2016 IL App (4th) 140873-U

NO. 4-14-0873

FILED
September 20, 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.	)	Coles County
MICHAEL R. HOWLETT,	)	No. 14CF142
Defendant-Appellant.	)	
	)	Honorable
	)	Mitchell K. Shick,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Knecht and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not error by allowing the State to present a video recording of statements made by the victim of dismissed charges at defendant's sentencing hearing in this case, and the record does not indicate the court's sentence was a punishment for the dismissed charges.

¶ 2 In April 2014, the State charged defendant, Michael R. Howlett, by information with one count of participation in methamphetamine manufacturing (15 grams or more but less than 100 grams) (720 ILCS 646/15(a)(1) (West 2012)) and one count of methamphetamine possession (less than five grams) (720 ILCS 646/60(a) (West 2014)). In June 2014, the Coles County circuit court dismissed the charge of participation in methamphetamine manufacturing at the State's request, and the State charged defendant with a new count of participation in methamphetamine manufacturing (less than 15 grams) (720 ILCS 646/15(a)(1) (West 2012)). After a July 2014 trial, a jury found defendant guilty of both methamphetamine possession and participa-

tion in methamphetamine manufacturing. Defendant then filed a motion for an acquittal or, in the alternative, a new trial. At a joint hearing in September 2014, the court denied defendant's posttrial motion and sentenced him to concurrent prison terms of 8 years for methamphetamine possession and 22 years for participation in methamphetamine manufacturing. Defendant filed a motion to reconsider his sentence, which the court denied.

¶ 3 Defendant appeals, asserting he was denied a fair sentencing hearing because the circuit court erroneously admitted the digital video disc (DVD) of an alleged victim in a dismissed criminal-sexual-assault case and then improperly relied on those statements in sentencing him. We affirm.

¶ 4 I. BACKGROUND

¶ 5 The record indicates defendant was out on bond in Coles County case No. 14-CF-7, which involved six counts of criminal sexual assault, when he was arrested in this case. At defendant's April 2014 status hearing in this case, it was noted the alleged victim in case No. 14-CF-7 had recanted her allegations. The State did not dismiss the criminal-sexual-assault charges at that time but did so before defendant's trial in this case.

¶ 6 In July 2014, the circuit court held a jury trial on the charges of methamphetamine possession (less than five grams) and participation in methamphetamine manufacturing (less than 15 grams). A description of the evidence necessary to address the issues on appeal follows. Inspector Brandon Spindler with the Charleston police department testified that, on March 26, 2014, he, along with Inspectors Tyrel Ledbetter and Thomas Williamson, went to 9 16th Street in Charleston, Illinois, which was defendant's last known address. Eventually, defendant opened the door. Defendant was cooperative and allowed the inspectors to search his home for over two hours. In the basement, Inspector Spindler found coffee filters, remnants of a battery, and some

tubing. Inspector Spindler explained coffee filters were used to strain the solid material from the liquid that contains the methamphetamine. When he searched the kitchen garbage, Inspector Spindler found five to six pieces of tinfoil with a burnt black residue. He explained the finished product is consumed by smoking it on the tinfoil. In defendant's bedroom, methamphetamine and a scale were found. Inspector Spindler explained the scale is used to weigh the methamphetamine for sale. Also in defendant's bedroom, Officer Williams found a black pouch containing a pipe and some methamphetamine in a plastic bag. They also found a Gatorade bottle containing fluid under the toilet in the bathroom. The bottle did not have a label and the cap had deteriorated from a caustic material that had been in the bottle. The fluid inside the bottle smelled like Coleman fuel. Inspector Spindler explained "Gatorade bottles are used in a typical one pot shake and bake style methamphetamine clandestine lab cook." Defendant told the inspectors that, until a week before the search, Debra and John Lang were living in his residence. The inspectors did not find any contraband in the bedroom where the Langs stayed. The total amount of methamphetamine recovered from the home was "one hit and some residue."

¶ 7 Inspector Ledbetter testified he was responsible for staying with defendant during the search. He too testified the Gatorade bottle smelled like fuel. Defendant stated he used the bottle to drink water, but someone else may have used it for fuel.

