2018 IL App (4th) 170629-U

NO. 4-17-0629

FILED
July 19, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
TERRANCE M. LLOYD,	)	No. 13CF438
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas E. Griffith Jr.,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Justices Holder White and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding the trial court did not err in sentencing defendant *in absentia* and he was not entitled to a new sentencing hearing.

¶ 2 In March 2014, defendant, Terrance M. Lloyd, pleaded guilty to one count of being an armed habitual criminal. The trial court sentenced him *in absentia* to 15 years in prison.

¶ 3 On appeal, defendant argues the trial court erred in sentencing him *in absentia* and his case should be remanded for a new sentencing hearing. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In April 2013, the State charged defendant with one count of being an armed habitual criminal (count I) (720 ILCS 5/24-1.7(a) (West 2012)), alleging he, having been convicted of manufacture and delivery of 1 to 15 grams of cocaine and aggravated unlawful use

of weapons, knowingly possessed a firearm—a revolver. The State also charged defendant with one count of unlawful possession of a controlled substance (count II) (720 ILCS 570/402(c) (West 2012)), alleging he knowingly and unlawfully had in his possession less than 15 grams of a substance containing cocaine.

¶ 6 Defendant waived his right to a preliminary hearing in June 2013. At the hearing, the trial court admonished defendant, in part, as follows:

> "Mr. Lloyd, do you understand that if this case would go to trial and if you didn't appear at the trial, the trial, more than likely, would go ahead and proceed in your absence and you'd be deemed to have given up your right to be present and confront and cross-examine witnesses[?]"

Defendant indicated he understood.

¶ 7 In January 2014, defendant waived his right to a jury trial. On March 10, 2014, the trial court called the case for a bench trial. Prior to the start of the trial, defendant asked for a continuance to find a different attorney. The State objected, and the court denied defendant's request. After a witness was sworn, the court took a recess to give counsel an opportunity to speak with defendant. Once the court reconvened, defense counsel indicated defendant wanted to enter an open guilty plea on count I. The court admonished defendant on the offense, the possible penalties, and the rights he would be giving up by pleading guilty. Following a factual basis, the court found defendant's guilty plea was knowingly, voluntarily, and intelligently made. The court then set the sentencing hearing for April 24, 2014, and directed defendant "to report to probation for the preparation of a presentence investigation report."

¶ 8 The sentencing hearing was rescheduled until June 5, 2014, at which time

defendant failed to appear. The State asked the trial court to proceed in defendant's absence, and defense counsel objected. Relying on this court's decision in *People v. Smith*, 202 Ill. App. 3d 606, 560 N.E.2d 399 (1990), the court proceeded in defendant's absence. The State sought a 25-year sentence, while defense counsel asked for a 7-year sentence.

¶ 9 The trial court noted defendant was 25 years old and had three prior felony convictions. The court found it "very significant" that defendant "failed to show up at his probation appointment and has failed to show up in court today." Believing defendant to be a "dangerous person" who "needs to be taken off the streets because he is a danger to our community," the court sentenced him to 15 years in prison.

¶ 10 Defense counsel filed a motion to reconsider the sentence and a motion to withdraw the guilty plea. Defendant appeared in court for hearings on the motions, both of which the court denied. Defendant appealed, but this court summarily remanded for compliance with Illinois Supreme Court Rule 604(d) (eff. Dec. 11, 2014). *People v. Lloyd*, No. 4-15-0063 (Sept. 1, 2015) (unpublished summary remand order granting defendant's motion for remand).

¶ 11 In May 2017, defense counsel filed a Rule 604(d) certificate, an amended motion to withdraw the guilty plea, and an amended motion to reconsider the sentence. At the hearing, the trial court allowed defendant to make a statement in allocution. Believing the court was "probably mad" because he missed his sentencing hearing, defendant stated he was "scared at the time" and "wasn't ready to come to prison yet." Having been in prison for three years, defendant wanted "to get out" to watch his children grow and thought he could "be a better citizen now."

