2019 IL App (1st) 151097-UB

SIXTH DIVISION
February 22, 2019

No. 1-15-1097

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LAVERT BONNER, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. No. 10 CR 11989 (01) Honorable Anna Helen Demacopoulos, Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 ***Held*:** We affirm defendant's conviction for first degree murder over his contention that his jury waiver was invalid. Because the circuit court improperly considered a factor inherent in the offense as a factor in aggravation, we vacate defendant's sentence and remand this case for resentencing.

¶ 2 BACKGROUND

¶ 3 On April 19, 2010, defendant, Lavert Bonner, shot and killed Lawrence Mack. Defendant was subsequently charged by indictment with 24 counts of first degree murder (720 ILCS 5/9-1 (West 2008)), three counts of attempted first degree murder (720 ILCS 5/8-4(a) (West 2008), 720 ILCS 5/9-1(a)(1) (West 2008)), two counts of reckless discharge of a firearm (720 ILCS

5/24-1.5 (West 2008)), and one count of aggravated discharge of a firearm (720 ILCS 5/24-1.2 (a) (West 2008)). The case proceeded to a bench trial on eleven counts of first degree murder, three counts of attempted first degree murder, and one count of aggravated discharge of a firearm. The State nolle prossed the remaining counts.

¶ 4 Defendant's counsel originally indicated to the circuit court that defendant desired a jury trial. However, approximately seven weeks before the scheduled trial date, in defendant's presence, counsel informed the court that he would request a bench trial. The day before trial, counsel again, in defendant's presence, confirmed with the court that he wanted a bench trial. On the day of trial, the court admonished defendant about his right to a jury trial and reviewed his jury waiver form with him:

"THE COURT: Mr. Bonner, you are entitled to a jury trial. Do you know what a jury trial is?

MR. BONNER: Yes.

* * *

THE COURT: Mr. Bonner, is this your signature?

MR. BONNER: Yes.

THE COURT: Do you understand that by signing this document you are waiving your right to a jury trial?

MR. BONNER: Yes.

THE COURT: That means that I will be the person determining whether or not the State has proven you guilty beyond a reasonable doubt. Is that your desire?

MR. BONNER: Yes."

¶ 5 At trial, defendant admitted to shooting and killing Lawrence Mack, but claimed that he had done so in self defense. He testified that he was 17 years old on April 19, 2010. That day, he and Aziz Abdul Rahim, his nephew's father, happened to drive by Mack's home. In front of Mack's house, defendant saw a group of people, including Mack, Daniel "Snake" Duprey, Calvin Gassaway, and Mike Austin. Defendant testified that Duprey waved to them and motioned for them to stop the car. When Rahim pulled over, Duprey asked, "Why the f*** are y'all riding down our block?" Rahim replied that they needed to "squash the beef." Defendant testified that Mack then interjected that "the only way that the beef is gone [sic] get squashed is somebody get out and fight." While Rahim and Mack were exchanging words, defendant saw Duprey approaching with a gun in his hand. Rahim, embroiled in his argument with Mack, did not notice defendant's attempts to get his attention. Defendant testified that he was afraid for his life because Duprey had a reputation for shooting people and had a gun in his hand. To protect himself from Duprey, defendant searched for and found the gun that Rahim occasionally had in his car. When he turned back to Duprey, he saw that Duprey was raising his gun and cocking it. Defendant testified that he hurriedly shot one round at Duprey, the shot that killed Mack.

¶ 6 On cross-examination, defendant was confronted with conflicting accounts that he had given to police. At first, he told the police that he was not present at the time of the shooting. Later, he admitted that he was present, but claimed that Rahim was the shooter. Finally, defendant admitted that he was the shooter. He told the police that he and Rahim passed Mack's house once, then drove to the corner, stopped, and retrieved the gun from its hiding place under the hood of the car. They then drove back past the house in the opposite direction. Rahim yelled for defendant to shoot and defendant fired one shot, not intending to hit Mack.

¶ 7 The State presented the testimony of Austin, Duprey, and Gassaway, who all testified that they were at Mack's house on the day of the shooting. They all testified that they saw defendant and Rahim drive by once, and then return from the opposite direction shortly thereafter. They all also testified that after the second pass, the car stopped, and reversed. Then, defendant pointed a gun out of the window and fired. As the car sped away, Duprey returned fire.

