2018 IL App (1st) 161101-U

No. 1-16-1101

Order filed September 11, 2018

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 15 CR 15082
	)	
DONALD WILLIAMS,	)	Honorable
	)	Thomas J. Hennelly,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Mason and Justice Walker concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for delivery of a controlled substance is affirmed over his contention that his 10-year sentence is excessive. We remand the matter to the circuit court with instructions to modify the mittimus and the order assessing fines, fees, and costs.

¶ 2 Following a bench trial, defendant Donald Williams was convicted of delivery of a controlled substance (heroin) (720 ILCS 570/401(c)(1) (West 2014)) and sentenced, based on his background, as a Class X offender to 10 years' imprisonment. Defendant appeals, arguing that

his 10-year sentence is excessive given the nature of the offense and his criminal history. He also challenges certain monetary assessments imposed by the trial court and requests that his presentence custody credit be applied to offset eligible fines. We affirm, modify the fines, fees, and costs order, and correct the mittimus. For the reasons set forth herein, we affirm defendant's conviction and remand the matter with instructions for the court to modify both the mittimus and the order assessing fines, fees, and costs.

¶ 3 Defendant was charged by indictment, in relevant part, with one count of delivery of more than 1 gram but less than 15 grams of a controlled substance (720 ILCS 570/401(c)(1) (West 2014)), and one count of delivery of the same amount of a controlled substance within 1,000 of a church (720 ILCS 570/407(b)(1) (West 2014)). Both charges alleged he delivered heroin to an undercover officer on August 26, 2015. Prior to trial, the State *nolle prossed* the charge alleging delivery within 1,000 feet of a church.

¶ 4 At defendant's bench trial, the evidence showed that, on August 26, 2015, a team of Chicago police officers conducted a narcotics investigation in the area of 3900 West Lexington Avenue in Chicago. A surveillance officer, Christopher Wilson, parked an unmarked car in the 4000 block of Lexington and observed defendant and another male on a porch of a house on the 3900 block of Lexington. A man on a bicycle stopped in front of the house, defendant walked to meet him, and the pair engaged in a hand-to-hand transaction. Wilson radioed an undercover officer, Officer Paolino, and directed him to defendant's address. Paolino rode a bicycle to the house where he observed defendant on the porch with one or two other men. Paolino asked defendant for "three blows," a street term for heroin. Defendant met Paolino at the curb where he gave Paolino three tinfoil packets and Paolino handed him $30 in prerecorded 1505 funds.

Paolino made a nonverbal signal to Wilson that it was a positive narcotics transaction. After Paolino rode back to his car, Paolino radioed enforcement officers that it was a positive narcotics transaction and relayed a description of defendant.

¶ 5 After Paolino departed the scene, and before enforcement officers arrived, Wilson remained at his location and observed defendant leave the porch with two other men. One of the men left and defendant and the other man joined five or six other individuals playing a dice game on the sidewalk across the street. For 8 to 10 minutes, Wilson observed the game and saw men exchanging money. Officer Thornton, an enforcement officer, and his partner arrived at the scene and detained defendant. Paolino returned and identified defendant as the man who had sold him suspect heroin. Wilson and his partner then arrested defendant, returned to the police station, and conducted a custodial search of defendant. The search yielded $251, from which no prerecorded 1505 funds were recovered. Paolino inventoried the three tinfoil packets of suspect narcotics he received from defendant. The three tinfoil packets were tested by a forensic chemist of the Illinois State Police crime lab and found to contain 1.02 grams of heroin.

¶ 6 The court found defendant guilty of delivery of more than 1 gram but less than 15 grams of heroin. The defendant filed a motion for new trial and supplemental motion for new trial, which the trial court denied. Prior to sentencing, the court ordered a presentence investigation (PSI) report.

¶ 7 Defendant's PSI report reflected that he was born on October 13, 1964, in Chicago. Defendant reported that he was raised by his mother, who had three other children, and that he had a normal childhood. Defendant had never been married and did not have any children. He withdrew from high school in the eleventh grade, but received his general equivalency diploma (GED) in 1986.