¶ 12 The trial court denied the postplea motions. As to the motion to reconsider the sentence, the court stated the fact defendant did not show up at the sentencing hearing "probably caused [him] a couple of years" but the 15-year sentence was "reasonable under the

circumstances." This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 A. Sentencing *in Absentia*

¶ 15 Defendant argues he is entitled to a new sentencing hearing because the trial court failed to admonish him he could be sentenced *in absentia* following the entry of his guilty plea. We disagree.

¶ 16 Initially, we note, although defense counsel objected to the trial court proceeding to sentencing in defendant's absence, defendant failed to raise this issue in his amended motion to reconsider the sentence. Normally, this would result in forfeiture. *People v. Almond*, 2015 IL 113817, ¶ 54, 32 N.E.3d 535 (stating "to preserve an issue for review a party must raise it at trial and in a written posttrial motion"). Defendant, however, argues the issue should be addressed as a matter of plain error.

¶ 17 The plain-error doctrine allows a court to disregard a defendant's forfeiture and consider unpreserved error in two instances:

> "(1) where 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 and (2) where 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 ***." *People v. Belknap*, 2014 IL 117094, ¶ 48, 23 N.E.3d 325.

¶ 18 Under both prongs of the plain-error analysis, the burden of persuasion remains with the defendant. *People v. Wilmington*, 2013 IL 112938, ¶ 43, 983 N.E.2d 1015. As the first

step in the analysis, we must determine "whether there was a clear or obvious error at trial." *People v. Sebby*, 2017 IL 119445, ¶ 49, 89 N.E.3d 675; *People v. Eppinger*, 2013 IL 114121, ¶ 19, 984 N.E.2d 475. "If error did occur, we then consider whether either prong of the plain-error doctrine has been satisfied." *People v. Sykes*, 2012 IL App (4th) 111110, ¶ 31, 972 N.E.2d 1272. "[T]he plain error rule is not a general savings clause for any alleged error, but instead is designed to address *serious injustices*." (Emphasis in original.) *People v. Williams*, 299 Ill. App. 3d 791, 796, 701 N.E.2d 1186, 1189 (1998).

¶ 19 A defendant has a constitutional right to be present at his sentencing hearing. See *People v. Lindsey*, 201 Ill. 2d 45, 55, 772 N.E.2d 1268, 1275 (2002) (stating "both the federal constitution and our state constitution afford criminal defendants the general right to be present, not only at trial, but at all critical stages of the proceedings, from arraignment to sentencing"). "A defendant's voluntary absence from trial may be construed as an effective waiver of his constitutional right to be present[,] and he may be tried and sentenced *in absentia*, even if he is not specifically warned that this is a possible consequence of his absence." *People v. Phillips*, 242 Ill. 2d 189, 194-95, 950 N.E.2d 1126, 1130 (2011) (citing *Taylor v. United States*, 414 U.S. 17, 18-20 (1973)). "Waiver of a constitutional right is valid only if it is clearly established that there was 'an intentional relinquishment or abandonment of a known right ***.' " *People v. Johnson*, 75 Ill. 2d 180, 187, 387 N.E.2d 688, 691 (1979) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

¶ 20 In the case *sub judice*, defendant waived his right to a preliminary hearing in June 2013. At that hearing, the trial court admonished defendant, in part, as follows:

> "Mr. Lloyd, do you understand that if this case would go to trial
> and if you didn't appear at the trial, the trial, more than likely,

> would go ahead and proceed in your absence and you'd be deemed to have given up your right to be present and confront and cross-examine witnesses[?]"

Defendant indicated he understood. Defendant ultimately pleaded guilty but failed to appear at sentencing. Now on appeal, defendant contends he did not effectively waive his constitutional right to be present at his sentencing hearing because he was never advised the hearing would proceed in his absence.