¶ 8 Inspector Williamson testified that, before they started searching the home, defendant said they would find a drug pipe with possible methamphetamine. Defendant told the inspectors he had removed the pouch with the pipe from the bedroom where Debra and John Lang had been staying and placed it in the computer cabinet in his bedroom. The substance in the pouch with the pipe tested positive for methamphetamine.

¶ 9 As to the materials found in the basement, Inspector Williamson testified the part

of the battery discovered was the lithium strip casing. Lithium is an ingredient used in making methamphetamine using the "shake and bake" method. Near the lithium strip casing was a plastic tube, which was around 18 inches in length. Inspector Williamson noted the tubing could be used to gas off the solution used in making methamphetamine. The coffee filters were about three feet from the lithium string casing and the tubing in the basement. Inspector Williamson testified defendant stated he found the Gatorade bottle in the basement and brought it upstairs to the bathroom to drink water out of it. Inspector Williamson also opined the Gatorade bottle smelled like Coleman fuel. He explained that, in making methamphetamine, Coleman fuel is used to break down the pseudoephedrine. Defendant told the inspectors anything in the basement would have been John Lang's. Also, defendant stated he had no knowledge of what was in the basement and John would have been the one manufacturing the methamphetamine. Additionally, Inspector Williamson acknowledged methamphetamine could not have been made with only the materials found at defendant's residence. However, he explained it was common to not find every ingredient needed for methamphetamine manufacturing when searching a suspected manufacturing site.

¶ 10 After the search was completed, defendant was arrested, and Inspector Williamson interviewed him at the police station. Defendant admitted he was a methamphetamine user and consumed it by smoking it from foils. He had used methamphetamine the day of the search and interview. Defendant also admitted to receiving pseudoephedrine from different individuals for the manufacture of methamphetamine. He would either pay the individual or give them finished methamphetamine in exchange for the pseudoephedrine. Defendant further stated he had manufactured methamphetamine in his residence using the "one pot cook method." Inspector Williamson explained that was also referred to as the "shake and bake method." Within the pre-

vious six months, defendant had made methamphetamine 10 to 15 times with the Langs. Each cook resulted in one to one and one-half grams of methamphetamine. In the two weeks before his arrest, defendant had purchased methamphetamine two or three times. Defendant further mentioned he had been told John Lang was selling methamphetamine.

¶ 11 Nasrin Ronaghi, a pharmacist, testified defendant purchased pseudoephedrine on February 8, 2014. John Davis, store manager of the Charleston Walgreens, testified defendant purchased pseudoephedrine on the following dates: September 10, 2013; November 26, 2013; December 26, 2013; and February 20, 2014. Marsha Turner, a pharmacist, testified defendant purchased pseudoephedrine on October 31, 2013.

¶ 12 Aaron Roemer, a forensic scientist for the Illinois State Police, testified he tested two liquid samples, one containing 19.2 grams and another 24.3 grams. Both liquid samples did not contain a scheduled substance. The samples were water-based and not a solvent. Coleman fuel is a solvent. Roemer also testified he tested an off-white powder, which was 0.1 grams of methamphetamine.

¶ 13 Defendant's sister, Brandy Ely, testified she checked on defendant's home while he was in jail from January 10 to February 8, 2014. During that time, her cousin, John Lang, and his family lived in defendant's home.

¶ 14 At the conclusion of the trial, the jury found defendant guilty of methamphetamine possession and participation in methamphetamine manufacturing. Defendant filed a timely posttrial motion. The presentence investigation report stated defendant had (1) a 1987 burglary conviction, (2) a 1988 felony retail theft conviction, (3) 1989 and 1992 driving under the influence of alcohol convictions, (4) a 2002 misdemeanor conviction for unlawful use of "Black-Jack/Knife," (5) a 2003 misdemeanor conviction for battery; (6) a 2004 conviction for possession

