2016 IL App (5th) 130451-U

NO. 5-13-0451

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 13-CF-219
	)	
LOUIS DAVIS,	)	Honorable
	)	John Baricevic,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Schwarm and Justice Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: Evidence that the defendant's vehicle was stopped because there were warrants for him in both this and an unrelated case was not sufficiently prejudicial to constitute reversible error, much less plain error, where there was no evidence concerning the nature of the unrelated offense and the evidence against the defendant was overwhelming. Defendant's as-applied challenge to the constitutionality of his sentence was forfeited where the trial court had no opportunity to make factual findings related to that claim.

¶ 2 The defendant, Louis Davis, was convicted of failure to comply with the Sex Offender Registration Act (730 ILCS 150/1 *et seq.* (West 2012)). He was arrested and charged with the offense after an officer conducting random license plate checks discovered that he had an outstanding warrant. At the time of his arrest, the defendant

was required to register weekly because he was homeless. According to the defendant, he attempted to register a few times, but was unable to do so because the officer responsible for registering him was unavailable. Pursuant to a combination of statutes aimed at recidivism, the offense was elevated from a Class 3 felony to a Class X felony. See 730 ILCS 150/10(a) (West 2012); 730 ILCS 5/5-4.5-95(b) (West 2012). The defendant was sentenced to six years in prison. On appeal, he argues that (1) he was deprived of a fair trial because the arresting officer testified that there was an active warrant for the defendant in an unrelated matter; and (2) his sentence violates the eighth amendment of the federal Constitution and the proportionate penalties clause of the Illinois Constitution. We affirm.

¶ 3 The defendant became subject to the requirements of the Sex Offender Registration Act because of a 1974 rape conviction. Pursuant to that Act, a sex offender with a fixed address must register within three days after establishing a new residence or starting a new job or school. 730 ILCS 150/3(b) (West 2012). The offender must also re-register once a year. 730 ILCS 150/6 (West 2012). If a sex offender does not have a fixed address, however, he must register weekly. 730 ILCS 150/6 (West 2012). At the time of the events at issue, the defendant did not have a fixed address. He was thus required to register weekly.

¶ 4 The defendant first registered as a sex offender with the East St. Louis police department in December 2012. Prior to that time, he registered elsewhere. He registered with the East St. Louis police department on December 10, 17, and 31, 2012, and again on January 7, 2013. That was the last time he registered before his February 6 arrest. On

that date, the defendant was pulled over in his vehicle by St. Clair County Sheriff's Deputy Matthew Dobler, who was conducting random warrant checks in a high crime area of East St. Louis. The defendant was arrested and charged with failure to register as a sex offender.

¶ 5 At the defendant's trial, East St. Louis jail supervisor Byron Holton testified about the procedures followed by that department in registering sex offenders. When the events at issue took place, Officer Holton's predecessor, Julius Young, was responsible for sex offender registration at the East St. Louis jail; however, Officer Young retired before the matter came to trial and did not testify. Officer Holton testified that the jail supervisor is available to handle sex offender registrations between 7 a.m. and 3 p.m. He stated that registration is a "very methodical" process. He explained that a sex offender seeking to register must first go to the desk sergeant, who informs the jail supervisor that the person is waiting to register. The jail supervisor provides the offender with a new form for each registration period. Records of registration are kept by dispatch. Officer Holton acknowledged that there are times when an offender seeking to register must wait several hours to register or is told to come back later that day because the jail supervisor is busy performing other duties of his job. However, he testified that there has never been a period during which the jail supervisor was unavailable for three weeks.

¶ 6 Deputy Matthew Dobler testified about the circumstances surrounding his arrest of the defendant. He testified that on February 6, 2013, he was conducting random warrant checks on vehicle registrations. When he ran the defendant's license plate number, "the registered owner came back with an active warrant out of Jackson County, Illinois, and

he also had a warning for a violation of a sex offender [*sic*]." Deputy Dobler explained that this information came from a data base called LEADS. The following exchange then took place:

"Q. Okay. And on this particular car, you said that the registered owner came back as having a warrant?

A. Yes, ma'am.

Q. And then the registered owner also came back as being an out-of-compliant sex offender?

A. Yes, ma'am."

Deputy Dobler then testified that the reason he stopped the defendant's vehicle was the Jackson County warrant.

