2017 IL App (2d) 141204-U
No. 2-14-1204
Order filed February 24, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. VAUGHN FITZGERALD CURRY, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 13-CF-926 Honorable Randy Wilt, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Hudson and Justice Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant showed no second-prong plain error in the trial court's sentence of six years' imprisonment after revoking his probation for domestic battery: the court's consideration of hearsay evidence of uncharged conduct did not qualify as such error, and the court did not express a policy prohibiting a resentence of probation after a revocation.

¶ 2 Defendant, Vaughn Fitzgerald Curry, appeals from the six-year sentence imposed on him after the court found that he had violated the terms of his probation for domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2012)). He asserts that the court (1) improperly considered uncharged criminal conduct and (2) improperly acted on a bias against a sentence of further probation after

a probation violation. The State responds that defendant has forfeited both issues and, moreover, has failed to meet his burden of showing that plain error occurred. We agree and thus affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on seven domestic-battery-related counts stemming from a March 16, 2013, incident. The indictment included one count of aggravated battery with a deadly weapon other than a firearm, namely a cane, with that battery causing bodily harm (720 ILCS 5/12-3.05(f)(1) (West 2012)). The indictment also included six counts of domestic battery. The first such count (count II) alleged that defendant struck A.B., a family or household member, with a cane, thus causing bodily harm—swelling—and that this was a repeat offense (720 ILCS 5/12-3.2(a)(1) (West 2012)). Count III alleged domestic battery as a repeat offense in that defendant grabbed and scratched A.B. (720 ILCS 5/12-3.2(a)(1) (West 2012)). Count IV alleged domestic battery as a repeat offense in that defendant struck A.B., causing injury to her eye (720 ILCS 5/12-3.2(a)(1) (West 2012)). Count V alleged domestic battery as a repeat offense in that defendant head-butted A.B., causing injury to her eye (720 ILCS 5/12-3.2(a)(1) (West 2012)). Count VI alleged domestic battery as a repeat offense in that defendant made contact with an insulting or provoking nature with A.B. in that he head-butted her (720 ILCS 5/12-3.2(a)(2) (West 2012)). Count VII alleged domestic battery as a repeat offense in that defendant made contact of an insulting or provoking nature with A.B. in that he struck her (720 ILCS 5/12-3.2(a)(2) (West 2012)).

¶ 5 Defendant accepted a plea offer and entered a guilty plea to count III (grabbing and scratching). The State set out the factual basis as follows:

> "On March 16, 2013, Officer Mark Petrucci responded to a domestic battery complaint at 912 Haskell Avenue and spoke with [A.B.] [A.B.] stated [that her]

boyfriend, [defendant], had gotten mad at her and grabbed her around the neck causing scratches. Officers observed and photographed the injuries.

Defendant was previously convicted of the offense of domestic battery on February 27, 2002 in Winnebago County Illinois case No. 02-CM-20."

¶ 6 On September 3, 2013, the court imposed a sentence of 30 months' probation. The probation order prohibited *unlawful* contact, but not all contact, with A.B. It otherwise had standard terms.

¶ 7 The State filed a petition to revoke defendant's probation on August 6, 2014. It alleged three instances of failure to report to his probation officer, one instance of failure to provide a required urine sample, one instance of testing positive for cocaine, and four instances of failing to complete required counseling.

¶ 8 Defendant's probation officer, Nicole Ticknor, testified at the revocation hearing. She had recently taken over for Shannon Johnson, defendant's probation officer at the times of the alleged violations. The notes Ticknor had received from Johnson showed that defendant had failed three times to report to probation. Further, defendant had failed to submit a urine sample, a failure that the probation department treated as equivalent to a positive sample. He had tested positive for cocaine once. He had also been discharged from counseling programs or failed to meet requirements of those programs.

¶ 9 Defendant testified at the hearing. He described administrative difficulties in meeting the requirements and a series of problems getting to appointments on time.

¶ 10 The court ruled that the State did not prove that defendant's failure to provide a urine sample was intentional; it further ruled that defendant's failure to complete a specific counseling

program was not the result of his noncompliance. However, it ruled that the State had met its burden as to the remaining allegations.

¶ 11 A presentencing report was filed with the court. It contained the State's description of the offense, which included the statement that, after defendant grabbed A.B., he "then head-butted her and punched her in the face causing injury to her eye," a fact supporting one of the counts withdrawn in the plea agreement. The statement otherwise matched the factual basis for defendant's guilty plea. The report also contained notes on defendant's behavior on probation. One reported that defendant's behavior had induced three women to obtain orders of protection against him. Another reported that defendant had threatened a probation officer:

> "The defendant's animosity toward his probation officer came to the attention of the State's Attorney's Office when the defendant threatened physical harm to his probation officer during an encounter with an advocate at the Jubilee Center on August 5, 2014."