of manufacturing chemicals, and (7) a 2004 conviction for possession of between 400 and 900 grams of methamphetamine. Defendant received concurrent terms of 12 years in prison for the two 2004 drug-related convictions. Defendant reported he first used methamphetamine at the age of 15 and used it weekly until he was 28. He was sober for a few years and then started using again in 1998. For the last year, defendant had been smoking and snorting methamphetamine almost daily with his friends, who had drug backgrounds. Defendant admitted to having a drug problem and hoped to get help with his addiction. Defendant denied being involved in manufacturing methamphetamine and stated the items found at his house were his cousin John Lang's. Defendant was married, but his wife lived in Iowa and did not approve of his drug use. Defendant had seven adult children and had a relationship with five of them. Defendant had not been employed since 2002.

¶ 15 At a September 19, 2014, hearing, the circuit court denied defendant's posttrial motion. Some minor changes were made to defendant's presentence investigation report, and then the State presented the testimony of Officer Marlon Williams. Officer Williams testified another officer was investigating criminal-sexual-abuse allegations against a 17-year-old male when the victim, M.E., made a spontaneous statement regarding sexual relations with defendant. Officer Williams was assigned to investigate the allegations against defendant. On January 10, 2014, Officer Williams interviewed M.E. at the Children's Advocacy Center. The interview was recorded onto DVD. Officer Williams testified he had an opportunity to review the DVD and the DVD was a true and accurate depiction of the interview he conducted with M.E. on January 10, 2014. The State moved to admit the DVD and play it. No objections were raised. On cross-examination, Officer Williams testified defendant voluntarily provided a sample of his deoxyribonucleic acid and offered to take a polygraph test.

¶ 16 During the recorded interview, M.E. stated that, when she was 13 years old, she performed oral sex on defendant, who was her uncle. Defendant had said she could ride the four-wheeler if she did so. The first time it happened defendant told her not tell anyone. M.E. did tell her mother, but her mother did not believe her. M.E. performed oral sex on defendant four times, and he performed oral sex on her twice. M.E. also stated defendant had used his penis to penetrate her "bottom" three times.

¶ 17 At the sentencing hearing, M.E. testified on defendant's behalf and recanted the statements she made to Officer Williams. M.E. explained she made the statements against defendant because she was mad at him for not letting her live with him. She also noted the police were investigating what took place between her and a boy and she told a lie about defendant to get the attention away from her and the boy. M.E. later told the State's Attorney she lied to the police. M.E. stated all of her previous statements to Officer Williams and the assistant State's Attorney about defendant were lies. When cross-examined about her previous statements regarding sexual contact with defendant, M.E. testified her statements were not true. She insisted she was telling the truth in court and made up the other statements.

¶ 18 Defendant presented some letters in his support and spoke in allocution. Defendant apologized for his methamphetamine use. He admitted having a drug problem and said his wife and children needed him.

¶ 19 The circuit court began explaining its sentence by noting it had considered the evidence at the trial where defendant was found guilty of the two counts for which he was being sentenced. The court noted the evidence of guilt was overwhelming. The court then commented on defendant's allocution and the financial impact of incarceration. It then addressed the evidence at the sentencing hearing. The court found the DVD admissible and explained that find-

ing. It then went through M.E.'s statements during the interview by Officer Williams and explained why it found M.E.'s statements on the DVD credible and her statements in court not credible. The court concluded defendant committed the criminal acts against M.E. The court then noted that was not defendant's whole story. The court went on to address defendant's criminal history and prior punishments. The court noted it considered (1) the nature and circumstances of the offenses he was found guilty of by the jury; and (2) defendant's history, character, and condition. The court found a "substantial" prison sentence was warranted and sentenced defendant to concurrent prison terms of 8 years for methamphetamine possession and 22 years for participation in methamphetamine manufacturing.

¶ 20 Defendant filed a motion to reconsider his sentence. The motion did not mention the DVD of M.E.'s interview. After a September 29, 2014, hearing, the circuit court denied defendant's motion to reconsider his sentence. On October 2, 2014, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Feb. 6, 2013). Accordingly, this court has jurisdiction of this case under Illinois Supreme Court Rule 603 (eff. Feb. 6, 2013).