¶ 7 On cross-examination, Deputy Dobler was asked if he stopped the defendant because he had "information from LEADS suggesting that there was a warrant associated with that registration?" Deputy Dobler responded affirmatively. He was then asked if part of the reason for the stop was the defendant's out-of-compliant status. Again, he replied that this was part of the reason. On redirect examination, the prosecutor asked, "When you received the information through LEADS, did it have him as an active warrant for a registration offense or was it a different issue?" Deputy Dobler replied, "It was two separate warnings on it."

¶ 8 St. Clair County sheriff's department Investigators Frank Bennett and Brian Cregger interviewed the defendant at the St. Clair County jail the day following his arrest. Bennett testified about that interview. He testified that prior to the interview, he

obtained copies of the defendant's two most recent sex offender registration forms. Those forms indicated that the defendant registered on December 31, 2012, and on January 7, 2013. During the interview, the defendant acknowledged that he was required to register every seven days because he was homeless.

¶ 9 Bennett testified that the defendant initially told them that he was in compliance with this requirement. The defendant said that he had a "more current" registration form in his wallet. Bennett testified that they retrieved the defendant's property to allow the defendant to show them the more current registration form. However, the form the defendant pulled from his wallet was the January 7, 2013, form. The defendant then told the investigators that he registered every week after January 7, but the officer who registered him signed the same form. Bennett testified that in spite of this claim, the defendant's copy of the January 7 registration form had only one officer signature on it.

¶ 10 Bennett testified further that the defendant insisted that he tried several times to register but was turned away. The defendant acknowledged during the interview, however, that it was his responsibility to register. Bennett asked the defendant if he could have been more compliant. According to Bennett, the defendant admitted that he could have been more compliant, but did not elaborate.

¶ 11 The defendant testified on his own behalf. He testified that he was 64 years old and received disability benefits due to a physical disability. He testified that he registered with Officer Julius Young at the East St. Louis police department four times. He testified, however, that each time he attempted to register after January 7, 2013, Young was not available. He stated that the lobby of the police department was small, with five

or six seats in the waiting area, and it was usually "not too busy." The defendant testified that when he went to register on January 14, the desk sergeant told him that Julius Young was not there. The defendant testified, "So I figured I would come back the next day in order to catch him or either, you know, I was told to leave." He stated that he returned two or three times that week to attempt to register. Asked by defense counsel how long he had to wait in the lobby, the defendant replied, "Half hour. One time it was about an hour."

¶ 12 The defendant next testified that he made an effort to register on each of the three Mondays during the relevant time period. (We note that there were actually four Mondays during the relevant time frame—January 14, January 21, January 28, and February 4, 2013.) He stated that one day he arrived and could see that Julius Young was busy preparing to transport prisoners. Another time, he arrived in the morning and was told to return at 1 p.m. When he did so, however, he was told that Young was still not available. The defendant testified that Young "didn't seem overly concerned about, you know, coming down and registering" the defendant. The defendant testified that when he went to the East St. Louis police department to attempt to register on the third Monday, Young was not at work. He asserted that he returned to attempt to register the following day, but Young was still not there.

¶ 13 The defendant was asked about his statements to Investigator Bennett. He denied telling Bennett that he registered after January 7. He explained that he merely told Bennett that he attempted to register after that date but was unable to do so. He acknowledged telling Bennett that he "could have been more compliant." Asked what he

meant by this, the defendant said he meant that he should have asked for proof that he was there. He explained that there was no log book for him to sign that would indicate that he was there. However, he noticed cameras in the parking lot and over the door leading into the lobby. He explained that he did not ask for any type of proof that he attempted to register because he "thought the cameras had [his] back."

¶ 14 The jury returned a verdict of guilty. The defendant subsequently filed a motion for a new trial, arguing that the evidence was insufficient to prove him guilty beyond a reasonable doubt, and that he was prejudiced by admission of the fact that he was convicted of rape and armed robbery in 1974. Evidence of these convictions was admitted for purposes of impeaching the defendant's credibility as a witness. The court denied the motion and moved on to sentencing.

¶ 15 A presentence investigation report indicated that the defendant had a substantial prior criminal history. In 1971, he was convicted of burglary and theft. In 1974, he was convicted of rape and armed robbery. He was sentenced to concurrent terms of 25 to 75 years on those charges and released from prison in 2005. After the defendant's release, he was convicted three times on charges of failing to comply with the Sex Offender Registration Act−in 2008, 2009, and 2011. In addition, he was convicted on three misdemeanor charges−a 2008 charge for knowing damage to property under $300 and two 2012 convictions for retail theft.

