." The responding police officer testified he made contact with Pellizzaro and defendant. The officer testified defendant had been slurring her speech and her "motor skills were somewhat deteriorated." The officer arrested defendant that night.

¶ 6 This series of events—*i.e.*, defendant's consumption of alcohol, contact with Pellizzaro, and criminal destruction of property—led to the State's petition to revoke her probation. Following additional testimony by the reporting officer and defendant, the court found the State had "more than proven the allegations in the petition to revoke probation by a preponderance of the evidence." (Defendant testified she heard the judge say, at her original sentencing hearing, a condition of her probation was no contact with Pellizzaro. After acknowledging this, she testified, "[B]ut I didn't believe it.") The court then revoked defendant's probation. At this time, the court again admonished defendant she was extended-term eligible on the original charge of felony domestic battery. Under the Unified Code of Corrections (Unified Code), the nonextended-term sentencing range for the offense was a prison term of one to three years, and the extended-term range was three to six years in prison (730 ILCS 5/5-4.5-45(a)

(West 2014)). A presentence investigation report (PSI) was filed.

¶ 7 In May 2014, a resentencing hearing was held. According to testimony and the PSI, defendant had an alcohol problem and was previously ordered to complete alcohol treatment multiple times. "[Defendant had] been sentenced to jail, alcohol[,] and mental health treatment *** and they have not deterred her from committing further violations." The State sought resentencing to the Department of Corrections. In particular, the State argued a term of imprisonment was appropriate given defendant's (1) "multiple previous sentences of court supervision, conditional discharge, probation, special probation[,] *** jail, and alcohol and mental health treatment"; and (2) continued lack of deterrence. Defendant first explained she never received any instruction concerning the "no contact provision" of her probation. Defendant further sought to discredit Pellizzaro's testimony regarding her behavior. Defendant argued additional treatment was necessary and a community-based sentence would be more impactful. Defendant gave no statement on her behalf, instead asking solely about her right to appeal.

¶ 8 The trial court admonished defendant of her right to file a postsentencing motion challenging the correctness of the sentence or sentencing hearing, her waiver of rights if she did not raise a particular issue or claim in a postsentencing motion, and her right to appeal. The court proceeded to outline "all relevant statutory factors" in aggravation and mitigation. The court outlined defendant's experience within the criminal justice system, her prior convictions and sentences, and her substance-abuse treatment successes and failures. The court recounted defendant's conviction for this offense occurred while she was serving a "community[-]based sentence." The court deemed this as "certainly a factor in aggravation[.]" The court continued, outlining defendant's conduct that led to the current revocation of probation. The court went

over defendant's intelligence and postsecondary education; employment history; physical ailments; brief, yet intense, history of alcoholism and drug use; and "miserable failures on community[-]based sentences."

¶ 9 The court, based on the PSI, also mentioned defendant's multiple instances of driving while under the influence of alcohol (DUI) and convictions for battery, aggravated battery, and domestic battery. The court, based on all of the above facts and considerations, determined probation "would deprecate the seriousness of this [d]efendant's conduct, be inconsistent with the ends of justice[,] and send precisely the wrong message." The court resentenced defendant to 2 1/2 years' imprisonment, followed by 4 years' MSR. Defendant did not file any postsentencing motions. This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 On appeal, defendant argues remand for resentencing is appropriate because the trial court (1) erred by improperly punishing defendant for the conduct that led to the revocation of probation, not for the underlying offense; and (2) considered improper factors in aggravation. The State counters, arguing (1) defendant's arguments are forfeited and do not constitute plain error, or in the alternative, the court's sentence was not erroneous; and (2) defendant was not deprived of a fair sentencing hearing by considering allegedly erroneous factors in aggravation and mitigation. Defendant argues, in her reply brief, the court's alleged errors constituted plain error. We agree with the State and affirm.

¶ 12 A. Forfeiture

¶ 13 "[F]orfeiture is the failure to make the timely assertion of a right ***." *United States v. Olano*, 507 U.S. 725, 733 (1993). "[F]orfeiture 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).

For an issue to be preserved for review on appeal, the record must show (1) a contemporaneous objection to the trial court's error was timely made and (2) the issue was contained in a written posttrial motion. *People v. Rathbone*, 345 Ill. App. 3d 305, 309, 802 N.E.2d 333, 336 (2003). The forfeiture rule is intended to bar claims from review when they are not first considered by the trial court. *Id.* at 310, 802 N.E.2d at 337.

¶ 14 Defendant did not make any objection at trial to the trial court's alleged errors. Additionally, defendant did not file any postsentencing motions. Instead, defendant filed her notice of appeal four days after being resentenced. Thus, we find defendant has forfeited these issues. Given our finding of forfeiture, we next determine whether defendant's contentions of error constitute plain error.