¶ 21 II. ANALYSIS

¶ 22 On appeal, defendant asserts he was denied a fair sentencing hearing due to the circuit court's admission of the DVD of M.E.'s statements and its improper reliance on those statements in sentencing him. Defendant acknowledges he did not object to the DVD's admission at his sentencing hearing and in his motion to reconsider his sentence. Accordingly, defendant has forfeited his claim. See *People v. Hillier*, 237 Ill. 2d 539, 544, 931 N.E.2d 1184, 1187 (2010) (holding "that, to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required"). However, he asks

this court to review his contentions under the plain-error doctrine (Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)).

¶ 23 To obtain relief under the plain-error doctrine, the defendant must first show a clear or obvious error occurred. *Hillier*, 237 Ill. 2d at 545, 931 N.E.2d at 1187. In the sentencing context, a defendant must then demonstrate either "(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." *Hillier*, 237 Ill. 2d at 545, 931 N.E.2d at 1187. Under both prongs, the defendant bears the burden of persuasion. *Hillier*, 237 Ill. 2d at 545, 931 N.E.2d at 1187. "If the defendant fails to meet his burden, the procedural default will be honored." *Hillier*, 237 Ill. 2d at 545, 931 N.E.2d at 1188. Thus, we begin by determining whether an error occurred.

¶ 24 A. Admissibility of the DVD

¶ 25 Defendant first argues the circuit court erred by allowing the State to show the DVD of Officer Williams' January 2014 interview of M.E. At the sentencing stage, a defendant has already been convicted and thus is "entitled to fewer procedural safeguards than one who has not been convicted at all." (Internal quotation marks omitted.) *People v. Lee*, 196 Ill. 2d 368, 382, 752 N.E.2d 1017, 1024 (2001) (quoting *People v. Foster*, 119 Ill. 2d 69, 102, 518 N.E.2d 82, 96-97 (1987)). "The ordinary rules of evidence which apply at trial are relaxed at a sentencing hearing, where a court has the ability to consider a variety of sources and types of information when determining a sentence." *People v. Raney*, 2014 IL App (4th) 130551, ¶ 44, 8 N.E.3d 633. In a sentencing hearing, the only requirement for the admission of evidence is the evidence must be reliable and relevant as determined by the circuit court within its sound discretion. *People v. Harris*, 375 Ill. App. 3d 398, 409, 873 N.E.2d 584, 594 (2007). Accordingly, we will not disturb a circuit court's evidentiary ruling at a sentencing hearing absent an abuse of dis-

cretion. See *People v. Lyles*, 106 Ill. 2d 373, 415, 478 N.E.2d 291, 310 (1985). " '[A] court abuses its discretion when its decision is fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree with it.' " *People v. Staple*, 402 Ill. App. 3d 1098, 1102-03, 932 N.E.2d 1064, 1068 (2010) (quoting *People v. Ortega*, 209 Ill. 2d 354, 359, 808 N.E.2d 496, 500-01 (2004)).

¶ 26 Defendant asserts the circuit court abused its discretion by allowing the DVD of M.E.'s statements to Officer Williams because (1) M.E. was present and available to testify and (2) M.E.'s statements on the DVD were unreliable since she later recanted them. As to the presentation of the DVD itself, other criminal conduct for which the defendant has not been prosecuted or convicted may be considered at sentencing. *People v. Jackson*, 149 Ill. 2d 540, 548, 599 N.E.2d 926, 930 (1992). However, our supreme court has held such evidence "should be presented by witnesses who can be confronted and cross-examined, rather than by hearsay allegations in the presentence report, and the defendant should have an opportunity to rebut the testimony." *Jackson*, 149 Ill. 2d at 548, 599 N.E.2d at 930. "[T]he State may prove up defendant's other criminal activity at sentencing by having the investigating officer testify about what the witnesses told him and about what he learned during his investigation of the other crime." *Harris*, 375 Ill. App. 3d at 410, 873 N.E.2d at 594. Moreover, the sentencing court has broad discretionary power to consider *various sources and types of information* so that it can make a sentencing determination within the parameters outlined by the legislature. *People v. Williams*, 149 Ill. 2d 467, 490, 599 N.E.2d 913, 924 (1992).