¶ 16 The three prior convictions for violating the Sex Offender Registration Act are significant because of their impact on the defendant's sentence in this case. Under the Sex Offender Registration Act, a first conviction for violating the Act is a Class 3 felony.

However, a second or subsequent violation is a Class 2 felony. 730 ILCS 150/10(a) (West 2012). Under a general recidivism provision in the Unified Code of Corrections, a defendant convicted of a Class 2 or higher felony is subject to sentencing as a Class X offender if the defendant has previously been convicted of two or more Class 2 or higher felonies. 730 ILCS 5/5-4.5-95(b) (West 2012). This provision is applicable only to felonies committed after February 1, 1978, when the provision went into effect. 730 ILCS 5/5-4.5-95(b)(1) (West 2012). It therefore does not apply to the defendant's 1971 burglary conviction or his 1974 convictions for rape and armed robbery.

¶ 17 At the defendant's sentencing hearing, both the prosecutor and defense counsel noted that because of his two prior Class 2 convictions for failure to register, it was mandatory for the court to sentence the defendant as a Class X offender under the general recidivism statute. The prosecutor asked only for the minimum Class X sentence of six years. He noted, however, that in light of the defendant's lengthy criminal history, he believed a sentence of six years was just and appropriate. The court sentenced the defendant to six years. This appeal followed.

¶ 18 The defendant first argues that he was deprived of a fair trial when the State introduced testimony that he was wanted on a warrant in an unrelated case. He acknowledges that he did not object to the testimony at trial or raise this issue in his posttrial motion. However, he asks us to consider his argument under the plain error doctrine. Assuming the admission of the testimony to be error, we do not find it prejudicial enough to constitute plain error. We thus find that the defendant has forfeited this claim on appeal.

¶ 19 Ordinarily, errors not raised both by a timely objection at trial and in a written posttrial motion are forfeited on appeal. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). One exception to this rule is the plain error doctrine. Under that doctrine, a court of review may relax the forfeiture rule and consider a claim if (1) the evidence is closely balanced; or (2) the claimed error is "so serious that the defendant was denied a substantial right, and thus a fair trial." *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). The plain error doctrine provides a "disjunctive test" which offers defendants "two different ways to ensure the same thing−namely, a fair trial." *Id*. at 179. A fair trial need not be perfect to be fair. The plain error doctrine, therefore, is a limited and narrow exception to the forfeiture rule. *Id*. at 177. The doctrine is not applicable unless the asserted error affects the defendant's substantial rights. *Id*. at 185.

¶ 20 The first step in plain error analysis is to determine whether there has been an error at all. *Id*. at 184. Evidence that a defendant has committed other crimes is inadmissible if its only purpose is to demonstrate the defendant's propensity to commit crime. *People v. Hayes*, 139 Ill. 2d 89, 145 (1990). Even evidence that implies prior criminal conduct is generally inadmissible. *People v. Thompson*, 2014 IL App (5th) 120079, ¶ 54. Such evidence *is* admissible, however, if it is relevant to establish any material fact. *Hayes*, 139 Ill. 2d at 146. One purpose for which other-crimes evidence is relevant and admissible is to show the steps taken in an investigation. In particular, the evidence is admissible if it helps to explain how the defendant became a suspect. Without such evidence, jurors may be left with the impression "that the investigation lacked rigor." *Thompson*, 2014 IL App (5th) 120079, ¶ 46.

¶ 21 Even where other-crimes evidence is relevant and admissible, the trial court has an obligation to balance the relevancy of the evidence against its potential for unfair prejudice. *People v. Bailey*, 88 Ill. App. 3d 416, 420 (1980). "[O]therwise admissible evidence must be purged of references to other crimes if it is at all possible to do so without doing violence to the probative value of the evidence." *Id.* As with other evidentiary rulings, the decision to admit evidence of other crimes lies within the sound discretion of the trial court. *People v. Illgen*, 145 Ill. 2d 353, 364 (1991).

¶ 22 As discussed earlier in this decision, Deputy Dobler testified that he stopped the defendant's vehicle based on information he received during a warrant check. More specifically, he testified that the warrant check revealed both that there was an unrelated warrant in Jackson County for the defendant and that the defendant was an out-of-compliant sex offender. When asked for clarification by the State's attorney, Dobler testified that there were two separate warrants and that the Jackson County warrant was the basis for the stop. On redirect, the State again elicited testimony that there were two separate warrants, which Deputy Dobler described as "warnings."

