2018 IL App (1st) 161402-U

No. 1-16-1402

Order filed January 31, 2018

Third Division

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. 10 CR 16938
	)	
HUBERT SUMLER,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Cobbs and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not exhibit judicial bias in resentencing defendant to a term close to his original sentence. Moreover, the trial court did not abuse its discretion in sentencing defendant to 27 years for aggravated kidnapping, given his additional felony convictions since his initial sentencing.

¶ 2 Defendant Hubert Sumler appeals from his 27-year sentence imposed at a resentencing hearing. In defendant's initial appeal, this court remanded for resentencing after first asking the trial court to clarify whether it had imposed defendant's original 28-year sentence for aggravated

kidnapping knowing he would serve 85% of that sentence under the truth-in-sentencing provisions of section 3-6-3(a)(2)(ii) of the Unified Code of Corrections (the Code) (730 ILCS 5/3-6-3(a)(2)(ii) (West 2010)) (listing aggravated kidnapping among other enumerated offenses). *People v. Sumler*, 2015 IL App (1st) 123381, ¶¶ 77-82.

¶ 3 In this appeal, defendant asks this court to modify the 27-year term imposed on resentencing to 16 1/2 years to approximate the sentence that the trial court "originally intended" to impose. Defendant argues the trial court meant for him to serve 14 years in prison, or half of his original 28-year term, because the court mistakenly believed he was eligible to receive day-for-day good-conduct credit. In the alternative, defendant argues that the 27-year term imposed on resentencing is excessive and disproportionate to the seriousness of the offense.

¶ 4 The facts adduced at defendant's jury trial in 2012 are set out in our 2015 opinion and will be summarized only as necessary to discuss the issues raised in this appeal. The State presented evidence that S.M. and defendant had three children together and she had known defendant for 19 years. At 5 a.m. on March 30, 2010, S.M. returned home and parked on the street in front of her home when defendant approached the driver's side door while S.M. was still in the vehicle. Defendant punched S.M. in the face and head, causing her face to bleed.

¶ 5 Defendant drove away with S.M. in her vehicle. As defendant drove, S.M. kicked and screamed. S.M. testified she was afraid he would get on the expressway and she would not know where he was taking her. At a stop sign, defendant opened the passenger door, pushed S.M. out of the vehicle and drove away.

¶ 6 S.M. testified about the October 2008 incident on which the order of protection was based, in which she and defendant argued and defendant punched her repeatedly in the face and

body. S.M. also testified to four additional physical attacks by defendant in 2009 and 2010, including two that took place after the instant offense in March 2010. A paramedic and doctor testified that defendant had a bleeding lip that could have been caused by being struck with a closed fist.

¶ 7 The trial court convicted defendant of aggravated kidnapping, domestic battery and violating an order of protection. At sentencing, the trial court imposed a term of 28 years in prison for aggravated kidnapping and 3 years in prison on each of the two remaining counts, with all sentences to be served concurrently.

¶ 8 After the court pronounced those sentences, the following exchange took place:

"DEFENSE COUNSEL: Your Honor, is that at the 85 percent or is that at the 50?

THE COURT: That aggravated kidnapping?

DEFENSE COUNSEL: The aggravated kidnapping.

THE COURT: No, that's at 50."

¶ 9 Defendant appealed to this court in 2012. On February 11, 2015, this court filed an opinion that was withdrawn on February 23, 2015. This court entered a *sua sponte* order on that day seeking clarification of the trial court's sentencing ruling. *People v. Sumler*, No. 1-12-3381 (Feb. 23, 2015). In that order, this court cited the above colloquy and directed the trial judge to "clarify to this court whether, in this cause, he crafted defendant Sumler's sentence for aggravated kidnapping pursuant to 730 ILCS 5/3-6-3, that is, with an understanding that a sentence for aggravated kidnapping must be served at 85%." *Id*.

¶ 10 On February 27, 2015, the trial judge stated, after reviewing this court's order:

"I do not consider the amount of good time credit a defendant is entitled to as a part of my sentencing structure; that is, I do not consider whether it is 85% or 50% or 75% in the case of some drug cases or none at all in the case of a murder. Rather, I consider the facts of the case, the nature and circumstances of the offense, the character and background of the defendant and the factors listed in the statute in aggravation and mitigation.

