

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2017 IL App (4th) 140928-U

NO. 4-14-0928

FILED
April 10, 2017
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.)	Vermilion County
AVION T. SMITH,)	No. 14CF186
Defendant-Appellant.)	
)	Honorable
)	Nancy S. Fahey,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Holder White and Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Defendant’s arguments with regard to the length of his sentence and the trial court’s reasoning for imposing the sentence are forfeited because defendant failed to file a motion to reconsider his sentence.

(2) The trial court erred by imposing the \$2 anti-crime assessment against defendant. Defendant is also entitled to have his presentence custody credit applied against the following assessments: court finance fine; youth diversion fine; drug court fine; and state police operations fine.

(3) This court continues to follow our earlier decision in *People v. Warren*, 2016 IL App (4th) 120721-B, ¶115, 55 N.E.3d 117, which held the \$2 State’s Attorney automation fee in not a fine.

¶ 2 On August 28, 2014, a jury convicted defendant, Avion T. Smith, of aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2014)) and aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2014)). On October 21, 2014, the trial court sentenced defendant to a 20-year term of imprisonment. Defendant appeals, arguing this court should (1)

remand for a new sentencing hearing or reduce his sentence and (2) reduce his assessments by \$76.80. We affirm defendant's prison sentence but vacate the \$2 anti-crime assessment and remand this case for the trial court to apply defendant's presentence custody credit toward his court finance fine, youth diversion fine, drug court fine, and state police operations fine.

¶ 3

I. BACKGROUND

¶ 4 Defendant was convicted of aggravated battery with a firearm and aggravated discharge of a firearm for shooting Jameil Smith. Jameil was shot four times, including in the stomach, chest, and leg. Defendant was 18 years old at the time of the offense.

¶ 5 In October 2014, the trial court held a sentencing hearing for defendant. Defendant testified this was his first adult felony, but he was adjudicated delinquent in a case involving a gun. He testified he only pleaded guilty to the juvenile charge to keep his brother, who was four or five years older, from serving a five-year prison term. Prior to being incarcerated, he did not have a job, but Auto Zone wanted to interview him after he obtained an identification card. Defendant had planned to join the Marines and then go to college to study business, welding, or culinary arts. Defendant planned on attending college courses if offered in prison.

¶ 6 The State asked the trial court to sentence defendant to 30 years in prison, the statutory maximum. Defense counsel asked for leniency from the court, noting defendant's lack of an extensive criminal background, his age, and his educational and employment aspirations. Defendant then offered the following statement:

“First I like everybody back there I would like to tell my family I'm sorry for letting them down cause this is not the life they wanted me to live, not a life in an orange jumpsuit. I would like to tell my little brother I'm sorry. 18 years old. I

suppose to—he follows my footsteps and this is not the type of footsteps I want him to follow, and that’s—that’s about it.”

The court then stated:

“Well, I appreciate the people that you apologized to and I’m sure that they appreciate that, but you were found guilty by a jury, and it strikes me—well, it amazes me that you would not apologize to the victim of this crime. The victim sustained horrific injuries that will be with that person for the rest of their life. And, you know, not only do you and your family live in this community, but I live in this community too and my family and my friends and I cannot tolerate this type of violence, nor will I tolerate this type of violence in this community. And I feel very strongly that I have to send a strong message to you and to anyone else that might be inclined to participate in this type of activity that I’m not gonna put up with it. I’m not gonna condone it in any way, shape, or form. I know you’re young, but that’s no excuse for what you did. And, yes, you don’t have any adult criminal history but you have a juvenile criminal history and it involved a gun. So you didn’t learn from that.

When I look at the factors in mitigation, you know, as I’ve said, your age is something that I am considering, but the crime in and of itself is so horrific that will—that minimizes any mitigation of your age, and it also minimizes any mitigation of and the fact that you do have prior juveniles involving a gun and battery, while they are mitigating factors to a certain extent, they certainly don’t override the factors in aggravation which—that are that your conduct caused or threatened serious harm. You do have a history of prior delinquency, and the

sentence is necessary, and this is what I feel so strongly about, the sentence is necessary to deter others from committing the same type of crime.