¶ 15 B. Plain Error

¶ 16 1. *Standard*

¶ 17 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.

¶ 18 After finding an error occurred, 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

the original offense." (Emphases in original.) *People v. Young*, 138 Ill. App. 3d 130, 142, 485 N.E.2d 443, 450 (1985). "Misdeeds occurring up to the time of sentencing, whether before the finding of guilty or subsequent," are relevant to the defendant's history and character. *Id.* at 140, 485 N.E.2d at 448-49.

¶ 22 Defendant was originally charged with domestic battery, a Class 4 felony, and was extended-term eligible. According to section 5-4.5-45 of the Unified Code, defendant was eligible for a nonextended-term sentence of one to three years' imprisonment and an extended-term sentence of three to six years (730 ILCS 5/5-4.5-45 (West 2014)); thus, the court was authorized to resentence defendant to 2 1/2 years' imprisonment.

¶ 23 In resentencing defendant to 2 1/2 years' imprisonment, the trial court made reference to defendant's inability to abide by the terms of her probation, tending to show defendant's "history, character, and rehabilitative potential." While the court discussed defendant's prior, postplea history, nothing in the record indicates the court's sentence was imposed as a penalty for violations of probation. We find no error and therefore do not need to proceed to the second prong of the plain-error analysis.

¶ 24 *3. Aggravating Factors*

¶ 25 Defendant additionally argues the trial court improperly relied on certain evidence as aggravating factors. In particular, defendant argues the court relied on (1) the erroneous belief defendant was on a community-based sentence at the time of the initial offense and (2) defendant's unemployment. The State argues the court's actions did not rise to the level of plain error. We agree with the State.

¶ 26 Assuming, *arguendo*, the trial court, during resentencing, improperly considered (1) defendant's unemployment and (2) defendant was on conditional discharge at the time of the initial offense, we cannot say these errors constitute plain error.

¶ 27 Defendant cites *People v. Kopczick*, 312 Ill. App. 3d 843, 852, 728 N.E.2d 107, 115 (2000), to argue any sentencing error inherently "impinges upon defendant's fundamental right to liberty." This court has rejected the holding of *Kopczick* and explicitly refused to follow its lead. *People v. Scott*, 2015 IL App (4th) 130222, ¶ 43, 25 N.E.3d 1257 (firmly rejecting *Kopczick's* holding that all sentencing errors arguably affect a defendant's fundamental right to liberty; instead, determining a sentencing error reviewable as plain error requires an in-depth analysis); see also *Rathbone*, 345 Ill. App. 3d at 311, 802 N.E.2d at 338 (rejecting the contention in *Kopczick* that all sentencing errors inherently affect a defendant's fundamental right to liberty); *People v. Martin*, 119 Ill. 2d 453, 458, 519 N.E.2d 884, 886 (1988) (finding a sentencing error clearly affected a defendant's right to be properly sentenced but engaging in a plain-error analysis).

¶ 28 Defendant argues plain error applies because the evidence was closely balanced and consideration of these two improper aggravating factors tipped the scales of justice against her.

¶ 29 At the resentencing hearing, the trial court gave consideration to all factors in aggravation and mitigation. The court paid particular attention to defendant's extensive history with the criminal justice system—*i.e.*, defendant's "DUI related or violent[,] battery-related offenses" amounting to "five violent[,] battery-related offenses, two of them felonies in the last four years." The court also took notice of how many times defendant has been sentenced to probation and the fact she "has never taken the [court] orders seriously. It is a track record of

miserable failures *** and at some point deterrence has to be a factor." The record illustrates the court did not base its sentence on defendant's unemployment or the belief she was on a community-based sentence at the time of the initial offense. Instead, the court relied on defendant's "miserable failures," "five violent[,] battery-related offenses," the need for deterrence, her many opportunities to correct her behavior, her lack of "insight, *** remorse, [or] *** recognition," and her alcoholism. It was the cumulative effect of these properly considered facts that led to a sentence of 2 1/2 years' imprisonment. We find the court's consideration of these aggravating factors was proper, does not constitute plain error, and thus cannot survive defendant's procedural default. Further, the court's mistake in considering defendant was on conditional discharge at the time of the offense was a *de minimus* error that could have been corrected had defendant brought the error to the court's attention at the time. That misapprehension did not prejudice defendant, as the outcome at sentencing would have been the same absent the error.

¶ 30

III. CONCLUSION

¶ 31 For the reasons stated above, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 32 Affirmed.