¶ 21 "As a matter of constitutional law, it is clear that a defendant who flees during trial may be tried and sentenced in his absence, even if he is not specifically informed that this is a possible consequence of his flight." *People v. Partee*, 125 Ill. 2d 24, 39, 530 N.E.2d 460, 467 (1988). Here, the trial court gave the quoted admonishment at the June 2013 hearing. In March 2014, defendant's bench trial had commenced when the court granted a recess, after which defendant pleaded guilty. Defendant later failed to appear at his June 2014 sentencing hearing and was sentenced *in absentia*. At the hearing on the amended motion to reconsider the sentence in July 2017, defendant stated he missed his sentencing hearing because he "was scared at the time" and "wasn't ready to come to prison yet." As defendant voluntarily absented himself from the sentencing hearing, we find he waived his right to appear.

¶ 22 A defendant also has a statutory right to be admonished as to the possible consequences of failing to appear in court when required. *Phillips*, 242 Ill. 2d at 195, 950 N.E.2d at 1130. Section 113-4(e) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/113-4(e) (West 2012)) provides as follows:

> "If a defendant pleads not guilty, the court shall advise him at the time or at any later court date on which he is present that if he

escapes from custody or is released on bond and fails to appear in court when required by the court that his failure to appear would constitute a waiver of his right to confront the witnesses against him and trial could proceed in his absence."

¶ 23 Defendant argues the trial court's admonishments, which referenced defendant's appearance at *trial*, were insufficient because he pleaded guilty in this case. We find defendant's argument unavailing. Defendant argues as if he was perhaps mistaken about the effects of failing to appear at sentencing since he did not proceed to trial but instead pleaded guilty. Defendant cites no relevant authority in support of this argument. The case cited, *People v. McClanahan*, 191 Ill. 2d 127, 729 N.E.2d 470 (2000), has nothing to do with trials or sentencing hearings held *in absentia*. In fact, the defendant in *McClanahan* attended and participated in his trial and sentencing. The only reference to an intelligent relinquishment of a constitutional right was in relation to the use of laboratory reports in place of live witnesses. *McClanahan*, 191 Ill. 2d at 136-37, 729 N.E.2d at 476-77.

¶ 24 Defendant's claimed misunderstanding that he could be sentenced *in absentia* if he failed to appear after a plea as opposed to trial is further belied by his own testimony once he did appear. Defendant stated: "I was just—I was scared at the time, you know, and I—really I wasn't ready to come to prison yet." He was aware of his sentencing, feared returning to prison, and chose not to appear at that time. This is not a failure to comprehend the effects of failing to appear. This is a clear choice to do so.

¶ 25 In *Smith*, 202 Ill. App. 3d at 607, 560 N.E.2d at 399, the trial court advised the defendant at his arraignment and at the preliminary hearing that, if he failed to appear at any other hearing, he would waive his right to confront witnesses, and the trial would proceed in his

absence. The defendant pleaded guilty, and the trial court sentenced him to probation. *Smith*, 202 Ill. App. 3d at 607, 560 N.E.2d at 399. The State later filed petitions to revoke the defendant's probation and, following a stipulation, the court found the defendant violated his probation. *Smith*, 202 Ill. App. 3d at 607, 560 N.E.2d at 399-400. On the day of resentencing, the defendant appeared prior to the hearing but then left. *Smith*, 202 Ill. App. 3d at 607-08, 560 N.E.2d at 400. The court resentenced defendant *in absentia* to four years in prison. *Smith*, 202 Ill. App. 3d at 608, 560 N.E.2d at 400.

¶ 26 On appeal, this court found the trial court twice advised the defendant that the trial would proceed in his absence if he failed to appear at any hearing. *Smith*, 202 Ill. App. 3d at 608, 560 N.E.2d at 400. We also stated, in part, as follows:

> "Section 113-4(e) of the Code requires the defendant be admonished of the consequences of his absence from trial. [Citation.] However, the defendant need not be specifically admonished that sentencing can occur in his absence. A sentencing hearing is a part of the trial. Therefore, notice that the trial can proceed in a defendant's absence is notice that sentencing may occur in his absence." *Smith*, 202 Ill. App. 3d at 608, 560 N.E.2d at 400.