¶ 8 The State also presented the testimony of two other eyewitnesses. Tishia O'Harrow, Mack's neighbor, testified that she heard gunshots and saw a car matching the description of Rahim's car with a gun sticking out of the passenger window in the direction of Mack's house. Davick Barnes testified that he saw a small car drive by, stop, and reverse before he heard shots ring out.

¶ 9 The court found defendant guilty of the first-degree murder with personal discharge of a firearm, and merged all of the other counts into that one. In explaining its conclusion, the court stated that O'Harrow and Barnes were "extraordinarily credible" and that their accounts corroborated the testimony of Austin, Duprey, and Galloway. The court rejected defendant's self-defense theory because defendant's account of the events was not plausible in light of the other evidence. The court later reconsidered the verdict with respect to the attempted murder of Daniel Duprey, and found defendant not guilty on those counts.

¶ 10 Before sentencing, defendant sent a letter to the court in which he asserted "that ineffective assistance of counsel is at hand," and that he did not want to proceed with his current attorney.

¶ 11 In aggravation, the State presented impact statements from Mack's sister and mother. The State also argued that defendant had taken his loving family for granted and that a long prison sentence would "send a message" to the community. Defense counsel argued that the mandatory

minimum of 45 years' imprisonment was "ridiculous in this case." In open court, defendant apologized to Mack's mother and asked for her forgiveness.

¶ 12 The court found that defendant had potential for rehabilitation, stating, "You are young. I believe that there is room for rehabilitation. I do believe that you sincerely take acceptance for what you did that day and that you can be rehabilitated." However, the court noted that it had "no discretion" to sentence defendant to less than the statutory minimum. The court sentenced defendant to 25 years' imprisonment for the murder, with a 25-year enhancement for having personally fired the gun, a total of five years more than the mandatory minimum.

¶ 13 In crafting the sentence, the court listed two aggravating factors:

> "*** one of the things that I need to take into consideration is that, one, you caused a death. That did cause injury to Mr. Mack and his death.
>
> And, secondly, and probably most importantly, is that deterrence factor. How do we get this message across to people that this is not acceptable conduct in our communities? These are our communities. We all care."

¶ 14 Defense counsel moved for reconsideration of the sentence, arguing, *inter alia*, that the court improperly considered in aggravation findings that are implicit in the offense, and that the sentence was excessive. The court denied the motion. This appeal followed.

¶ 15 One of the issues defendant raised on appeal was that the circuit court failed to conduct a proper inquiry regarding defendant's *pro se* claim of ineffective assistance of counsel. The State conceded error on that issue. Consequently, this court issued a partial mandate remanding the case to the circuit court to conduct the required inquiry under *People v. Krankel*, 102 Ill. 2d 181 (1984). We retained jurisdiction over the remaining issues. *People v. Bonner*, 2017 IL App (1st) 151097-U (unpublished summary order under Illinois Supreme Court Rule 23(c)).

¶ 16 On August 31, 2018, defendant appeared before the circuit court with private counsel for the *Krankel* hearing. The hearing was continued until October 26, 2018, when the court entered a ruling finding insufficient evidence of ineffective assistance of counsel. The defendant has not taken an appeal from those post-remand proceedings. We now address the remaining issues that we reserved in our 2017 order.

¶ 17 ANALYSIS

¶ 18 Aside from the *Krankel* issue, defendant raises five issues on appeal. He claims: (1) his jury waiver was invalid because the trial court did not provide sufficiently detailed admonitions; (2) his sentence is excessive under the eighth amendment to the United States Constitution (U.S. Const., amend.VIII) and the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11); (3) he should be resentenced under a new law which became effective while his appeal was pending;[1] (4) the trial court improperly increased his sentence because his actions caused a death, even though death was a factor inherent in the underlying offense; and (5) his mittimus should be corrected to reflect the proper number of days of credit for pre-trial detention.

¶ 19 Defendant first contends that he did not make a valid waiver of his right to a jury trial. He argues that the circuit court failed to explain the nature of a jury trial and did not specifically inquire as to whether his waiver was voluntary. Defendant admits that he forfeited this claim by not raising it in the trial court but contends that it is reviewable as plain error. The first step in a plain-error analysis is determining whether an error occurred at all. *People v. West*, 2017 IL App (1st) 143632, ¶ 11.