So having regard to the nature and circumstance of the offense, and to the history, character, and condition of the offender the Court is sentencing you to 20 years in the Illinois Department of Corrections, plus 3 years mandatory supervised release which used to be called parole. This Count II will merge into Count I. You will have to serve this sentence at 85 percent. And you'll be assessed court costs in the amount of \$272."

¶ 7 Defendant did not file a motion to reconsider his sentence. Instead, defense counsel asked the trial court to direct the circuit clerk to file a notice of appeal.

¶ 8 This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 We ordinarily apply an abuse of discretion standard of review to a trial court's sentencing decision. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8, 973 N.E.2d 459. Reviewing courts normally apply a strong presumption the trial court based its sentencing decision on proper legal reasoning and give the trial court's sentencing decision great deference. *Id.* "The presumption is overcome only by an affirmative showing that the sentence imposed varies greatly from the purpose and spirit of the law or manifestly violates constitutional guidelines." *Id.* However, whether a trial court relied on an improper factor in imposing a sentence presents a question of law, which we review *de novo*. *Id.* The defendant still bears the burden of establishing the trial court relied on an improper factor during sentencing. *People v. Conley*, 118 Ill. App. 3d 122, 133, 454 N.E.2d 1107, 1116 (1983).

¶ 11 Defendant summarizes his argument as follows:

“Here, although the court sentenced [defendant] within the applicable sentencing range, the trial judge relied on improper aggravating factors, including: (a) her subjective feelings and biases about her personal safety in the community, and (b) her belief that [defendant’s] expression of penitence instead represented a lack of remorse. In addition, the trial court (c) disregarded *Miller* and failed to give proper weight to the mitigating factor of youth even though [defendant] was only 18 years old at the time of the offense. In light of other mitigating factors demonstrating [defendant’s] rehabilitative potential, (d) his 20-year sentence is excessive. Considered individually or cumulatively, each of those errors entitles [defendant] to a reduced sentence or to a remand for a new sentencing hearing before a different judge.”

Defendant concedes he forfeited these issues. However, he argues the trial court’s errors are clear and reviewable pursuant to the plain-error doctrine. Under the plain-error doctrine, a reviewing court may consider an unpreserved error if the alleged error was a clear or obvious error and (1) the evidence is closely balanced or (2) the error was so serious defendant was denied a fair hearing. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *People v. Rathbone*, 345 Ill. App. 3d 305, 311-12, 802 N.E.2d 333, 338-39 (2003). Defendant also argues his trial counsel was ineffective for not filing a motion to reconsider his sentence.

¶ 12 We note our supreme court has stated:

“The Illinois Constitution provides that ‘[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.’ (Ill. Const. 1970, art. I, sec. 11.) A reasoned judgment as to the proper penalty to be imposed must therefore be based upon the

particular circumstances of each individual case. [Citations.] Such a judgment depends upon many *relevant* factors, including the defendant's demeanor, habits, age, mentality, credibility, general moral character, and social environment [citations], as well as ‘ “the nature and circumstances of the offense, including the nature and extent of each element of the offense as committed by the defendant” ’ [citations].

Sound public policy demands that a defendant's sentence be varied in accordance with the particular circumstances of the criminal offense committed. Certain criminal conduct may warrant a harsher penalty than other conduct, even though both are technically punishable under the same statute. Likewise, the commission of any offense, regardless of whether the offense itself deals with harm, can have varying degrees of harm or threatened harm. The legislature clearly and unequivocally intended that this varying quantum of harm may constitute an aggravating factor. While the classification of a crime determines the sentencing range, the severity of the sentence depends upon the *degree of harm* caused to the victim and as such may be considered as an aggravating factor in determining the exact length of a particular sentence, *even in cases where serious bodily harm is arguably implicit in the offense for which a defendant is convicted.*” (Emphases in original.) *People v. Saldivar*, 113 Ill. 2d 256, 268-69, 497 N.E.2d 1138, 1143 (1986).