Other courts have found the term "trial" includes the sentencing hearing. *People v. Miller*, 2014 IL App (1st) 122186, ¶ 31, 8 N.E.3d 1281 (stating " '[a] sentencing hearing is a part of the trial' and, therefore, 'the defendant need not be admonished that sentencing can occur in his absence' ") (citing *Smith*, 202 Ill. App. 3d at 608, 560 N.E.2d at 400); *People v. Wakenight*, 374 Ill. App. 3d 1089, 1097, 872 N.E.2d 555, 561 (2007) (stating "the trial and sentencing hearing[s]

are considered parts of a single proceeding"); *People v. Marks*, 239 Ill. App. 3d 178, 182, 607 N.E.2d 286, 288 (1992) (stating "a sentencing hearing is part of the trial"). The First District has noted how a defendant's voluntary absence may be construed as an effective waiver of his constitutional rights to be present for trial and sentencing. *Miller*, 2014 IL App (1st) 122186, ¶ 31, 8 N.E.3d 1281 (citing *Phillips*, 242 Ill. 2d at 194-95, 950 N.E.2d at 1130).

¶ 27 Defendant argues "[n]o one ever told him that his 'trial' included the sentencing proceedings," the admonishments became irrelevant "once he pled guilty," and he "did not know that the sentencing proceedings would be held in his absence." However, the trial court admonished defendant that if he did not appear for trial, the trial would proceed in his absence. Under *Smith*, notice that a trial may proceed in a defendant's absence constitutes notice that a sentencing hearing may also proceed in his absence.

¶ 28 Moreover, it is hard to believe defendant did not know a sentencing hearing would take place in the future, with or without him, when he pleaded guilty. At the guilty plea hearing, the trial court noted defendant would proceed to an "open sentencing hearing" and the court would "determine what your sentence is going to be." The court also informed defendant of the charge of being an armed habitual criminal, the possible prison terms, and the fact that he was ineligible for conditional discharge or probation. Defendant indicated he understood. To conclude defendant did not know he could be sentenced in his absence would require us to believe defendant thought he could plead guilty and go about his business without consequence. In fact, defendant knew he would be sentenced, as noted by his later excuse that he was not ready to go to prison at the time of the sentencing hearing. Defendant has presented nothing to indicate he did not know the sentencing proceeding would be held in his absence, and thus we find no error. Without a showing of error, we hold defendant to his forfeiture of this issue.

¶ 29 B. Aggravating Factor in Sentencing

¶ 30 Defendant argues his case should be remanded for a new sentencing hearing because the trial court improperly considered his failure to assist in the preparation of a presentence investigation report as a factor in aggravation at sentencing. We disagree.

¶ 31 Defendant admits he failed to preserve this issue by raising it in a postplea motion, which results in forfeiture. However, defendant asks this court to review the issue as a matter of plain error. Thus, we must first determine "whether there was a clear or obvious error at trial." *Sebby*, 2017 IL 119445, ¶ 49, 89 N.E.3d 675.

¶ 32 The Illinois Constitution mandates "[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, § 11. Because a trial court has broad discretion in imposing a sentence, this court will not overturn the sentence absent an abuse of discretion. *People v. Chester*, 409 Ill. App. 3d 442, 450, 949 N.E.2d 1111, 1118-19 (2011). "A court abuses its discretion by fashioning a sentence based upon irrational or arbitrary factors." *People v. Maggio*, 2017 IL App (4th) 150287, ¶ 47, 80 N.E.3d 72.

¶ 33 The fifth amendment to the United States Constitution provides, in part, no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const., amend. V. The fifth amendment's privilege against self-incrimination applies to the states through the fourteenth amendment (U.S. Const., amend. XIV). *In re A.W.*, 231 Ill. 2d 92, 106, 896 N.E.2d 316, 325 (2008) (citing *Allen v. Illinois*, 478 U.S. 364, 368 (1986)).

¶ 34 "In accordance with the text of the Fifth Amendment, we must accord the privilege the same protection in the sentencing phase of 'any criminal case' as that which is due in the trial phase of the same case [citation]." *Mitchell v. United States*, 526 U.S. 314, 328-29

(1999). Our supreme court has noted "[w]hatever information the defendant provided the probation officer could have been used against him at the sentencing proceeding, and he therefore had a right to remain silent." *People v. Ashford*, 121 Ill. 2d 55, 80, 520 N.E.2d 332, 342 (1988).