¶ 23 The defendant argues that the stop of his vehicle could have been explained through testimony that the Deputy Dobler's warrant check indicated that he was an out-of-compliance sex offender. As such, he argues, the additional testimony concerning the unrelated Jackson County warrant was unnecessary and should have been excluded. See *Bailey*, 88 Ill. App. 3d at 420. The defendant further argues that the State added to the potential for prejudice by twice eliciting additional testimony from Deputy Dobler repeating the fact that there were two different warrants involved. We are not persuaded.

¶ 24 We first note that because Deputy Dobler testified that the Jackson County warrant was the basis for the stop, it would have been difficult for the State to elicit testimony explaining how the defendant became a suspect without referencing that warrant. On the other hand, we do not believe the additional questioning asking Deputy Dobler to clarify the fact that there were two separate warrants added anything to the jury's understanding of any relevant question. Nevertheless, we find the potential for prejudice from this testimony to be so minimal that reversal would not be required even if the defendant had preserved this question for our review. There was no evidence concerning what the Jackson County warrant involved. In addition, as noted, Deputy Dobler described both warrants as "warnings," which implied to jurors that the warrant did not involve a serious offense. Furthermore, the prosecutor did not refer to the Jackson County warrant either in his opening statement or closing arguments.

¶ 25 Although the defendant asserts that the evidence in this case is closely balanced, we find that it was overwhelming. There was no dispute that the defendant failed to register for a period of four weeks. In addition, although the defendant presented evidence that he made some efforts to register, there was no evidence from which the jury could conclude that he was completely precluded from doing so. In this regard, the case before us stands in stark contrast to *People v. Wlecke*, a case cited by the defendant in support of his position. There, a defendant was released from prison and issued a temporary identification card by the Illinois Department of Corrections (IDOC). *People v. Wlecke*, 2014 IL App (1st) 112467, ¶ 9. Because IDOC does not verify addresses before issuing temporary identification cards, these cards are not valid for purposes of sex

offender registration. However, this fact was not explained to the defendant. *Id*. Three days after his release from prison, the defendant attempted to register, using the temporary identification card from IDOC. *Id*. ¶ 10. The officer in charge of registration told him that he would need to obtain a valid government-issued form of identification before he could register. *Id*. The officer did not register the defendant, either as a person with a fixed address or as a person without a fixed address. *Id*. ¶ 38.

¶ 26 The defendant was arrested six days later. *Id*. ¶ 11. He was charged with violating the Sex Offender Registration Act under two alternative theories−failure to register within three days of establishing a new residence (730 ILCS 150/3(a)(1) (West 2010)), and failure to report weekly while lacking a fixed residence (730 ILCS 150/6 (West 2010)). *Wlecke*, 2014 IL App (1st) 112467, ¶ 7. The jury found him not guilty on the count of failing to register within three days of establishing a new residence, but guilty on the count of failure to report weekly while lacking a fixed residence. *Id*. ¶ 15.

¶ 27 In reversing the conviction, the First District noted that the defendant there made a "good faith effort" to register, but was unable to do so because the officer refused to register him either as a person with a fixed address or as a person without a fixed address. Instead, he told the defendant to come back to register only after obtaining appropriate identification. *Id*. ¶ 38. The court further noted that had the officer registered the defendant as a person without a fixed residence at the time the defendant reported, he would have been in compliance when he was arrested six days later. *Id*. The court therefore concluded that failure to register was not due to any voluntary act on the part of the defendant. *Id*.

¶ 28 The defendant here argues that the evidence in this case was closely balanced because he presented a strong defense in the form of his testimony regarding his "good faith efforts" to register. However, unlike what happened in *Wlecke*, the defendant testified only that he was told to wait or return later in the day because Officer Young was not available when he attempted to register. He acknowledged that the waiting room at the police department was usually not very busy, and Officer Holton testified without contradiction that there was never a period of three weeks during which Officer Young was not available at all. Thus, the defendant was not precluded from registering as was the defendant in *Wlecke*. In the face of the overwhelming evidence of the defendant's guilt, we find that the challenged testimony does not constitute reversible error, much less plain error. We therefore uphold the defendant's conviction.