Taking those three things all together, I place the crime within the parameters that the legislature has laid out for the sentence; in other words, for a Class X felony, does it belong more to the top end of a Class X felony or does it belong more to the bottom end or does it belong in the middle. And then I decide upon the number there.

The fact that the defendant may or may not earn good-time credit in the penitentiary does not enter into the number that I arrive at in any way, shape or form. Nor do I think it should, because the fact is the legislature may change the sentencing structure at some time in the future and by sentencing them the way I do it, [a defendant] will always be if he belongs in the top end of that sentencing structure, he'll always be in the top end no matter if they shrink it down he will always be in the top end, if they broadened it out, he will always be in the middle. His relative position will have been expressed accurately at the time of the sentencing, no matter what they do with the good time. That's the legislators' prerogative what they want to do with the good time changing it or even changing the parameters of the sentence. So that's something that may or may not happen in the future.

> I don't consider 85% to 50% or 75% or no percents [*sic*] in arriving at an appropriate sentence for anyone, believing no one else should either for those reasons.
>
> So if they were to send this case back to me for resentencing, I would sentence him to exactly the same sentence that I sentenced him to before, that being 28 years in the Department of Corrections. About this, I have no more to say."

¶ 11 On March 26, 2015, this court issued an opinion remanding defendant's case for resentencing. *Sumler*, 2015 IL App (1st) 123381, ¶ 81. This court noted defendant's argument that he should receive a new sentencing hearing because the trial court imposed his 28-year sentence "under the mistaken belief" he would only need to serve half of that term, due to the truth-in-sentencing provisions in section 3-6-3(a)(2)(ii) of the Code, and accordingly, the trial court only intended that defendant serve a 14-year term. Defendant asserted the trial court would have imposed a shorter sentence had the court "understood he would be required to serve at least 85% of his sentence." *Id.* ¶¶ 64, 77.

¶ 12 This court noted defendant's concession that he had forfeited that issue by failing to raise that argument during sentencing or include it in a post-sentencing motion. *Id*. ¶ 65. This court reviewed the truth-in-sentencing provisions and quoted the trial court's remarks at the end of the initial sentencing hearing. *Id.* ¶¶ 78-79.

¶ 13 This court then stated:

> "Based on the record before us, we cannot preclude a finding of error for purposes of plain-error review where the sentencing court and the attorneys appear to have been acting under the misapprehension that defendant would be eligible for day-for-day credit. The question remains, however, whether the sentencing court relied on any mistaken

belief that defendant was eligible for day-for-day credit when fashioning defendant's sentence." *Id.* ¶ 80.

¶ 14 Stating that it remained unable to "discern what, if any, weight, the [trial] court accorded to the good-conduct credit issue in fashioning its sentence," this court again remanded this case for the trial court to reconsider its sentence "knowing day-for-day credit does not apply." *Id.* ¶ 81. This court also vacated defendant's domestic battery conviction under the one-act, one-crime rule. *Id.* ¶ 93.

¶ 15 On April 28, 2016, the trial court held a new sentencing hearing on remand. The State recounted defendant's prior convictions that had been set out at his initial sentencing. Those convictions included: a 1998 conviction for attempted murder, a 2007 conviction for possession of a controlled substance, three 2008 convictions for misdemeanor domestic battery and 2010 convictions for felony domestic battery and aggravated domestic battery. Defendant also had been convicted of unlawful use of a weapon (UUW) in 1995.

¶ 16 In addition, the State submitted certified copies of three more recent convictions in cases that were pending during his trial in the instant case. Defendant pled guilty in February 2013 to a Class 2 felony charge of aggravated domestic battery and a Class 4 felony charge of domestic battery, and he pled guilty in October 2013 to a Class X felony charge of aggravated battery with a firearm. The State also read a victim impact statement from S.M.

¶ 17 In aggravation of defendant's sentence, the State argued that defendant was a "dangerous person" who repeatedly attacked S.M. despite an active order of protection. The State also emphasized defendant's criminal history and the felony offenses he committed since his initial sentencing.

¶ 18 In sentencing defendant, the trial court stated it would not consider defendant's UUW conviction, citing *People v. Aguilar*, 2013 IL 112116. The court noted, however, that defendant's seven prior convictions were "a ground for raising your sentence."