¶ 35 In *Maggio*, 2017 IL App (4th) 150287, ¶ 46, 80 N.E.3d 72, the defendant argued the trial court erred in considering his refusal to cooperate with the presentence investigation as an aggravating factor at sentencing. The court found it "significant" and "troubling" that the defendant refused to cooperate with a court services department interview and fill out a social history form, which spoke "volumes about his attitude" and his rehabilitative potential. (Internal quotation marks omitted.) *Maggio*, 2017 IL App (4th) 150287, ¶ 49, 80 N.E.3d 72.

¶ 36 This court found "the trial court's remarks were an improper comment on defendant's fifth amendment right to remain silent during the presentence investigation." *Maggio*, 2017 IL App (4th) 150287, ¶ 49, 80 N.E.3d 72. Because the defendant had a right to remain silent, "invocation of the right cannot be used as an aggravating factor at sentencing." *Maggio*, 2017 IL App (4th) 150287, ¶ 49, 80 N.E.3d 72. This court found the trial court abused its discretion and, after being unable to find the factor did not lead to a greater sentence, we vacated the defendant's sentence and remanded for a new sentencing hearing. *Maggio*, 2017 IL App (4th) 150287, ¶¶ 49-50, 80 N.E.3d 72.

¶ 37 The facts in this case are distinguishable from *Maggio*. There, it was the defendant's refusal to answer questions or fill out forms when requested by the court services officer preparing the presentence report which the trial court found problematic. On appeal, this court found the defendant "had a right to remain silent during the presentence investigation, and invocation of the right cannot be used as an aggravating factor at sentencing." *Maggio*, 2017 IL

App (4th) 150287, ¶ 49, 80 N.E.3d 72. The trial court's comments regarding the defendant's refusal to answer questions or provide information as indicative of his lack of rehabilitative potential was found by this court to be an impermissible comment on the defendant's fifth amendment right to remain silent. *Maggio*, 2017 IL App (4th) 150287, ¶ 49, 80 N.E.3d 72.

¶ 38 Here, the only comment by the trial court was, "[i]t is very significant to the Court that Mr. Lloyd failed to show up at his probation appointment and has failed to show up in court today." Other than the State's reference to his failure to appear, nothing else is said about defendant's conduct in this regard. Neither the comment of the State, nor that of the court, was directed at defendant's right to remain silent. Nothing was said about his cooperation or failure to provide answers or information to the court services officer. The comments in this case related to his obligation to appear in court and comply with a court order directing him to the probation department for preparation of a presentence report.

¶ 39 Defendant's failure to appear, both for sentencing and as directed by the trial court, constituted violations of his bail bond. The bond statute (725 ILCS 5/110-10 (West 2012)) provides certain statutory conditions for persons released on a bail bond. They include "(1) [a]ppear to answer the charge in the court having jurisdiction on a day certain and thereafter as ordered by the court until discharged or final order of the court" and "(2) [s]ubmit himself or herself to the orders and process of the court." 725 ILCS 5/110-10(a)(1), (a)(2) (West 2012). The bond sheet filed in this case included the same two conditions, among others. In addition, the presentence report required in felony cases includes a provision for the inclusion of "information concerning the defendant's status since arrest, including his record if released on his own recognizance[.]" 730 ILCS 5/5-3-2(a)(4) (West 2012). The contents of the presentence report are then to be considered by the court pursuant to section 5-4-1(a)(2) of the Unified Code

of Corrections (730 ILCS 5/5-4-1(a)(2) (West 2012)). Defendant's failure to comply or appear was a legitimate consideration of the court, recognized by statute.

¶ 40 Defendant contends his failure to appear for his presentence interview should not have been considered by the trial court because it somehow constitutes a comment on his fifth amendment rights, citing *Maggio* as his only authority. There is no support for such a claim in the record. The court's comment was a legitimate consideration of his status and behavior since being placed on bond, and the court did not err by so noting.