[1] Defendant has withdrawn this contention in light of our supreme court's recent opinion in *People v. Hunter*, 2017 IL 121306, which settled the question of whether the new law applied to defendants whose appeals were pending when the law came into effect.

¶ 20 A defendant may waive his constitutional right to a jury trial, and that waiver is valid if the defendant understandingly, or knowingly and voluntarily, relinquishes his right to a jury trial. *Id.* ¶ 10. A written jury waiver is a means by which a defendant may waive his right but is not conclusive. *Id*. The court need not give any specific admonishment or advice for a waiver to be effective. *Id*. The court must ensure that the defendant knows that the facts of his case will be determined by a judge rather than a jury and knows the consequences of that decision. *Id*. We determine the validity of a jury waiver under the circumstances of the particular case, and we have no precise formula for making the determination. *Id*. A jury waiver is generally valid when defense counsel waives the right in open court and the defendant does not object to the waiver. *Id*. The defendant bears the burden of establishing that his waiver was invalid, and we review *de novo* the validity of a jury waiver. *Id*.

¶ 21 Here, defendant contends that the circuit court did not ensure that he knew what a jury trial was. Although the court did ask him if he knew, and he responded in the affirmative, he contends that the court should have told him that a jury is comprised of 12 individuals from the community, that defense counsel would be involved in the selection of jury members, that the jury would have to reach a unanimous decision. Additionally, he contends that the court should have informed him that he had the constitutional right to demand a jury trial. Finally, defendant contends that the court should have inquired as to whether his waiver was the result of threats or promises. Because defendant lacked any experience with the criminal justice system and had only a ninth-grade education, he contends that the court should have performed a more detailed inquiry into whether his jury waiver was knowing, intelligent, and voluntary. However, this argument is unavailing.

¶ 22 On two separate occasions before trial, defendant's counsel indicated that the case would be a bench trial rather than a jury trial. Defendant did not object on either occasion. Neither did defendant object on the day of trial. The court told defendant that he was entitled to a jury trial. The court then asked whether defendant knew what a jury trial is, to which he replied, "Yes." The court then asked whether he understood that by signing the jury waiver he was waiving his right to a jury trial. Again, defendant replied, "Yes." The court then went on to explain that defendant's waiver meant "that I [the judge] will be the person determining whether or not the State has proven you guilty beyond a reasonable doubt." Defendant again expressed that that was his wish. On these facts, defendant has failed to show that he was unaware of his rights or the consequences of his waiver. He signed a jury waiver and verbally indicated that he understood what a jury trial was, what a bench trial was, and that he wished to waive his right to a jury trial. Additionally, counsel twice stated in open court that defendant was requesting a bench trial, with no objection from defendant. The record is bereft of any indication that defendant's waiver was involuntary. We therefore conclude that he has failed to show that his jury waiver was not intelligently and voluntarily made. See *People v. Smith*, 372 Ill. App. 3d 179, 181 (2007) (without error there can be no plain error).

¶ 23 Next, we address defendant's contention that the trial court improperly increased his sentence because his actions caused a death, even though death was a factor inherent in the underlying offense. In determining the propriety of a sentence, we must consider the record as a whole and not focus on a few words or statements made by the trial court. *People v. Walker*, 2012 IL App (1st) 083655, ¶ 30. When the trial court mentions an improper factor, but gives insignificant weight to that factor and it does not result in a greater sentence, the case need not be remanded for resentencing. *Id.* The trial court is generally prohibited from considering a factor

implicit in the offense as an aggravating factor at sentencing. *People v. Phelps*, 211 Ill. 2d 1, 11 (2004). In other words, one factor cannot be used as both an element of the offense, and as a basis for imposing a sentence that is harsher than what might otherwise have been imposed. *Id*. at 11-12. In crafting a sentence for murder, the court may consider the use of force or the manner in which death was brought about, but it may not rely on the mere fact that the defendant caused a death. *People v. Saldivar*, 113 Ill. 3d 256, 271-72 (1986). Whether the trial court considered an improper factor at sentencing is reviewed *de novo*. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 49.