¶ 19 The court further stated:

> "I find [] that the sentence is necessary for the protection of the public and necessary for the victim in this case, specifically. I reiterate, I do not find a great deal of mitigation here with your record. You've apparently discontinued your drug use, and we'll consider that in mitigation and apparently you've had no problems getting along in the jail since I've heard nothing more about that.
>
> When I indicated before that the victim was not severely injured as a result of this, I was referring to [the fact that] she was not severely injured requiring extensive hospitalization, and for that reason, I do not think an extended term is warranted in this case.
>
> However, I think the State is also correct that the situation has changed somewhat. So I was originally going to reduce your sentence to two years, so by two years what I originally sentenced you to. However, I'm going to reduce it by one year, and so defendant will be resentenced to 27 years in the Illinois Department of Corrections on the charge of aggravated kidnapping[.]"

¶ 20 Defense counsel filed a motion to reconsider the sentence, arguing defendant's term should be reduced based on his rehabilitative potential. Counsel pointed out that defendant had not been accused of "wrongdoing while he's been incarcerated in the Illinois Department of Corrections behaving properly." Denying that motion, the court stated "the only reason the

defendant hasn't shown any improper behavior in the Illinois Department of Corrections is he hasn't been able to get at the victim." Noting defendant's prior offenses, the court stated those acts demonstrated that defendant was "incapable of [] being in close proximity [to S.M.] without hitting or choking her or wreaking some type of mayhem upon her."

¶ 21 In this appeal, defendant first argues that despite the resentencing hearing held on remand, this court should further reduce his sentence. He asserts that the trial court displayed bias in refusing to acknowledge its mistaken belief that the 28-year sentence originally imposed would be eligible for day-for-day good-conduct credit. Defendant asks this court to modify his 27-year sentence to 16 1/2 years, which he argues would "approximate the 14-year sentence" that the trial court intended to impose by thinking he would only serve 50% of the term.

¶ 22 As a general rule, an incarcerated defendant is entitled to day-for-day good-conduct credit that can effectively shorten the sentence to 50% of the term imposed by the court. 735 ILCS 5/3-6-3(a)(2.1) (West 2010). However, under the "truth-in-sentencing" provision, a defendant who is convicted of certain enumerated offenses, including aggravated kidnapping, can receive no more than 4.5 days of credit for each month of his sentence. 730 ILCS 5/3-6-3(a)(2)(ii) (West 2010). Here, defendant was convicted of aggravated kidnapping. Thus, defendant must serve at least 85% of his sentence and is not eligible for day-for-day good-conduct credit. See *People v. Salley*, 373 Ill. App. 3d 106, 109 (2007).

¶ 23 Defendant concedes he did not raise his claim of the trial court's bias in his written motion to reconsider his sentence following his resentencing. Generally, the failure to raise the issue in a written motion before the trial court results in a waiver of that issue on appeal. *People v. Enoch*, 122 Ill. 2d 176, 185-86 (1988).

¶ 24 Defendant offers several paths around forfeiture. He first argues that because his claim involves the trial court's own bias, it should be considered as though it had been properly preserved, citing the relaxation of forfeiture in *People v. Sprinkle*, 27 Ill. 2d 398, 400-01 (1963). *Sprinkle* involved the difficulty of expecting counsel to object to questions or comments by the judge when the parties involved are in front of a jury, as counsel would risk alienating jurors by challenging the court's authority. *Id.*; see also *People v. McLaurin*, 235 Ill. 2d 478, 486-87 (2009). In such a case, the defendant may object to the trial court's behavior for the first time on appeal. *Sprinkle*, 27 Ill. 2d at 400-01. We do not find the *Sprinkle* doctrine to apply here, where nothing prevented defense counsel from reiterating its position to the trial court that defendant should be subject to a lower sentence.

¶ 25 In the alternative, defendant argues his contention of the trial court's bias can be reviewed as plain error and that his counsel was ineffective in failing to raise it at resentencing. The plain-error doctrine allows consideration of a forfeited claim of clear error in a sentencing proceeding where the evidence is so closely balanced that the error alone might have resulted in an improper sentence or where 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). Defendant seeks review of his 27-year term under either the first or second prong of plain error.

