FIFTH DIVISION
March 10, 2017

No. 1-15-0226

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 23757
	)	
RICHARD WHITE,	)	Honorable
	)	Michael B. McHale,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE REYES delivered the judgment of the court.
Justice Lampkin concurred in the judgment.
Presiding Justice Gordon dissented.

ORDER

¶ 1 *Held*: Defendant's failure to inform the trial court of alleged errors in his presentence investigation report resulted in a concession as to the accuracy of the report and wavier of the issue on appeal. Defendant cannot establish plain error or that he was denied the effective assistance of counsel based upon errors in his presentence investigation report when the record does not establish that the trial court relied upon the class of defendant's prior convictions at sentencing rather than the circumstances of the instant offense and the number of convictions in defendant's criminal background.

¶ 2 Following a jury trial, defendant Richard White was found guilty of unlawful use or possession of a weapon by a felon and sentenced to 13 years in prison. On appeal, defendant contends that he is entitled to a new sentencing hearing because the presentence investigation report (PSI), which the trial court relied upon incorrectly classified two of his convictions for possession of a controlled substance as convictions for delivery of a controlled substance. In the alternative, he contends that he was denied the effective assistance of counsel by counsel's failure to correct these errors and preserve the issue in a postsentencing motion. We affirm.

¶ 3 At trial, Officer David Lemmon testified that at approximately 8:20 p.m. on December 5, 2013, he was on patrol with his partner Officer Garcia. He was driving a marked squad car when he noticed a green van traveling in the opposite direction. The van had a front headlight which was "out." As the van got closer, Lemmon could see that defendant was driving the van, and that defendant was not wearing a seat belt. Lemmon made a u-turn, and curbed the van. When defendant exited the van, Garcia told him to get back inside. Defendant looked at the officers, "kind of gave us a smile and took off running." Lemmon and Garcia pursued the defendant on foot.

¶ 4 At one point during the pursuit, Lemmon observed a black pistol in defendant's hand. Defendant then tripped and fell. The pistol "went in the air" and landed in the street. Lemmon recovered a 9 millimeter "Highpoint" which had "one in the chamber" while Garcia "jumped" on defendant. Lemmon further testified that prior to observing defendant with a handgun, he heard a "thump" as if "someone threw something." A silver revolver was later recovered.

¶ 5 Officer Garcia testified consistently with Lemmon that defendant stepped out of the van, smiled and "made a gesture with his hand as if he was swearing." Although Garcia instructed defendant to get back inside the vehicle, defendant "took off running." During the subsequent

pursuit, Garcia observed defendant reach into his waistband and get rid of a silver handgun by throwing it on the ground. While defendant continued to run he reached for his waistband again, looked back and tripped. Garcia took defendant into custody.

¶ 6 The parties then stipulated that defendant had previously been convicted of a qualifying felony offense for purposes of the charge of unlawful use or possession of a weapon by a felon.

¶ 7 The jury found defendant guilty of one count of unlawful use or possession of a weapon by a felon, that is, a 9 millimeter firearm. The trial court then ordered that a PSI be prepared.

¶ 8 The PSI stated, *inter alia,* that defendant had three convictions for aggravated robbery, one conviction for aggravated battery, two convictions for possession of less than 15 grams of heroin, and two convictions for the manufacture or delivery of a controlled substance.

¶ 9 At a posttrial hearing, the trial court inquired as to whether there were any corrections to the PSI. Neither party made any corrections. The State then argued in aggravation that defendant had a "significant" criminal history. Defense counsel responded that defendant had a family that depended on him, but that counsel could not "sugar coat" defendant's criminal history.

¶ 10 Defendant stated that he served 10 years for aggravated battery, that the time spent away from his daughter impacted their relationship, and that a "significant amount of time" in prison would cause his relationship with his daughter to be "lost." Defendant acknowledged that his background:

> "may seem extensive, but I have a few drug convictions, one bags [*sic*] here, two bags here, maybe three bags here which accounts for all of my convictions [from] when I was from most likely 20 to 23. That was a rough period in my life. Those days are gone. I'm a totally different person now. * * *

> And as far as the aggravated robbery, it wouldn't be four, so it would be only one had they not tricked me when—and that's just the truth of it. *** I really didn't know much of what was going on, so I pled guilty to four robberies allegedly, but I'm thinking it was one. So it really would have been only one in my background including like three other drug convictions."

Defendant asked for "maybe three years" and stated that there was "stuff about his life" that did not make it into the PSI.

