2019 IL App (1st) 171797-U

No. 1-17-1797

Order filed September 12, 2019

Fourth 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. 16 CR 5123
	)	
DARRICK SKIPPER,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's forfeiture of his claim that the trial court relied upon improper factors in aggravation at sentencing must be honored when he failed to establish plain error.

¶ 2 Following a bench trial, defendant Darrick Skipper was found guilty of possession of cocaine with intent to deliver and possession of cannabis with intent to deliver. He was sentenced to 14 years in prison for possession of cocaine with intent to deliver and a concurrent 5-year sentence for possession of cannabis with intent to deliver. On appeal, he contends that his

sentences must be vacated and the cause remanded for resentencing because the trial court relied in aggravation on certain juvenile cases that did not result in delinquency findings. We affirm.

¶ 3 Defendant was charged with possession with intent to deliver 15 grams or more but less than 100 grams of cocaine (720 ILCS 570/401(a)(2)(A) (West 2016)), possession with intent with deliver more than 30 grams but not more than 500 grams of cannabis (720 ILCS 550/5(d) (West 2016)), and two counts of unlawful use or possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2016)).

¶ 4 Chicago police officer Rocco Pruger testified that on March 8, 2016, he was part of a team executing a search warrant at a residence on South Kildare Street. Once inside, he observed defendant pushing a woman through a bedroom window. Defendant then went through the window and landed on the woman. Pruger radioed other officers to detain defendant. Pruger observed narcotics and cannabis on a table in the bedroom.

¶ 5 Chicago police officer David Salago testified that he observed numerous Ziploc baggies containing cannabis, a bowl of loose cannabis, and a scale in the bedroom. A bag containing "a large amount" of crack cocaine, a social security card bearing defendant's name, and ammunition were also recovered from the bedroom. Salago later read the *Miranda* warnings to defendant, and asked why defendant jumped out the window. Defendant stated he jumped because he "had the weed and coke inside," and did not "want to get caught."

¶ 6 The parties stipulated that forensic scientist Daniel Beerman would testify that he received the 37 plastic bags of plant material recovered, that the contents of one bag tested positive for cannabis and weighed 33.8 grams, and that the estimated weight of the other 36 bags was 28.3 grams. Beerman would further testify that he received a bag that contained 101 bags of

a "chunky substance," that the contents of one bag tested positive for cocaine and weighed 23.5 grams, and that the other 100 bags had an estimated weight of 19.8 grams. The parties also stipulated that defendant was convicted of unlawful use of a weapon by a felon in case number 03 CR 17197, and aggravated involuntary servitude in case number 11 CR 21037.

¶ 7 The defense called defendant's mother, Sandra Skipper, who testified that she lived on the first floor of the South Kildare residence. Defendant moved in with her in the fall of 2016, and her grandson Damon Skipper also lived with her.

¶ 8 Defendant testified that in March 2016, he was on parole and living with his mother, but actually spent most nights elsewhere. He acknowledged a 2011 conviction for involuntary servitude, a 2008 conviction for theft, and a 2007 conviction for possession of a controlled substance. Defendant had problems with Damon, who was "dealing in some activities" that defendant did not want happening in his mother's house. Defendant told Damon to stop or move. After finding drugs behind a stove, defendant destroyed the drugs and confronted Damon. Damon threatened him, and afterward defendant stayed away from Damon. On the day of his arrest, defendant went to the South Kildare address to get his book bag when he saw his girlfriend looking out a window. She exited the window and landed on him. Defendant was then arrested. He denied being in the apartment that day prior to his arrest or owning the drugs, packing materials, and ammunition that officers recovered.

¶ 9 The trial court found defendant guilty of possession of cocaine with intent to deliver and possession of cannabis with intent to deliver, but not guilty of the unlawful use or possession of a weapon by a felon. Defendant filed a motion for a new trial, which the court denied.