¶ 12 At the sentencing hearing, defendant did not request any changes to the presentencing report. Neither side presented witnesses, but defendant made a statement in allocution. The State asked for a sentence near the extended-term maximum sentence of six years' imprisonment, emphasizing defendant's strikingly long history of prior convictions and his tendency to blame his problems on others. Defendant argued that his noncompliance with both the law and his probation conditions was driven by his well-documented mental health problems. He argued that medication alleviated his problems, but that his difficulties were compounded by his physical health problems, which included epilepsy and a history of strokes. He suggested that he could succeed under appropriately structured probation.

¶ 13 The court stated that it agreed that mitigating factors were present. In aggravation, it noted that defendant had a "horrible record," that A.B. and two other women had received orders

of protection against him, and, "[m]ost importantly of all, he threatened physical harm to a probation officer." It further explained that it deemed the circumstances his battery of A.B. to be more serious than those in the count to which he entered his plea:

> "[Defendant] pled guilty originally to Count 3 of the Bill of Indictment, which alleged that he grabbed [A.B.], causing a scratch. ***
>
> Well, the facts of the situation here were significantly more than that. According to the Statement of Facts presented [for] the original plea, *** he got mad at her. He hit her with his cane, first of all, causing injury. Then he grabbed her by the neck, and then head butted her. So it's more than just a grab.
>
> *Now, to the extent that the scratch was part of what he admitted to, the grab was part of what he admitted to, I'm not going to reconsider that, but I can certainly consider the whole fact scenario behind the offense itself. It was not just a simple grab. It was striking somebody with a weapon *** [and] head butting them.*" (Emphasis added.)

¶ 14 The court noted that, with juvenile probation included, defendant had been on probation 20 times and had completed it satisfactorily only once. It further explained its disinclination to impose a further sentence of probation as follows:

> "*There is a statutory presumption in favor of probation, but in my mind it does not apply where somebody is in front of me on a Petition to Vacate Probation. I would say in this case even if it still did apply, it has been well overcome by his continued noncompliance with probation.* The factors in aggravation far outweigh any mitigating factors that might be considered here. The fact of the matter is, he is just not an appropriate candidate for further probation. The fact of the matter is, I consider him to be a risk to other people." (Emphasis added.)

¶ 15 Finally, it summarized all of its reasoning:

> "Based upon all of these, the history of violence, the continued history of violence, and the most recent evidence that he potentially threatened a probation officer, I think a Department of Corrections sentence is most appropriate for this gentleman."

¶ 16 Defendant filed a motion for reconsideration of his sentence. He raised no objection to the matters at issue in this appeal. The court denied defendant's motion; he timely appealed, and now challenges only his sentence.

¶ 17 II. ANALYSIS

¶ 18 In this appeal, defendant asserts that the court relied on improper factors, "including uncharged acts, incorrect information, and the judge's personal beliefs," in imposing sentence. He argues that "the judge incorrectly recalled the content of the State's factual basis offered at the plea hearing," conflating it with the information contained in the presentencing report, so that it used uncharged matters as if they were part of the offense. He further argues that the court unfairly prejudged him when it stated, "[I]n my mind [the statutory presumption in favor of probation] does not apply where somebody is in front of me on a Petition to Vacate Probation." He concedes that he did not raise these matters at the sentencing hearing or in a postsentencing motion, but asserts that these errors violated his due-process rights and that the sentence was thus the product of second-prong plain error. However, his argument is limited to citing *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 7, for the proposition that the use of "improper factors" in sentencing is reviewable as second-prong plain error.

¶ 19 The State argues, *inter alia*, that all the facts at issue appeared in the presentencing report, giving defendant a fair opportunity to challenge any inaccuracies. It further argues that defendant

has forfeited his claim of plain error by failing to support his assertion that the plain-error doctrine applies here.

¶ 20 In his reply, defendant concedes that a court may consider uncharged offenses, but argues that it may properly do so only when the State has supplied adequate evidence. He contends the only evidence of the uncharged offenses here was the presentencing report, which was inadequate. He does not respond to the State's argument that he has forfeited his plain-error argument, but does state that "it is the judge's reliance on the uncorroborated information contained within [the presentencing report] that constitutes an abuse of discretion and a denial of due process resulting in reversible plain error."