¶ 11 In sentencing defendant, the trial court stated that it had read "all of the components of the PSI" and considered the sentencing factors in aggravation and mitigation. The court noted that despite defendant's assertion that he only committed one aggravated robbery, the court could not take defendant's "word over the PSI" which indicated:

> "three separate aggravated robberies in one it looks like an aggravated battery in there as well, unless that's a typo. Nevertheless, four serious violent cases from 2004, all running concurrent and you got ten years. I take those as I see them in your background.
>
> Two drug cases. One of them is a Class II delivery from 2003 and the other one is a straight possession from 2003. Another drug case in '02, another delivery in 2001, which your probation was revoked. So that's eight felony convictions."

The court found defendant's behavior "disturbing" and "[p]retty bold" when the testimony at trial indicated that rather than getting back inside his vehicle, defendant "waved at the officers, snickered at them or smiled and then [you] ran with at least one loaded weapon. And during the chase you pulled it out of your waistband ***." The court found it "extremely disturbing" that a person with defendant's background was "on the street with a loaded nine-millimeter, with

officers pursuing" him. The trial court then sentenced defendant to 13 years in prison. Defendant filed a motion to reconsider sentence, which the trial court denied.

¶ 12 On appeal defendant contends that this cause must be remanded for a new sentencing hearing because the trial court relied upon a PSI that incorrectly labeled two of his prior convictions for possession of a controlled substance as convictions for manufacture or delivery of a controlled substance when determining defendant's sentence. He notes that although the PSI labeled the convictions as manufacture or delivery of a controlled substance, certain supporting documents in the record and the Illinois Department of Corrections website indicate that these convictions are actually for possession of a controlled substance. Defendant asks this court to take judicial notice of the information of the Department of Corrections website. See *People v. Gipson*, 2015 IL App (1st) 122451, ¶ 66, *pet. for leave to appeal granted*, No. 119594 (Nov. 23, 2016) (a court may take judicial notice of information on the Department of Corrections website).

¶ 13 Defendant acknowledges that he failed to preserve this error for review. However, he asks this court to review it pursuant to the plain error rule. In the alternative, defendant contends that he was denied the effective assistance of counsel when counsel failed to object to, or correct, the errors contained in the PSI.

¶ 14 Although this court may take judicial notice of the information on the Department of Corrections website, defendant has failed to provide this court with certified copies of his convictions which would definitively establish the nature of the disputed convictions. The record before this court merely reveals a discrepancy between the PSI and certain supporting documents. More importantly, however, it was defendant's responsibility to bring to the trial court's attention any errors or discrepancies in the PSI and by failing to raise any objections to

the content of the report, defendant conceded the PSI's accuracy with respect to his prior convictions. See *People v. Matthews*, 362 Ill. App. 3d 953, 967-68 (2005). See also *People v. Jones*, 2016 IL 119391, ¶ 37, *petition for certiorari docketed* Feb. 3, 2017 ("a PSI is generally a reliable source for the purpose of inquiring into a defendant's criminal history"). The record reveals that although defendant addressed the trial court at sentencing and stated that there was "stuff about his life" that did not make it into the PSI, he did not offer any corrections or additions to the PSI. Thus, defendant has waived consideration of this issue on appeal.

¶ 15 *People v. Tapia*, 2014 IL App (2d) 111314, is instructive. In that case, the defendant was given a copy of the PSI to review prior to the sentencing hearing, and informed his counsel that he did not notice any errors. At sentencing, neither party made corrections or additions to the PSI. However, the PSI listed two prior out-of state convictions as felonies when in fact those convictions were actually misdemeanors. Defendant subsequently filed a petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/ 122-1 *et seq*. (West 2008)), alleging, *inter alia,* that he was denied the effective assistance of counsel when counsel failed to discover and correct the error in the PSI regarding the out-of-state convictions.

¶ 16 On appeal, the court first reiterated that a PSI is generally a reliable source for the purpose of inquiring into a defendant's criminal history, that any inaccuracies in the PSI must be brought to the attention of the sentencing court, and that the failure to raise this issue before the sentencing court " 'results in *waiver* of the issue on review.' " (Emphasis in original.) *Id.* ¶ 45 (quoting *People v. Williams*, 149 Ill. 2d 467, 493 (1992)). The court noted that although the defendant had the obligation to notify the sentencing court that he believed that the PSI was not accurate, the defendant did not provide an explanation for his failure to "speak up" when the sentencing court specifically mentioned the misclassified out-of-state convictions. *Id.* The

defendant's failure to act had therefore resulted in waiver of the issue on appeal. The court then noted that "[w]hereas waiver precludes review, forfeiture permits review under the plain-error doctrine." *Id.* ¶ 46. The court ultimately concluded, however, that even if the rules of forfeiture were relaxed, the defendant's claim would still fail.