We review defendant's arguments with these points in mind. In addition, defendant's arguments are based on statements the trial court made at the sentencing hearing. We will not view the

court's statements in isolation but in the context of the court's entire statement. *People v. Ward*, 113 Ill. 2d 516, 526-27, 499 N.E.2d 422, 426 (1986).

¶ 13 We first examine defendant's argument the trial judge improperly relied on her subjective feelings and personal biases and "aligned herself with the complainant" in imposing defendant's sentence. A trial court should not base sentencing decisions on private knowledge or subjective feelings. *People v. Dameron*, 196 Ill. 2d 156, 171-72, 751 N.E.2d 1111, 1120 (2001). Citing *People v. Pace*, 2015 IL App (1st) 110415, ¶¶ 104, 107-08, 44 N.E.3d 378, defendant argues the trial court's statements in this case reveal a loss of objectivity and reliance on subjective feelings. We disagree.

¶ 14 We note the First District Appellate Court's decision in *Pace* was vacated by our supreme court on November 23, 2016, which was after defendant filed his briefs in this case. See *People v. Pace*, 2016 WL 7403947 (November 23, 2016). As a result, this decision cannot be relied on by defendant. Regardless, in *Pace*, the appellate court noted the trial court placed significant emphasis on improper considerations when sentencing the defendant. *Pace*, 2015 IL App (1st) 110415, ¶ 108, 44 N.E.3d 378. The trial court's personal feelings about gang violence made up four pages of transcripts. Other large portions of the trial court's 16-page sentencing explanation discussed the victims and the trial court's stated alignment with them. The trial court's statements in this case are a far cry from the situation present in *Pace*.

¶ 15 Defendant also relies on *People v. Henry*, 254 Ill. App. 3d 899, 627 N.E.2d 225 (1993). In *Henry*, the court specifically stated it was imposing the particular sentence because the crime was "disgusting." *Id.* at 904, 627 N.E.2d at 229. The appellate court stated, "Based upon the clarity of the trial court's statement, we cannot say that the court did not rely upon its own opinion of the crime when it sentenced defendant." *Id.* at 905, 627 N.E.2d at 229. After

reviewing the trial court’s statements in their entirety, we do not find the trial court based its sentencing decision on private knowledge or subjective feelings. The court’s sentence was based on the information before the court.

¶ 16 Defendant next argues “the trial judge also improperly relied on her belief that [defendant’s] expression of penitence *** represented a lack of remorse.” Defendant refers to the following statement by the trial court:

“I appreciate the people that you apologized to and I’m sure that they appreciate that, but you were found guilty by a jury, and it *** amazes me that you would not apologize to the victim in this case. The victim sustained horrific injuries that will be with that person for the rest of their life.”

Defendant argues apologizing to Jameil would have been inconsistent with the fact he still maintained his innocence. However, the record does not show defendant was still maintaining his innocence at the sentencing hearing. Further, the record does not show the trial court increased defendant’s sentence because he did not apologize to Jameil.

¶ 17 Defendant next argues the trial court failed to give sufficient weight to his age as a mitigating factor. Defendant was 18 years old at the time of the offense. According to defendant’s brief:

“[C]ontrary to the U.S. Supreme Court’s findings regarding the transient characteristics of youth—such as youthful immaturity, recklessness, and impulsiveness—the trial court in this case disregarded the *Miller* Court’s teachings and failed to give proper weight to the mitigating factor of [defendant’s] youth. See *Miller v. Alabama*, 132 S. Ct. 2455, 2465-69 (2012) (citing *Graham v.*

Florida, 560 U.S. 48, 68 (2010) and *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005)).”