Defendant reported he was a recovering addict and had not used drugs since receiving treatment at Haymarket House in April 2013. Prior to his arrest in this case, defendant was employed as a laborer and lived with his sister.

¶ 8 Defendant's criminal history reflects eight felony convictions: a 1982 and a 1990 armed robbery for which he received 14 and 22 years' imprisonment, respectively; a 2010 felony theft for which he received two years' imprisonment; and five convictions for possession of a controlled substance, the most recent of which was a 2013 possession charge for which he was sentenced to 2 years' imprisonment.

¶ 9 At sentencing, the court heard arguments in aggravation and mitigation. In aggravation, the State argued that defendant had numerous felony convictions, two of which made him eligible to be sentenced as a Class X offender. In mitigation, defense counsel pointed out that those two convictions, stemming from the 1990 and 1982 armed robberies, were "extremely old," and that the crimes defendant has committed since those convictions were nonviolent. Counsel also pointed out that many of defendant's convictions since those armed robberies were related to his prior drug addiction. Defense counsel also argued that the instant offense was nonviolent and involved a small amount of heroin. Counsel requested that the court sentence defendant to the minimum of six years' imprisonment. In allocution, defendant stated that his prior convictions stemmed from his prior struggle with drug addiction and maintained that he was innocent of the instant offense.

¶ 10 In announcing sentence, the trial court stated it had considered the evidence presented at trial, the PSI report, the statutory factors in aggravation and mitigation, the financial impact of incarceration, the attorneys' arguments, and defendant's statement on his own behalf. The court also noted that it had considered defendant's rehabilitative potential, which it found to be "zero

based on background." The court further noted defendant's numerous felony convictions and stated the following:

> "You are the reason why, Mr. Williams, they have a recidivism statute. You know, quite frankly, I don't believe that you weren't out there selling. I don't believe that for a minute. I believe the police officers. You really with a background like this deserve closer to the high end of the class X which is 30. That's really what you deserve. But after what I heard from your lawyer *** I am going to show some consideration. If you are an addict is one thing; if you are selling, though, that's to me something else."

¶ 11 The court sentenced defendant to 10 years' imprisonment and assessed fines and fees. The court credited defendant with 212 days of presentence custody. Defendant did not file a motion to reconsider sentence.

¶ 12 On appeal, defendant first argues that his 10-year sentence for delivery of heroin was excessive in light of his history of drug addiction, and his rehabilitative potential. He also highlights the nonviolent nature of both the underlying offense and the offenses in his recent criminal history.

¶ 13 The State responds that defendant has forfeited his argument by failing to raise it in a postsentencing motion and that, because the trial court did not abuse its discretion in imposing sentence, no plain error occurred.

¶ 14 In his reply brief, defendant concedes that he forfeited his argument by failing to raise it in a postsentencing motion, but argues that we may review the issue under the plain error doctrine. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) ("[T]o preserve a claim of sentencing

error, both a contemporaneous objection and a written postsentencing motion raising the issue are required."). Although defendant did not suggest plain error in his initial brief, we may nevertheless consider it. See *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010) (a defendant may raise plain error in his reply brief in response to the State's forfeiture argument).

¶ 15 The plain-error doctrine permits a reviewing court to consider unpreserved errors when " '(1) the evidence in a criminal case is closely balanced or (2) where the error is so fundamental and of such magnitude that the accused was denied a right to a fair trial.' " *People v. Harvey*, 211 Ill. 2d 368, 387 (2004) (quoting *People v. Byron*, 164 Ill. 2d 279, 293 (1995)). Prior to addressing plain error, however, we must first determine whether any error occurred as without error there can be no plain error. See *People v. Herron*, 215 Ill. 2d 167, 187 (2005); *People v. Walker*, 232 Ill. 2d 113, 124 (2009) (plain error rule does not apply if a clear and obvious error did not occur). Here, we find no error.