¶ 17 Similarly, here, the complained of errors in defendant's PSI were not brought to the attention of the trial court. Defendant's counsel told the trial court that there were no corrections to the PSI. Further, while defendant addressed the trial court and explained that his criminal history "may seem extensive" but it was just "a few drug convictions" during "a rough period" in his life and that he "pled guilty to four robberies allegedly, but [he was] thinking it was just one," he did not later "speak up" to correct the court when the court described his criminal background. See *Id.* ¶ 45. Defendant's failure to bring any alleged errors in the PSI to the trial court's attention resulted in a concession of the PSI's accuracy and the waiver of any claims of inaccuracy. See *Williams*, 149 Ill. 2d at 495 ("No purpose would be served by giving the parties notice of the presentence reports at least three days prior to the imposition of sentence [citation] if we were to permit them to later raise objections to the presentence reports for the first time on appeal."). However, even if this court were to overlook defendant's waiver and subject his claim to plain-error review, he cannot meet the burden to demonstrate error.

¶ 18 The plain error doctrine permits "a reviewing court to consider unpreserved error when (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." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *People*

v. Herron, 215 Ill. 2d 167, 186-87 (2005)). "[S]entencing errors raised for the first time on appeal are reviewable as plain error if (1) the evidence was closely balanced or (2) the error was sufficiently grave that it deprived the defendant of a fair sentencing hearing." *People v. Ahlers*, 402 Ill. App. 3d 726, 734 (2010). Pursuant to the plain error doctrine, a "defendant has the burden of persuasion and, if he fails to meet his burden, his procedural default will be honored." *People v. Johnson*, 2015 IL App (1st) 133663, ¶ 12 (citing *People v. Hillier*, 237 Ill. 2d 539, 545 (2010)).

¶ 19 Defendant contends that the trial court's reliance on the inaccurate PSI amounts to plain error under both prongs of the plain error doctrine. However, defendant has failed to establish that the evidence at the sentencing hearing was closely balanced when the evidence established that defendant smiled and waved at police officers before fleeing a traffic stop, that defendant discarded a loaded firearm during the subsequent chase, and that he had eight prior felony convictions. Although defendant told the trial court that his family depended on him and that he was a different person than he had been when he was younger, the court found defendant's behavior in the instant case "disturbing." Accordingly, because defendant has failed to persuade this court that the evidence at his sentencing hearing was closely balanced, his claim must fail under the first prong of the plain-error doctrine. See *Johnson*, 2015 IL App (1st) 133663, ¶ 12 (a defendant bears the burden of persuasion under both prongs of the plain-error doctrine).

¶ 20 To the extent that defendant argues that the trial court's reliance on an improper aggravating factor, the inaccurate classification of two prior convictions, denied him a fair sentencing hearing, we also disagree.

¶ 21 In *People v. Whitney*, 297 Ill. App. 3d 965 (1998), *aff'd,* 188 Ill. 2d 91 (1999), the trial court "took into consideration a prior conviction which did not exist" and the reviewing court

addressed the issue as plain error because "a defendant has a right not to be sentenced based upon improper factors in aggravation, and a trial judge's reliance upon an improper factor in sentencing impinges upon a defendant's 'fundamental right to liberty.' " *Id.* at 969 (quoting *People v. Martin*, 119 Ill. 2d 453, 458 (1988)). However, "[a] trial court's reliance upon an improper factor does not always necessitate remandment for resentencing; where it can be determined from the record that the weight placed upon the improperly considered aggravating factor was insignificant and that it did not lead to a greater sentence, remandment is not required." *People v. Voit*, 355 Ill. App. 3d 1015, 1028 (2004).

¶ 22 Here, the trial court sentenced defendant to 13 years in prison when the applicable statutory range was between 3 and 14 years. See 720 ILCS 5/24-1.1(e) (West 2012). The record reveals that at sentencing the trial court focused on the circumstances of the offense and the number of defendant's prior felony convictions, rather than the class of those convictions. The court noted in particular that defendant had "four serious violent cases from 2004," as well as drug cases in 2003, 2002 and 2001, for a total of eight felony convictions. Although the trial court listed the cases that were incorrectly classified in the PSI during the sentencing hearing, the court then immediately returned to a discussion of the circumstances of the instant case during which defendant waved at police officers and ran off with "at least one loaded weapon."