¶ 26 First, defendant claims the evidence at his resentencing hearing was closely balanced in that S.M. suffered "limited harm" in this case. The harm to a victim is only one factor to be considered at sentencing. 730 ILCS 5/5-5-3.2(a)(1) (West 2010). We do not find the evidence at defendant's resentencing was closely balanced, where proof of defendant's substantial criminal record was presented. Moreover, given that finding, defendant cannot meet the prejudice

requirement for ineffective assistance of counsel for failing to raise that argument to the trial court because, as this court has held, counsel is not deficient for failing to raise a claim that would not have affected the case's outcome. See *People v. White*, 2011 IL 109689, ¶ 148 (the prejudice requirement of ineffectiveness of counsel is similar to the closely balanced prong of plain error review).

¶ 27 Under the second-prong of plain error, defendant contends his resentencing proceeding was fundamentally unfair because the trial court made contradictory statements regarding its belief in the application of day-for-day good-conduct credit to this case. He points out that in the initial remand for clarification, the court stated it did not consider the application of good-conduct credit when it imposed a sentence. Defendant argues that representation was contrary to the exchange immediately after sentencing in which defense counsel asked the court if defendant's aggravated kidnapping sentence was "at the 85 percent or [] at the 50," and the court replied, "No, that's at 50." Defendant thus attributes his 27-year sentence to judicial bias, arguing the trial court was unwilling to admit its earlier misunderstanding of the law.

¶ 28 As noted in our initial opinion, the first step in plain-error review is determining whether, in fact, any error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Nothing in the record of defendant's resentencing reveals that the trial court committed error or displayed bias in imposing a 27-year term.

¶ 29 A trial judge is presumed to be impartial, and the burden of overcoming this presumption is born by the party making the charge of prejudice. *People v. Faria*, 402 Ill. App. 3d 475, 482 (2010). Allegations of judicial bias or prejudice must be viewed in context and should be evaluated in terms of the trial judge's specific reaction to the events taking place. *Id*.

¶ 30 "A sentencing hearing is fundamentally unfair - and due process is denied - when the proceeding is affected by judicial bias." *People v. Rademacher*, 2016 IL App (3d) 130881, ¶ 47 (citing *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997)). Judicial bias requires proof of more than simply an unfavorable result; rather, a defendant must show the court has displayed " 'animosity, hostility, ill will or distrust' " towards him. *Rademacher*, 2016 IL App (3d) 130881, ¶ 47 (quoting *People v. Vance*, 76 Ill. 2d 171, 181 (1979)). Absent such a showing, this court will not conclude that actual prejudice existed that prevented the defendant from receiving a fair hearing. *People v. Johnson*, 199 Ill. App. 3d 798, 806 (1990).

¶ 31 When considering whether a mistaken belief influenced a trial court's sentencing decision, a reviewing court looks to whether the trial judge's comments show that the trial judge relied on the mistaken belief as a reference point in fashioning the sentence. *People v. Myrieckes*, 315 Ill. App. 3d 478, 483-84 (2000); see *Sumler*, 2015 IL App (1st) 123381, ¶ 70. In defendant's initial appeal remanding for resentencing, this court voiced its concern that the trial court "relied on any mistaken belief that defendant was eligible for day-for-day credit (50%) when fashioning defendant's sentence." *Id*. ¶ 80.

¶ 32 The truth-in-sentencing provision requiring a defendant to serve 85% of his term "governs only the *potential* credit that a defendant may receive for good conduct." *People v. Davis*, 405 Ill. App. 3d 585, 603 (2010). As noted in *Davis*: "The award of any good-conduct credit is contingent upon a defendant's behavior in prison and there is no guarantee that a defendant will receive any credit." *Id*. (citing *People v. Castano*, 392 Ill. App. 3d 956, 959 (2009)). Moreover, "the trial court has no control over the manner in which a defendant's good-conduct credit is earned or lost" and the calculation of what credit, if any, the defendant will

receive is within the discretion of the Department of Corrections. *Davis*, 405 Ill. App. 3d at 603. The "truth-in-sentencing" provision "no more mandates that [a defendant] serve a certain sentence than the day-for-day good-conduct provisions require a defendant to serve half of his or her sentence." *People v. Frison*, 365 Ill. App. 3d 932, 936 (2006). The trial court does not control the number of years a defendant ultimately serves because the court has no idea whether he will earn that credit and how the credit is implemented. Thus, the existence of the *potential* credit, as emphasized in *Davis*, does not affect the length of defendant's sentence until the credit has been earned.