¶ 10 Defendant's presentencing investigation (PSI) report showed that he had juvenile arrests for delivery, assault and intimidation, possession of a stolen motor vehicle, battery, and residential burglary. The cases for delivery (95 JD 02788) and assault and intimidation (98 JD 03571) did not result in findings of delinquency. However, the three other juvenile arrests, for possession of a stolen vehicle, battery, and residential burglary, resulted in delinquency findings. As an adult, defendant had three prior drug-related felony convictions, two prior felony weapons convictions, a conviction for aggravated involuntary servitude, a felony theft conviction, and a conviction for domestic battery. The PSI report also stated that defendant had used alcohol and marijuana since he was 10 years old.

¶ 11 In aggravation, the State highlighted defendant's adult criminal history, including defendant's prior conviction for aggravated involuntary servitude. The State noted that in that case, defendant told the homeless victim that she was going to work as a prostitute and, when she refused, defendant struck her in the face and "forcibly raped" her. The defense argued in mitigation that defendant had strong familial and community ties, and had been compliant with his parole requirements until his arrest. Defendant had also been in a GED program, attended an anger management program, and was working. In allocution, defendant apologized to his mother and the court for his "wrong doings."

¶ 12 In sentencing defendant, the court stated that defendant had

> "been a thug and a criminal your whole life. When you were a juvenile going back to 1995, delivery of drugs, '98 assault and intimidation, 1998 possession of a stolen car, 1998 battery, 1998 residential burglary, you turn of age for criminal jurisdiction. Selling drugs, delivery in 2000, delivery again in 2000, having a gun with a felony record 2002,

another gun in 2003, involuntary servitude *** in 2011 again. And now here you are. You are a criminal."

¶ 13 The court sentenced defendant to a 14-year prison term for possession of cocaine with intent to deliver, and a concurrent 5-year sentence for possession of cannabis with intent to deliver. The court noted that it sentenced defendant to "less than half the maximum" because it had considered "some mitigating factors," The defense filed an oral motion to reconsider sentence. The court denied the motion, noting that defendant was sentenced to "less than half the maximum sentence that [he was] eligible for in light of his extreme criminal history."

¶ 14 On appeal, defendant contends that his sentences must be vacated and the cause remanded for resentencing when the trial court improperly relied on certain juvenile adjudications that defendant "did not actually have" when fashioning his sentences. Defendant notes that this claim is forfeited because counsel failed to object. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). ("It is well settled that, to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required"). He therefore asks this court to review the issue pursuant to the plain error doctrine. In the alternative, defendant contends that he was denied the effective assistance of counsel by counsel's failure to preserve the issue.

¶ 15 The State acknowledges that the trial court mentioned three juvenile charges that were subsequently dismissed, but responds that defendant cannot establish plain error when his sentences were appropriate based upon the offenses and defendant's lengthy criminal history, and the complained-of juvenile cases were not a significant factor in the trial court's determination of defendant's sentences.

¶ 16 To establish plain error in the context of sentencing, a defendant must show that a clear or obvious error occurred and "that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *Id.* Under either prong of the plain error doctrine, the burden of persuasion remains on the defendant. *Id*. The first step of plain error review is to determine whether a clear or obvious error occurred. *People v. Sebby*, 2017 IL 119445, ¶ 49.

¶ 17 As a threshold matter, we note that defendant's sentences were within the statutory range. Defendant was convicted of possession of a controlled substance with intent to deliver, a Class X offense with a sentencing range of between 6 and 30 years in prison. 720 ILCS 570/401(a)(2)(A) (West 2016). The 14-year sentence imposed by the trial court is within the lower half of the sentencing range. Defendant was also convicted of possession of cannabis with intent to deliver (720 ILCS 550/5(d) (West 2016)), a Class 3 felony with a sentencing range of between two and five years in prison (730 ILCS 5/5-4.5-40(a) (West 2016)). The five-year sentence imposed by the court was the statutory maximum.