¶ 41 Defendant further claims "[i]t is impossible to say that the court did not increase Mr. Lloyd's sentence based on his failure to assist the probation department with the preparation of the presentence investigation report." We have already determined the court's comments had nothing to do with defendant's "failure to assist" but instead had everything to do with his failure to appear and comply with an order of the court. By statute, the court was permitted to take defendant's failure to appear into consideration when imposing a sentence and, when fashioning an appropriate sentence, could give some weight to it.

¶ 42 "In determining whether the trial court based the sentence on proper aggravating and mitigating factors, a court of review should consider the record as a whole, rather than focusing on a few words or statements by the trial court." *People v. Dowding*, 388 Ill. App. 3d 936, 943, 904 N.E.2d 1022, 1028 (2009). In sentencing defendant, the trial court stated, in part, as follows:

> "Mr. Lloyd is 25. He stands convicted of being an armed habitual criminal. As pointed out, the range is six to 30 years. It is an 85[%] offense. In terms of his prior criminal history, he does have three prior felony convictions. The '06 and '07 are the predicates

> for this particular offense. Apparently, he is still on probation in the 2011 case at this time. There has also been some evidence presented that the defendant has certainly engaged in other significant criminal conduct. In terms of other information, he has a long history of other traffic and misdemeanor offenses. It is very significant to the Court that Mr. Lloyd failed to show up at his probation appointment and has failed to show up in court today. He apparently has two children. He has little education. He has little job history, and in terms of a drug or alcohol problem, it is not clear to the Court based on the scarcity of information the Court has before it. To get right to the point, Mr. Lloyd did plead guilty. That is probably the one thing he has going in his favor, but this Court does believe that Mr. Lloyd is a dangerous person. This Court does believe that Mr. Lloyd needs to be taken off the streets because he is a danger to our community. And in terms of redeeming qualities, I do not see a lot here."

The court then expressly noted its consideration of the presentence investigation report, the statutory factors in aggravation and mitigation, and the particular facts of the case before imposing a 15-year sentence. While the court found it "very significant" defendant failed to show up for his appointment with the probation department, the court also considered a number of other aggravating factors as well. The court noted defendant's criminal history, including a "long history of other traffic and misdemeanor offenses" and found he "has certainly engaged in other significant criminal conduct."

¶ 43 It should be noted the record reveals defendant's *in absentia* sentencing hearing on June 5, 2014, was not a *pro forma* affair where the State and defense stood on the presentence report and factual basis presented at the time of the plea. The State presented substantial testimonial evidence surrounding both the sentencing offense and other past criminal behavior of defendant, all of which was subject to rigorous cross-examination by defendant's counsel.

¶ 44 Even if the trial court had improperly considered defendant's failure to appear in aggravation, it would not necessarily require the case to be remanded. *People v. Bourke*, 96 Ill. 2d 327, 332, 449 N.E.2d 1338, 1340 (1983). Here, the record clearly reveals the court had available to it a number of other more serious factors in aggravation than the failures to appear. The court's consideration of a number of aggravating factors supports the conclusion that remand is unnecessary. *People v. Scott*, 2015 IL App (4th) 130222, ¶ 55, 25 N.E.3d 1257. Defendant's conduct while released on bond was relevant for consideration by the court and, when compared to the other evidence presented at sentencing, did not impermissibly lead to an increase in defendant's sentence. *People v. Gilliam*, 172 Ill. 2d 484, 522, 670 N.E.2d 606, 624 (1996).

¶ 45 Defendant's sentence was 15 years—well below the maximum sentence of 30 years to which he was otherwise subject by the terms of the plea. This fact alone may be considered sufficient to refute any claim of the trial court's consideration of improper factors. *Bourke*, 96 Ill. 2d at 333, 449 N.E.2d at 1341. Thus, we find defendant's sentence was not improperly increased based on the court's statement and remand is not required.

¶ 46 III. CONCLUSION

¶ 47 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this

appeal.

¶ 48 Affirmed.