¶ 16 It is well-settled that a trial court has broad discretionary powers in imposing a sentence. *People v. Alexander*, 239 Ill. 2d 201, 212 (2010). A trial court's sentencing decisions will not be altered by a reviewing court absent an abuse of discretion. *People v. Snyder*, 2011 IL 111382, ¶ 36. The trial court's sentencing decision is entitled to great deference because it is generally in a better position to determine the sentencing factors than the reviewing court. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). The reviewing court may not substitute its judgment for that of the trial court merely because it would have weighed these factors differently. *Alexander*, 239 Ill. 2d at 213. "[I]t is not our duty to reweigh the factors involved in [the trial court's] sentencing decision." *Id.* at 214. Further, a sentence which falls within the statutory range is not an abuse of

discretion unless it greatly varies with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *Id.* at 212.

¶ 17 The trial court is presumed to consider all relevant factors and any aggravation and mitigation evidence presented, absent some contrary indication other than the sentence imposed. *People v. Jackson*, 2014 IL App (1st) 123258, ¶ 48. While the sentencing court may not ignore evidence in mitigation, it may determine the weight to attribute to it. *People v. Markiewicz*, 246 Ill. App. 3d 31, 55 (1993). The seriousness of the crime is the most important factor in determining a sentence, and a defendant's rehabilitative potential need not be given greater weight. *People v. Brazziel*, 406 Ill. App. 3d 412, 435 (2010). In addition, the trial court has no obligation to recite and assign a value to each mitigation factor. *People v. Perkins*, 408 Ill. App. 3d 752, 763 (2011). Rather, a defendant must affirmatively establish that the sentencing court did not consider the relevant factors. *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38.

¶ 18 In this case, defendant was convicted of delivery of more than 1 gram but less than 15 grams of heroin, a Class 1 felony, and sentenced, based on his background, as a Class X offender. See 730 ILCS 5/5-4.5-95(b) (West 2014) ("When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, after having twice been convicted in any state or federal court of an offense that contains the same elements as an offense now *** classified in Illinois as a Class 2 or greater Class felony and those charges are separately brought and tried and arise out of different series of acts, that defendant shall be sentenced as a Class X offender."). The sentencing range for a Class X offense is 6 to 30 years' imprisonment. 730 ILCS 5/5-4.5-25(a) (West 2014). As a result, defendant's sentence of 10 years' imprisonment

falls within statutory sentencing range, and, therefore, is presumed proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46.

¶ 19 Defendant does not dispute that he was subject to a mandatory Class X sentence, or that his sentence fell within the permissible range and is presumed proper. Rather, he argues that his sentence is excessive given his rehabilitative potential, his history of drug addiction and the nonviolent nature of this offense and the offenses in his recent criminal history. However, as noted above, absent some indication to the contrary, other than the sentence itself, we presume the trial court properly considered all relevant mitigating factors presented. *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 19. That presumption may be overcome by an affirmative showing that the sentencing court failed to consider factors in mitigation. *People v. McWilliams*, 2015 IL App (1st) 130913, ¶ 27. Defendant is unable to make such a showing.

¶ 20 The record shows that the court presided over defendant's trial and heard evidence concerning the nature of the offense. In addition, prior to sentencing, the mitigating factors defendant highlights in his argument were presented to the court in his PSI report, in defense counsel's arguments in mitigation, and in defendant's own statements to the court. In announcing sentence, the court expressly stated it had considered these sources in fashioning defendant's sentence. The court specifically addressed defendant's rehabilitative potential, history of drug addiction, and criminal history that lacked recent violent offenses. However, the court found that defendant's extensive criminal history showed defendant's rehabilitative potential was "zero" and that the defendant's addiction to drugs was a separate matter from him selling drugs. Given this record defendant essentially asks us to reweigh the sentencing factors and substitute our judgment for that of the trial court. As mentioned, this we cannot do so. See *Busse*, 2016 IL App

(1st) 142941, ¶ 20 (a reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently). As the trial court is presumed to have considered all evidence in mitigation, and the evidence suggests that it did, we find that the trial court did not abuse its discretion in sentencing defendant to 10 years' imprisonment for delivery of a controlled substance. As such, we find no error, and hence, no plain error here. See *McGee*, 398 Ill. App. 3d at 794 ("[w]ithout reversible error, there can be no plain error."). Therefore, defendant's claim of sentencing error is forfeited.