¶ 18 A sentence within the statutory guidelines is presumed proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46. In order to overcome this presumption, defendant "must make an affirmative showing that the sentencing court did not consider the relevant factors." *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38. The mere mention of an improper factor in passing does not mean that the court relied on that factor in determining the appropriate sentence (*People v. Beals*, 162 Ill. 2d 497, 509-10 (1994)), because a trial court is presumed to have recognized and disregarded incompetent evidence unless the record affirmatively reveals the contrary (*In re N.B.*, 191 Ill. 2d 338, 345 (2000) (a trial court is "presumed to know the law and apply it

properly, absent an affirmative showing to the contrary in the record")). "Where a trial court considers an improper factor in aggravation, we must order resentencing if we cannot determine the weight that the trial court gave to the aggravating factor." *People v. Minter*, 2015 IL App (1st) 120958, ¶ 152.

¶ 19 However, where the trial court appears to place minimal emphasis upon an improper factor, a new sentencing hearing is not required. *Id*. In determining whether trial courts have afforded significant weight to improper factors, reviewing courts may consider (1) whether the trial court made any dismissive or emphatic comments in reciting its consideration of the improper factor, and (2) whether the sentence received was substantially less than the maximum sentence permissible by statute. *People v. Dowding*, 388 Ill. App. 3d 936, 945 (2009). The question of whether a court relied on an improper factor in imposing sentence is a question of law that we review *de novo*. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 49.

¶ 20 Here, the parties note, and we agree, that defendant's PSI report reveals that case number 95 JD 02788, in which defendant was charged with delivery, and case number 98 JD 03571, in which defendant was charged with assault and intimidation, did not result in findings of delinquency. Defendant argues that the trial court's consideration of these juvenile cases, which amounted to arrests, but not adjudications, in aggravation was improper. See *People v. Johnson*, 347 Ill. App. 3d 570, 575 (2004) (the court may not consider pending charges and bare arrests in aggravation when determining a defendant's sentence). However, based upon the record before us, we cannot agree with defendant that remand is warranted when the record reveals that the trial court merely mentioned these cases in passing.

¶ 21 The transcript shows that the trial court focused on defendant's choice to be a "thug and a criminal [his] whole life," a statement that replied to the defense's argument that defendant had strong ties to his family and community, and had been compliant with his parole requirements until his arrest in this case. The court then listed the five times defendant had contact with the court system before he "turn[ed] of age for criminal jurisdiction." The court next listed five of defendant's prior felony convictions to support its conclusion that defendant was a criminal.

¶ 22 First, we cannot say that the trial court's mere mention of the three complained-of juvenile charges meant that the trial court considered them as convictions or held them against defendant when determining defendant's sentences. The court is presumed to know the law and apply it properly. *In re N.B.*, 191 Ill. 2d at 345. Here, the court listed all of defendant's juvenile cases, regardless of outcome, to illustrate its point that defendant had chosen, from a very young age, to live as a criminal. Second, even accepting defendant's argument that the trial court should not have mentioned the complained-of juvenile charges, we find that the weight was insignificant when the court's conclusion that defendant led a criminal lifestyle was supported by seven prior felony convictions. *Minter*, 2015 IL App (1st) 120958, ¶ 152 (a new sentencing hearing is not required when it appears that the trial court placed minimal emphasis on the improper factor). Moreover, the court only mentioned those charges once as it listed defendant's contact with the court system, and although defendant was eligible for a Class X sentence of up to 30 years in prison, the court sentenced him to a total of only 14 years. See *Dowding*, 388 Ill. App. 3d at 945. As defendant has not established that the trial court erred, he cannot establish plain error (*Sebby*, 2017 IL 119445, ¶ 49), and we must honor his procedural default.

¶ 23 Moreover, because defendant has not established that an error occurred, we need not address defendant's alternative argument that trial counsel was ineffective for failing to object when the trial court mentioned the complained-of juvenile charges. See *People v. Hensley*, 2014 IL App (1st) 120802, ¶ 47 (where there is no plain error, there can be no ineffective assistance of counsel).

¶ 24 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 25 Affirmed.