¶ 29 The defendant next argues that his sentence violates the proportionate penalties clause of the Illinois Constitution and the eighth amendment of the United States Constitution. As previously discussed, the requirement of sentencing the defendant as a Class X offender resulted from the interplay between section 10 of the Sex Offender Registration Act (730 ILCS 150/10 (West 2012)) and the general recidivism provision in the Unified Code of Corrections (730 ILCS 5/5-4.5-95 (West 2012)). The defendant does not contend that either statute is facially invalid. Rather, he contends that the sentencing scheme that results from application of both statutes is unconstitutional as applied to him. He argues that his sentence is disproportionately harsh both in light of the offense itself and in light of his own culpability. See *People v. Holman*, 2016 IL App (5th) 100587-B, ¶ 21 (explaining that under the eighth amendment, sentences "must be proportionate to

both the offender and to the offense" (citing *Miller v. Alabama*, 567 U.S. ____, ___, 132 S. Ct. 2455, 2463 (2012))). He notes that Class X sentencing is ordinarily reserved for the most serious crimes, and that many of the crimes that trigger the requirement of registering under the Sex Offender Registration Act are not Class X felonies. In addition, he contends that he had lessened culpability because the evidence showed that he made good faith efforts to comply with the registration requirement, a requirement which was made more onerous by the fact that he was homeless.

¶ 30 In response, the State argues that the defendant forfeited this as-applied constitutional challenge by not raising it before the trial court. The State acknowledges that a sentence that is unconstitutional is void and may be challenged for the first time on appeal. See *People v. Luciano*, 2013 IL App (2d) 110792, ¶ 48. The State argues, however, that because an as-applied challenge depends upon the facts of the case, a defendant must raise the issue before the trial court in order to establish an evidentiary record and allow the court to make factual findings relevant to the claim. See *People v. Thompson*, 2015 IL 118151, ¶ 37; *People v. Mosley*, 2015 IL 115872, ¶ 49; *In re Parentage of John M.*, 212 Ill. 2d 253, 268 (2004). We agree with the State.

¶ 31 Here, the record does contain evidence related to the facts relied upon by the defendant in support of his claim. He argues that his sentence is disproportionately harsh, in part, because he made good faith efforts to register. The defendant testified that he went in person to register several times but was turned away because Officer Young was unavailable. Although the defendant's inconsistent excuses to Investigators Bennett and Cregger cast doubt on his credibility, Officer Holton's testimony provided some support

for the defendant's claim that the jail supervisor was sometimes unavailable and offenders sometimes had to wait to register. However, the court did not make any findings on this question. The jury's verdict of guilty necessarily entailed a finding that the defendant was not precluded from registering due to the obstacles he claimed he faced; however, it does not resolve the question of whether the defendant really did make a good faith effort to register or the question of whether he failed to do so due to obstacles sufficiently burdensome to render his conduct less culpable. It would not be appropriate for this court to resolve these questions and determine whether the sentencing scheme is unconstitutional as applied to the defendant because "we, as a reviewing court, are not arbiters of the facts." *In re Parentage of John M.*, 212 Ill. 2d at 268. We thus find that the defendant has forfeited his as-applied challenge to the sentencing scheme by failing to raise this claim in the trial court.

¶ 32 We also note that, were we to consider this argument, we would find it to be without merit. A prison term violates the eighth amendment if it is "grossly disproportionate" to the offense, taking into account all the circumstances of the case. *Graham v. Florida*, 560 U.S. 48, 59-60 (2010). Similarly, a sentence violates the proportionate penalties clause if it is "so wholly disproportionate to the offense as to shock the moral sense of the community." *People v. Miller*, 202 Ill. 2d 328, 338 (2002). The conviction at issue in this appeal was the defendant's fourth conviction for failing to comply with the Sex Offender Registration Act in four years. The Act itself provides that even a second violation is a Class 2 felony. 730 ILCS 150/10 (West 2012). The permissible sentencing range for a Class 2 felony is three to seven years. 730 ILCS 5/5-

4.5-35(a) (West 2012). The defendant's six-year sentence falls within this range. As discussed previously, the defendant was convicted of three misdemeanors during the same four-year period, and he was previously convicted of three serious felonies (burglary, rape, and armed robbery). Under these circumstances, a sentence of six years is not grossly disproportionate to the offense. Thus, we would uphold the defendant's sentence even if he had not forfeited his constitutional challenge.

¶ 33 For the foregoing reasons, we affirm the defendant's conviction and sentence.

¶ 34 Affirmed.