¶ 27 Here, the State did present the testimony of the investigating officer, Officer Williams, but it chose to present M.E.'s statements to him by showing the DVD instead of having Officer Williams testify about them. Defendant recognizes Officer Williams could have testified

about the statements M.E. made during the interview but contends the DVD itself is inadmissible because M.E. was present to testify. We disagree. As defendant correctly notes, Officer Williams could have testified about M.E.'s statements during the January 10, 2014, interview. See *Harris*, 375 Ill. App. 3d at 410, 873 N.E.2d at 594. Given the fact the DVD was a more accurate account of M.E.'s statements to Officer Williams than what his testimony would have been, it is only logical the State's use of the DVD was also proper where (1) Officer Williams was available to be confronted and cross-examined and (2) defendant had the opportunity to refute the evidence, which he did. Moreover, at a sentencing hearing, the circuit court has broad discretion to hear evidence from various sources. See *Williams*, 149 Ill. 2d at 490, 599 N.E.2d at 924. Accordingly, the circuit court did not abuse its discretion by allowing the State's use of the DVD to present the evidence of M.E.'s statements to Officer Williams.

¶ 28 Defendant further contends the videotape should not have been admitted because M.E.'s statements were unreliable since she recanted her statements. In support of his argument, he cites the Second District's decision in *People v. Mercado*, 356 Ill. App. 3d 487, 826 N.E.2d 612 (2005). There, the reviewing court addressed whether the circuit court's denial of defendant's motion to withdraw his guilty plea based on the victim's recantation was proper. *Mercado*, 356 Ill. App. 3d at 488, 826 N.E.2d at 614. In doing so, the court noted the following factors might be pivotal in evaluating a motion to withdraw a guilty plea based on recanted evidence: "when the victim recants in relation to when the defendant is convicted and sentenced, whether the affidavit is from the victim or the defendant's relatives, what motive the victim had to make the initial accusations, and whether the defendant has repeatedly claimed that he is innocent." *Mercado*, 356 Ill. App. 3d at 498, 826 N.E.2d at 621. The court emphasized that, by allowing the defendant to withdraw his guilty plea, the reviewing court was merely affording the defend-

ant an opportunity to test at trial the victim's credibility. *Mercado*, 356 Ill. App. 3d at 499, 826 N.E.2d at 622. Accordingly, even if the factors favor allowing the motion to withdraw the guilty plea, the credibility of the original statements is determined by the trier of fact at a trial. That is what took place here. The circuit court determined whether M.E.'s original statements to Officer Williams or her recantation testimony was more credible. Thus, we find M.E.'s recantation of her statements on the DVD and the circumstances surrounding it do not render her earlier statements unreliable for the purpose of their admissibility at defendant's sentencing hearing. As the State argues, the DVD was the most reliable source of evidence of M.E.'s statements to Officer Williams.

¶ 29 Accordingly, we find the circuit court did not abuse its discretion by allowing the State to present the DVD of M.E.'s statements during her January 10, 2014, interview by Officer Williams.

¶ 30 B. Circuit Court's Consideration of the Criminal-Sexual-Assault Case

¶ 31 Defendant argues that, even if the circuit court properly admitted the DVD of M.E.'s statements, the circuit court improperly placed great weight on the dismissed criminal-sexual-assault case in sentencing him. Specifically, he claims the court sentenced him on the dismissed criminal-sexual-assault case, and not the case before it. In support of his argument, he cites *People v. Bouyer*, 329 Ill. App. 3d 156, 164, 769 N.E.2d 145, 152 (2002), where the reviewing court found the defendant was entitled to a remand for resentencing. There, the circuit court's actions and comments throughout the proceedings made it clear the court was punishing the defendant on resentencing for primarily falling behind on his restitution payments and not for the original underlying offense. *Bouyer*, 329 Ill. App. 3d at 161, 769 N.E.2d at 149-50. Likewise, defendant cites *People v. Varghese*, 391 Ill. App. 3d 866, 877, 909 N.E.2d 939, 949 (2009),

where the reviewing court also remanded for resentencing because the circuit court's comments focused on the defendant's conduct while on probation and not on his original offense, indicating the court was punishing the defendant for his actions while on probation.