¶ 21 Defendant next argues, and the State concedes, that: the trial court improperly assessed the $5 electronic citation which should be vacated; and that he should be credited with the 210 days he spent in presentence custody, for which he is owed a $5 per day in credit to be applied to offset eligible fines.

¶ 22 Initially, defendant acknowledges that he did not challenge these assessments in the trial court. Generally, a sentencing issue is forfeited unless the defendant both objects to the error at the sentencing hearing and raises the objection in a postsentencing motion. *People v. Nowells*, 2013 IL App (1st) 113209, ¶ 18. The State, however, asserts that we may nevertheless review the defendant's claims. Because the State does not argue forfeiture on appeal, it has forfeited the claim that the issues raised by defendant are forfeited. *See People v. Reed*, 2016 IL App (1st) 140498, ¶ 13 ("By failing to timely argue that a defendant has forfeited an issue, the State waives the issue of forfeiture"). Accordingly, we will address defendant's claims.

¶ 23 Defendant first argues, and the State properly concedes, that the $5 electronic citation fee (705 ILCS 105/27.3e (West 2014)) was improperly assessed and must be vacated because it only applies to traffic, misdemeanor, municipal ordinance, and conservation cases, and is inapplicable

to his felony conviction. See *People v. Moore*, 2014 IL App (1st) 112592-B, ¶ 46 ($5 electronic citation fee does not apply to felonies); *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 115 (vacating the fee where the defendant's offense did not fall into an enumerated category). Accordingly, we vacate the electronic citation fee.

¶ 24 Defendant next contends, and the State agrees, that the mittimus does not accurately reflect the number of days he spent in presentence custody and that eligible fines should be offset by the amount of presentence custody credit he is owed.

¶ 25 We first address defendant's contention that the mittimus does not reflect the correct number of days that he spent in presentence custody. The mittimus is silent as to the number of days defendant was in presentence custody. In defendant's brief, he argues that he was detained for 212 days. The State responds that he was actually detained for 210 days as he was arrested on August 26, 2015, and was in custody until sentencing on March 23, 2016. Defendant, in his reply brief, concedes that the mittimus should be corrected to reflect that he spent 210 days in presentence custody. Section 5-4.5-100(b) of the Unified Code of Corrections provides that defendant "shall be given credit***for the number of days spent in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5-4.5-100(b) (West 2014). From our review, we agree with the parties that defendant spent 210 days in presentence custody. Therefore, we order correction of the mittimus to reflect that defendant spent 210 days in presentence custody. See *People v. Harper*, 387 Ill. App. 3d 240, 244 (2008).

¶ 26 Defendant contends, and the State agrees, that pursuant to section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2014)), defendant's 210 days of presentence custody—multiplied by $5 a day—entitles him to a total of $1,050 of presentence

custody credit to offset eligible fines. After reviewing the record, we agree with the parties that the $2,779 total assessed against defendant includes eligible fines exceeding $1,050 and, therefore the total should be reduced to $1,729 ($2,779 – $1,050).

¶ 27 In sum, we remand the matter to the circuit court with instructions to modify defendant's mittimus and his fines, fees, and costs order in accordance with this disposition. Specifically, on remand, we instruct the court to correct defendant's mittimus to reflect that he spent 210 days in custody before sentencing; modify the fines, fees, and costs order by vacating the $5 electronic citation fee and reducing the total amount defendant owes by $1,050 for a new total of $1,729. We affirm the judgment of the circuit court of Cook County in all other respects.

¶ 28 Affirmed in part and vacated in part; remanded with directions.