¶ 23 In view of defendant's criminal history, which included eight prior felony convictions, the most recent of which were for four violent felonies, defendant has failed to persuade us that the fact that two of his prior possession convictions were improperly classified as manufacture or delivery of a controlled substance convictions resulted in a greater sentence when the trial court emphasized the number of defendant's prior convictions and relied upon the facts of the case

when sentencing defendant. See *Johnson*, 2015 IL App (1st) 133663, ¶ 12. Accordingly, we must honor his procedural default.

¶ 24 In the alternative, defendant contends that trial counsel was ineffective for failing to object to, or correct, the errors in defendant's PSI.

¶ 25 To establish ineffective assistance of counsel, a defendant must establish that his attorney's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for the complained of errors, the result of the proceeding would have been different. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). To demonstrate prejudice under *Strickland*, the defendant must demonstrate that there is a reasonable probability that the outcome of the trial would have been different, that is, counsel's deficient performance made the result of the proceeding unreliable or fundamentally unfair. *People v. Evans*, 209 Ill. 2d 194, 220 (2004).

¶ 26 In the case at bar, defendant cannot establish that he was prejudiced by counsel's failure to note or correct the errors in the PSI when the record reveals that the trial court relied on the circumstances of the instant case and the number of defendant's prior convictions when crafting defendant's sentence. Even if defense counsel had brought the errors in the PSI to the trial court's attention, defendant has not established, based upon the record, that the outcome of his sentencing hearing would have different when the trial court relied upon defendant's behavior in the commission of the instant offense and his eight prior convictions when sentencing defendant to 13 years in prison. See *People v. Bew*, 228 Ill. 2d 122, 135 (2008) ("*Strickland* requires actual prejudice be shown, not mere speculation as to prejudice").

¶ 27 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 28 Affirmed.

¶ 29 PRESIDING JUSTICE GORDON, dissenting.

¶ 30 I would remand for resentencing. Thus, I must respectfully dissent.

¶ 31 In the case at bar, defendant was sentenced to 13 years for the unlawful possession of a weapon by a felon. The sentencing range was 3 to 14 years. Thus, in sentencing defendant to 13 years, the trial court imposed close to the maximum permissible sentence. In reaching the conclusion that this was the appropriate sentence for this defendant, the trial court observed that defendant had "[t]wo drug cases," which included "a Class II delivery from 2003" and "another delivery in 2001."

¶ 32 I agree with the majority that "this court may take judicial notice of the information on the Department of Corrections website" (*supra* ¶ 14), which shows that, although defendant's presentence report labeled these two drug convictions as convictions for manufacture or delivery, they were actually for possession. In addition, the presentence report stated that defendant had a conviction for aggravated battery when it was actually for aggravated robbery. *People v. Gipson*, 2015 IL App (1st) 122451, ¶ 66 (taking judicial notice of information on "the Illinois Department of Corrections' (IDOC) website); *People v. Sanchez*, 404 Ill. App. 3d 15, 17 (2010) ("this court may take judicial notice of the public records of the Illinois Department of Corrections"); *People v. Peterson*, 372 Ill. App. 3d 1010, 1019 (2007) ("this court may take judicial notice of DOC's records because they are public documents").

¶ 33 Although the majority first observes that we may take judicial notice of the information on the IDOC's website, it then goes on to say that "defendant has failed to provide this court with certified copies of his conviction." *Supra* ¶ 14. The majority is thereby raising an issue, without any supporting citation, that was not raised by either party. On appeal, the State does not dispute either: (1) the accuracy of defendant's description of his record as it appears on the IDOC's

website; or (2) that defendant's presentence report mistakenly described these convictions. In addition, I retrieved defendant's record from the IDOC's website using the citation provided by defendant (https://www.illinois.gov/idoc/offender/pages/inmatesearch.aspx), and I personally verified that defendant is correct when he states that the IDOC's website does not reflect any convictions for him for aggravated battery and that it reflects drug convictions only for possession.

¶ 34 Defendant acknowledges that his counsel failed to object at the time of his sentencing to the errors in the presentence report and asks us to consider this issue either pursuant to the plain-error doctrine or as ineffective assistance of trial counsel.[1]

¶ 35 To obtain relief under the plain-error doctrine in the sentencing context, a defendant must show either: (1) that the evidence at the sentencing hearing was closely balanced; or (2) that the error was so egregious as to deny the defendant a fair sentencing hearing. *People v. Wooden*, 2014 IL App (1st) 130907, ¶ 10 (citing *People v. Hiller*, 237 Ill. 2d 539, 545 (2010)). Normally, the mere fact that a trial court has knowledge of an inapplicable arrest or offense before imposing sentence does not amount to reversible error because the trial court is presumed to have disregarded incompetent evidence. *People v. Bowen*, 2015, IL App (1st) 132046, ¶ 55. However, in the case at bar, counsel did not inform the trial court at sentencing that this was incompetent evidence.