¶ 32 A reviewing court will not overturn a circuit court's sentencing decision absent an abuse of the circuit court's discretion. *Varghese*, 391 Ill. App. 3d at 876, 909 N.E.2d at 947. Moreover, in general, a sentence within the statutory range for the offense being sentenced will not be set aside on review unless the reviewing court is strongly persuaded the sentence imposed was in fact imposed as a penalty for other criminal conduct, and not for the offense being sentenced. See *Varghese*, 391 Ill. App. 3d at 876, 909 N.E.2d at 948.

¶ 33 Participation in methamphetamine manufacturing (less than 15 grams) is a Class 1 felony, subject to a sentencing range of 4 to 15 years in prison. See 720 ILCS 646/15(a)(2)(A) (West 2012); 730 ILCS 5/5-4.5-30(a) (West 2014). Due to defendant's prior methamphetamine conviction, he was eligible for an extended-term prison sentence of up to 30 years. See 720 ILCS 646/100(a) (West 2014). Methamphetamine possession (less than 5 grams) is a Class 3 felony with a sentencing range of two to five years in prison. See 720 ILCS 646/60(b)(1) (West 2014); 730 ILCS 5/5-4.5-40(a) (West 2014). With defendant's prior methamphetamine conviction, he was eligible for an extended-term prison sentence of up to 10 years. See 720 ILCS 646/100(a) (West 2014). Accordingly, defendant's prison sentences of 22 years for participation in methamphetamine manufacturing and 8 years for methamphetamine possession fell within the statutory sentencing range for the two offenses.

¶ 34 As the circuit court noted, the evidence at defendant's sentencing hearing focused on the dismissed criminal-sexual-assault charges. The court first explained why the DVD evidence was admissible at defendant's sentencing hearing. It then proceeded to address the con-

flicting evidence as to whether the sexual conduct occurred and why it found M.E.'s statements on the DVD more credible than her recantation testimony. The court found reliable evidence did exist defendant committed the criminal acts against M.E. It then noted that was not defendant's whole story and did not mention the uncharged crimes again. The court stated it considered the factors in aggravation and mitigation, the attorneys' arguments, and defendant's statement in allocution. The court addressed defendant's substantial criminal record, including prior drug convictions. After considering the nature and circumstances of the offenses of which the jury found defendant guilty and defendant's history, character, and condition, the court found a substantial prison sentence was warranted.

¶ 35 Based on the aforementioned facts, we find the court's lengthy discussion of the facts surrounding the dismissed criminal-sexual-assault charges was merely a reflection on the focus of the sentencing hearing and its conflicting evidence and not the court punishing defendant on the dismissed charges. Unlike in *Bouyer* and *Varghese*, the court's comments do not indicate it was punishing defendant for actions other than the offenses for which defendant was convicted. In fact, the court noted it had "considered the nature and circumstances of the offenses that he was found guilty of by the jury." Defendant had a lengthy criminal and drug history, including two prior drug-related felonies. He was sentenced to concurrent 12-year prison terms on those charges. Defendant reported that, for the last year, he had been smoking and snorting methamphetamine almost daily with friends, who had drug backgrounds. The trial evidence showed defendant frequently made methamphetamine with John and Debra Lang and regularly purchased pseudoephedrine, a key ingredient in methamphetamine manufacturing. The prosecutor, who gave little comment to the dismissed criminal-sexual-assault charges, recommended sentences of 10 and 24 years. The court imposed lesser sentences of 8 and 22 years. We disa-

gree with defendant the record indicates the circuit court's sentence was a punishment for the dismissed criminal-sexual-assault charges rather than the offenses at issue in this case.

¶ 36 Since we have found no error, defendant cannot establish plain error, and his contentions are deemed forfeited.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we affirm the Coles County circuit court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 39 Affirmed.