The first problem with defendant’s reliance on *Miller* is defendant was an adult when he committed the offense in question and when he was sentenced. In addition, he did not receive a life sentence without the possibility of parole. *Miller* held, “the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.” *Miller v. Alabama*, 567 U.S. ___, ___, 132 S. Ct. 2455, 2469 (2012). The second problem is the record does not establish the trial court failed to consider defendant’s age. In fact, it appears the court considered his age as a mitigating factor.

¶ 18 Next, defendant argues his sentence was excessive in light of other mitigating factors. According to defendant, the trial court failed to “adequately and seriously consider” mitigating evidence in addition to his youth. The record does not establish the trial court failed to consider mitigating evidence in this case. Unless disputed by the record, we assume the trial court took this evidence into consideration. *People v. Shaw*, 351 Ill. App. 3d 1087, 1093, 815 N.E.2d 469, 474 (2004). The court need not recite each factor it considered when sentencing a defendant. *Id.* Defendant’s sentence was not excessive based on the record in this case.

¶ 19 Based on our review of the record and defendant’s arguments, defendant has failed to establish the trial court made any clear or obvious errors with regard to defendant’s sentence. As a result, we find defendant’s arguments with regard to his sentence forfeited based on his failure to file a motion to reconsider his sentence.

¶ 20 Defendant makes an alternative argument his trial counsel was ineffective for failing to file a motion to reconsider sentence. However, based on the record before this court and the arguments made by defendant on appeal, we do not see how defendant could have been

prejudiced by his counsel's failure to file the motion to reconsider his sentence considering defendant's failure to establish any error.

¶ 21 Defendant argues the trial court erred in imposing a \$2 anti-crime assessment and in not applying his presentence custody credit against all of his applicable fines. Defendant also argues the State's Attorney records automation assessment is a fine and not a fee.

¶ 22 We first address the anti-crime assessment. Citing *People v. O'Laughlin*, 2012 IL App (4th) 110018, ¶ 16, 979 N.E.2d 1023, defendant argues this fine is only applicable when a defendant is sentenced to probation. The State concedes the trial court erroneously imposed the \$2 anti-crime fund fine. We accept the State's concession and reduce defendant's assessment by \$2.

¶ 23 Defendant next argues his presentence custody credit was not applied to all of the fines imposed on him. The trial court awarded defendant presentence custody credit for 178 days. He was entitled to \$5 in credit against creditable fines for each of the 178 days. 725 ILCS 5/110-14(a) (West 2014). According to defendant's brief:

“[Defendant's] assessments schedule shows that the following creditable fines were imposed: a \$50 court fine, a \$4 youth diversion fine, a \$3.80 drug court fine, a \$15 State Police Operations fine, and a \$2 State's Attorney automation fine. (SC. 1) [Citations.] Because those charges are fines subject to the \$5 per diem custody credit, this Court should reduce Avion's outstanding assessments by an additional \$74.80.”

The State concedes defendant's presentence custody credit should be applied against his court finance fine, youth diversion fine, drug court fine, and state police operations fine. We accept the State's concession.

¶ 24 However, the State argues defendant has not established the \$2 State's Attorney automation fee is actually a fine. The State relies on this court's decision in *People v. Warren*, 2016 IL App (4th) 120721-B, ¶ 115, 55 N.E.3d 117. Relying on *People v. Graves*, 235 Ill. 2d 244, 235 N.E.2d 244, and *People v. Camacho*, 2016 IL App (1st) 140604, ¶ 50, 64 N.E.3d 647, defendant argues the State's Attorney automation assessment is a fine because it does not compensate the State for the cost of prosecuting defendant. However, we continue to follow this court's decision in *Warren*, which held the State's Attorney automation fee was a "fee" and not a "fine."

¶ 25 III. CONCLUSION

¶ 26 We affirm defendant's sentence with regard to his prison sentence, vacate defendant's anti-crime assessment, and remand with directions to apply defendant's presentence custody credit against his court finance fine, youth diversion fine, drug court fine, and state police operations fine.

¶ 27 Affirmed in part and vacated in part; cause remanded with directions.