¶ 24 Defendant argues that the circuit court improperly increased his sentence because he caused the death of Lawrence Mack. He points out that the court specifically enumerated two aggravating factors: that defendant caused Mack's death, and the need for deterrence. The court stated, "one of the things that I need to take into consideration is that, one, you caused a death. That did cause injury to Mr. Mack and his death. And, secondly, and probably most importantly, is that deterrence factor." Defendant contends that he is entitled to a new sentencing hearing because of this error.

¶ 25 The State argues that the court's comment about Mack's death was merely a passing reference to the murder, rather than a factor that the court relied upon. The State correctly points out that "the trial court's perfunctory observation that defendant 'has murdered a person' or the trial court's simple acknowledgment that the victim died does not establish that the trial court improperly considered death as an aggravating factor." *People v. Verser*, 200 Ill. App. 3d 613, 620 (1990). But that argument belies the language that the court used in this case. The court made more than a perfunctory observation. It specifically listed Mack's death as a factor that *must* be taken into consideration: "one of the things that I need to take into consideration is that,

one, you caused a death." The court went on to list the need for deterrence as a "second" factor to be considered. Rather than address the force used or the manner of Mack's death, the court simply focused on the fact that defendant had "caused a death." This reliance on an improper factor was error. See *Saldivar*, 113 Ill. 3d at 271.

¶ 26 The State also argues that even if the court did rely on an improper factor, the reliance was so insignificant that it did not lead to a greater sentence. The State points out that the sentence was only five years greater than the statutory minimum, and that the court placed more emphasis on the importance of deterrence than on the fact that defendant caused a death. The court stated that "probably most importantly," the sentence would deter others from "the senseless pulling of a trigger." Therefore, the State argues, the sentence was increased only as a result of "the deterrence factor." However, that argument also fails. Although the record indicates that the court put more emphasis on deterrence than on Mack's death, it is impossible to conclude from this record that the court gave the improper factor such insignificant weight that it had no effect on the sentence. Because the record does not indicate how much weight the circuit court gave to the fact that defendant caused a death, we must vacate the sentence and remand for a new hearing. See *People v. Bourke*, 96 Ill. 2d 327, 332 (1983) ("Where the reviewing court is unable to determine the weight given to an improperly considered factor, the cause must be remanded for resentencing.").

¶ 27 Defendant's next argument is that his sentence runs afoul of the eighth amendment to the United States Constitution (U.S. Const., amend.VIII) and the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). The primary thrust of the argument is that defendant's 45-year minimum sentence and 50-year actual sentence were impermissible *de facto*

life sentences under *People v. Reyes*, 2016 IL 119271 and *People v. Ortiz*, 2016 IL App (1st) 133294, respectively.

¶ 28 However, we need not reach defendant's claims about the constitutionality of his sentence in light of our decision to remand for resentencing. See *People v. Brown*, 225 Ill. 2d 188, 200 (2007) ("If a court can resolve a case on nonconstitutional grounds, it should do so.") On remand, defendant is entitled to be resentenced under the law in effect at the time of resentencing, including the recent amendment to the Code of Corrections making the circuit court's application of firearm enhancement discretionary for defendants who were under 18 years of age at the time of their offense. 730 ILCS 5/5-4.5105(b), (c) (West Supp. 2015); see *Reyes*, 2016 IL 119271, ¶¶ 11-12. At the time of trial, defendant was subject to a 45-year minimum aggregate sentence (20 years for first-degree murder and a mandatory 25-year firearm enhancement.) However, on remand, the defendant will be subjected to a mandatory minimum aggregate sentence of 20 years' imprisonment, a term that is not a *de facto* life sentence. See *Id.*, ¶ 12 (holding that 32 years' imprisonment is not a *de facto* life sentence.) Since we have already vacated defendant's sentence and the sentencing scheme which defendant will be subject to on remand does not mandate that defendant serve a *de facto* life sentence, defendant is not entitled to further relief under *Reyes*.

¶ 29 Finally, defendant contends that his mittimus should be amended to reflect 1,793 days of presentencing credit, rather than the 1,785 days awarded by the court. The State agrees. Accordingly, while we remand this case for resentencing, we order that any future mittimus should reflect those eight additional days of presentencing credit. Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999); *People v. Harris*, 2012 IL App (1st) 092251, ¶ 38.

¶ 30 CONCLUSION

¶ 31 We affirm the defendant's conviction for first-degree murder. However, we vacate his sentence and remand for resentencing.

¶ 32 Affirmed in part; vacated in part; cause remanded.