¶ 21 We agree that defendant's argument for the applicability of the plain-error doctrine is poorly developed. We do not go so far as to deem it forfeited; we nevertheless agree that defendant has failed to meet his burden to demonstrate the existence of plain error.

¶ 22 Generally, "[t]o preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion." *People v. Thompson*, 238 Ill. 2d 598, 611 (2010). However, plain-error review allows a court to consider otherwise forfeited claims of error. *Thompson*, 238 Ill. 2d at 613. Specifically, the court may do so under two conditions:

> "(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 [(first-prong plain 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 [(second-prong plain error)]." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

"In the sentencing context, a defendant must then show either that (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." *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). "Under both prongs of the plain-error doctrine, the defendant has the burden of persuasion." *Hillier*, 237 Ill. 2d at 545.

¶ 23 Defendant relies on our holding in *Abdelhadi* for the proposition that the consideration of "improper factors" at sentencing is error that results in fundamentally unfair proceedings, so that it must be reviewed as second-prong plain error. *Abdelhadi* is inapposite, and defendant's argument is thus unpersuasive. The difficulty for defendant is that the trial court here did not consider an "improper factor" in the sense that we used that phrase in *Abdelhadi* and elsewhere. In *Abdelhadi*, the improper factor the court considered was one inherent in the offense of which the defendant was convicted. *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 6. "There is a general prohibition against the use of a single factor both as an element of a defendant's crime *and* as an aggravating factor justifying the imposition of a harsher sentence than might otherwise have been imposed." (Emphasis in original.) *People v. Gonzalez*, 151 Ill. 2d 79, 83-84 (1992). Similarly, we have held that it is impermissible for a sentencing court to give weight to the victim's status in the community. *People v. Mauricio*, 2014 IL App (2d) 121340, ¶¶ 13, 15-21. Factors such as those in *Abdelhadi* and *Mauricio* can be described as categorically impermissible, whereas, as we now discuss, the consideration of uncharged criminal conduct cannot.

¶ 24 Defendant has in fact conceded that uncharged criminal conduct is not a categorically impermissible factor. Indeed, he specifically argues that consideration of uncharged criminal conduct is proper, but that the trial court's error was considering the conduct when the only

evidence of it was hearsay. This is the rule in *People v. Jackson*, 149 Ill. 2d 540, 548 (1992): "criminal conduct for which there has been no prosecution or conviction may be considered in sentencing," but it "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." In effect, this rule requires the court to use the trial hearsay rule when it considers uncharged criminal conduct at sentencing—a context in which hearsay rules do not necessarily apply (*e.g.*, *People v. Varghese*, 391 Ill. App. 3d 866, 873 (2009)). Violations of the hearsay rules are not, without more, second-prong plain error, and defendants can waive or forfeit their claims that a sentencing court improperly considered hearsay. See, *e.g.*, *People v. Nieves*, 192 Ill. 2d 487, 502 (2000) (finding that a hearsay objection was waived in a capital sentencing hearing). Thus, even if we read *Abdelhadi* so broadly as to hold that consideration of a categorically impermissible factor is always second-prong plain error, that holding is inapplicable to the evidentiary error that defendant alleges. As defendant does not otherwise attempt to establish plain error, we reject his argument.

¶ 25 In conjunction with his claim that the court improperly considered uncharged criminal conduct, defendant also argues that the court made factual errors at sentencing, such as incorrectly characterizing his relationship with A.B. and "incorrectly recall[ing] the content of the State's factual basis offered at the plea hearing," so as to conflate it with the information contained in the presentencing report. Defendant has failed entirely to explain how these errors are subject to plain-error review.

¶ 26 Defendant's final claim is that the court demonstrated that it had prejudged defendant to be unworthy of further probation when it commented, "There is a statutory presumption in favor of probation, but in my mind it does not apply where somebody is in front of me on a Petition to

Vacate Probation." A court's complete prejudgment of such a sentencing issue clearly would be inconsistent with a fair hearing and thus would arguably establish second-prong plain error. However, we hold that no such error occurred.

¶ 27 The record here shows that the trial court merely made an awkward statement of a common-sense proposition. If a court decides conclusively that it will deny probation to some disfavored class of otherwise-eligible defendants, that position is arbitrary; that is, it denies the defendant the court's individualized judgment. No such thing occurred here. It stated only that an initial failure to comply with probation makes a second chance less likely. This was a particularly sensible stance in the present context, where defendant had been on probation *20 times* and had successfully completed probation only once. We see no sign of the kind of arbitrariness that would signal any fundamental unfairness in the court's denial of probation here. Consequently, we conclude that no basis exists to find second-prong plain error.

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we affirm defendant's sentence. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 30 Affirmed.