¶ 36 To justify reversal, the record must affirmatively disclose that the arrest or offense was considered by the trial court in imposing sentence. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 55 (citing *People v. Garza*, 125 Ill. App. 3d 182, 186 (1984)). Whether the trial court

[1] When defendant addressed the court directly at sentencing, he told the court that his criminal history was not what it seemed. He stated that "it may seem extensive," but it was just "a few drug convictions, one bags here [*sic*], two bags here."

relied on an improper factor in imposing sentence presents a question of law that we review *de novo*. *People v. Abedlehadi*, 2012 IL App (2d) 111053, ¶ 8. In the case at bar, the transcript leaves no doubt that the trial court considered the two alleged delivery charges when imposing sentence.

¶ 37 Normally, sentencing decisions are entitled to great deference on appeal because the trial court is in a superior position to "fashion an appropriate sentence" based on its firsthand consideration of relevant sentencing factors, such as "the defendant's credibility, demeanor, general moral character, mentality, social environment, habits and age." *E.g., People v. Fern*, 189 Ill. 2d 48, 53 (1999). However, here, the trial court, through no fault of its own, relied on incorrect information. Thus its decision is not entitled to the normal deference that sentencing decisions are accorded.

¶ 38 "[W]hen a trial court considers erroneous aggravating factors in determining the appropriate sentence of imprisonment, the defendant's 'fundamental right to liberty' is unjustly affected, which is seen as serious error" under the second prong of the plain-error doctrine. *Abdelhadi*, 2012 IL App (2d) 111503, ¶ 7 (remanded for resentencing under the second prong of the plain-error doctrine where the trial court relied on an improper aggravating factor). In the case at bar, that is exactly what happened here. In determining the appropriate sentence of imprisonment, the trial court considered erroneous aggravating factors, namely, two prior convictions for drug delivery that did not exist.

¶ 39 There is a world of difference between a conviction for possession and a conviction for delivery and manufacture. The former may indicate that the defendant suffers from an addiction, whereas the latter indicates that the defendant is part of the trade—in other words, a much more culpable part of the cause and the problem. *E.g., People v. Bradley*, 79 Ill. 2d 410, 418 (1980)

(the legislative scheme reveals an intent to punish "traffickers" more severely than "users"). See also *People v. Holloman*, 304 Ill. App. 3d 177, 185 (1999) (remanded for resentencing where the trial court referred to an "erroneous 'trafficking' conviction").

¶ 40 Even if I did not find a remand for resentencing justified under the plain-error doctrine, I would have to find ineffectiveness of sentencing counsel. To succeed on a claim of ineffective assistance of counsel, a defendant must show both: (1) that counsel's performance was objectively unreasonable; and (2) that it is reasonably probable that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v.Burton*, 2015 IL App (1st) 131600, ¶ 22 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). One of the basic jobs of sentencing counsel is to review the presentence report for accuracy and correct any errors which may negatively impact on the court's sentencing decision. *People v. Billups*, 2016 IL App (1st) 134006, ¶ 15 (where counsel "fail[ed] to object to the use of the two convictions in aggravation" that were listed in the presentence report, defendant had "sufficiently shown that his counsel's performance fell below an objective standard of reasonableness"). As I explained above, the difference between drug possession and drug dealing is not a small one.

¶ 41 In addition, there is no way that we can know whether the trial court would have sentenced defendant to 12 years or 11 years or 10 years or some other amount, instead of the 13 years imposed, if the court had the correct information in front of it. Since the transcript reveals that the trial court considered these convictions, emphasizing that defendant had one delivery and then "another delivery," it is reasonably probable that the result of the proceeding, namely, defendant's sentence, would have been different. *People v. Heider*, 231 Ill. 2d 1, 21 (2008) ("A sentence based on improper factors will not be affirmed unless the reviewing court can determine from the record that the weight placed on the improperly considered aggravating factor was so

insignificant that it did not lead to a greater sentence."). The difference of even one year is not insignificant to a person behind bars.

¶ 42 For these reasons, I would reverse defendant's sentence and remand for resentencing; and, thus, I must respectfully dissent.