¶ 33 Here, the trial court had the opportunity to reconsider defendant's sentence and held a full hearing on remand. Although defendant contends the trial court made a mistake in initially sentencing defendant to 28 years and then refused to reduce his sentence to correct that mistake, there is no indication in the record that the trial court believed its sentence was a mistake. Rather, the record establishes the court intended to impose a term at the upper end of the sentencing range. Defendant cites his 27-year sentence to support his claim of the court's bias at resentencing; however, he does not point to any statement of animosity, hostility, ill will or distrust made by the trial court at resentencing or any statement indicating that the court was not complying with the 2015 opinion.

¶ 34 In conclusion, the trial court's act of resentencing defendant to a term one year lower than its previous sentence did not demonstrate judicial bias. Defendant offers no reason, other than the sentence itself, to conclude the court imposed the 27-year sentence on any basis other than the appropriate factors.

¶ 35 Defendant next contends the 27-year term imposed on resentencing is excessive and violates the proportionate penalties clause. He argues that term was only three years less than the 30-year maximum sentence for a Class X felony and he also asserts that the victim in this case "sustained little actual physical harm." He again contends these claims can also be considered under the plain error doctrine since he did not raise them before the trial court following his resentencing. Again, we find no error.

¶ 36 Defendant was convicted of aggravated kidnapping, a Class X offense with a sentencing range of 6 to 30 years in prison. 720 ILCS 5/10-2(b) (West 2010); 730 ILCS 5/5-4.5-25(a) (West 2010). However, defendant was eligible for an extended-term sentence of up to 60 years due to his commission of two previous Class X felonies. 730 ILCS 5/5-4.5-25(a) (West 2010). At defendant's original sentencing, the State presented certified copies of defendant's convictions for attempted murder and aggravated battery with a firearm. Accordingly, the applicable sentencing range was 6 to 60 years, and defendant's 27-year sentence on remand should be considered in that context, not in relation to the 30-year maximum for a Class X felony.

¶ 37 The trial court has broad discretionary powers in imposing a sentence, and its sentencing decisions are entitled to great deference. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). A sentence that is within the statutory range is presumed to not be excessive or an abuse of the trial court's discretion unless "the sentence greatly varies from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense." *People v. Etherton*, 2017 IL App (5th) 140427, ¶ 28. To raise a proportionate penalties challenge, the defendant must show his sentence was not determined based on the seriousness of the offense. *People v. Thomas*, 2017 IL App

(1st) 142557, ¶ 29. We do not find defendant's sentence is excessive or that it violates the proportionate penalties clause.

¶ 38 When a resentencing hearing is held on remand, a trial court generally may not impose a more severe sentence than was originally ordered, unless that term is "based upon conduct on the part of the defendant occurring after the original sentencing." 730 ILCS 5/5-5-4(a) (West 2010). However, the court is not required to impose a lower sentence on remand than was initially ordered. *People v. Raya*, 267 Ill. App. 3d 705, 709 (1994); see also *People v. Flanery*, 243 Ill. App. 3d 759, 761 (1993) (trial court did not abuse its discretion in imposing the same sentence upon the defendant on remand).

¶ 39 Here, upon resentencing, the trial court reduced defendant's sentence by one year to a 27-year term. The court heard evidence that, in the time since his trial for the instant offenses, defendant had been convicted of multiple additional felonies, including aggravated domestic battery, domestic battery and aggravated battery with a firearm. The trial court could consider those convictions on resentencing. See 730 ILCS 5/5-5-3(d) (West 2010). The court correctly indicated that those convictions justified an increase in the original sentence. The court found its sentence was "necessary for the protection of the public" and for the safety of S.M.

¶ 40 However, the court stated it did not "think an extended term [sentence] was warranted in this case." The court indicated it was "originally" going to reduce defendant's 28-year sentence by two years but decided to reduce it by one year, though the court did not set out its precise reason for doing so. The trial court did not abuse its discretion in imposing that term at resentencing, as the court was presented with evidence in aggravation of defendant's sentence and found little evidence to mitigate his punishment.

¶ 41 In conclusion, the trial court did not display bias or prejudice in resentencing defendant to 27 years in prison. Moreover, that sentence did not represent an abuse of the court's discretion and was not disproportionate to the seriousness of the offense.

¶ 42 Accordingly, the judgment of the trial court is affirmed.

¶ 43 Affirmed.