2019 IL App (3d) 170418-U

Order filed July 3, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-17-0418 Circuit No. 15-CF-717
KIANGELO G. MARSHALL,	)	Honorable John P. Vespa,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices McDade and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Trial court's construction of defendant's letter at sentencing did not constitute an abuse of discretion; and (2) trial court's consideration of threat of serious harm in aggravation was not improper.

¶ 2 Defendant, Kiangelo G. Marshall, appeals after pleading guilty to first degree murder. He challenges only his sentence, arguing that the trial court abused its discretion in finding that he lacked remorse and that it considered an improper aggravating factor. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On February 21, 2017, defendant entered an open guilty plea to first degree murder (720 ILCS 5/9-1(a)(3) (West 2014)). The State provided a factual basis for the plea based on statements from witnesses, two codefendants, and investigators. The factual basis established that defendant and approximately five other individuals entered a house at 2405 North Flora in an attempt to steal marijuana and money. Defendant carried a .22-caliber long rifle handgun and was seen shooting into the house. Another intruder carried a 9-millimeter handgun. Five people who were in the house attempted to flee. Two occupants of the house suffered nonlethal gunshot wounds while Tommie Forest suffered a fatal gunshot wound to his head. An autopsy revealed that the fatal wound was caused by a "medium caliber bullet." Eight .22- caliber long rifle shell casings were recovered from the scene, as well as three 9-millimeter shell casings. The defense concurred in the factual basis and the court accepted defendant's plea.

¶ 5 A sentencing hearing was held on May 3, 2017. Defendant submitted a written statement to the court. Because of its relevance to this appeal, we will reproduce that letter in full here. Defendant wrote:

> "I am sorry for the situation I was involved in. I did not intend for anyone to get hurt and even more than that I didn't want anyone to die. But I still realize I have to accept responsibility for my actions.
>
> I never should have agreed to go with others to commit a robbery. I know doing that makes me guilty of murder even though I wasn't the one who shot Tommie Forest. Nothing can take back what happened and I know I will have a long prison sentence because of it, but I am asking for the minimum sentence of 35 years. That way I can eventually have a chance to be a part of society and try to give something back to the world.

> I know Tommie Forest will never get that chance and there is nothing I can do to make up for his death. I know I'm responsible under the law and that's why I pled guilty, so that Tommie's family wouldn't be put through a trial and I could start my punishment right away. Pleading guilty was the only way I had to make things better for them."

¶ 6 In arguing for a maximum sentence of 75 years' imprisonment, the State revealed that Forest was 14 years old, and that the other occupants of 2405 North Flora were all teenagers.

¶ 7 During defense counsel's argument, he insisted that defendant had accepted responsibility for the offense. The court cut counsel off and pointed out that defendant had commented that he was "sorry for the situation." The court opined: "I read that as 'I'm not sorry.' " Defense counsel insisted that defendant was taking responsibility, and continued in his argument.

¶ 8 At the close of arguments, defendant spoke briefly in allocution. He stated:

> "First off, I would like for the family to know that I am not the one who shot and killed Tommie Forest. I'm taking responsibility for being there and following a group of people who meant no good. I do deserve punishment for the things I have done, but I am not the one who killed Tommie Forest."

The court immediately responded: "That's what I got out of the letter, too, [defense counsel]. Not taking responsibility in other words. *** If anyone wants to describe that as him taking responsibility, you're wrong by the way." The court did concede that defendant's guilty plea was nevertheless worthy of some credit, commenting: "[T]hat's not a small thing." In considering the aggravating factors, the court found that defendant's conduct threatened serious

harm. The court observed that defendant and others had forced their way into the house "[g]uns a blazing." The court sentenced defendant to a term of 65 years' imprisonment.

¶ 9 Defendant filed a motion to reconsider sentence in which he alleged, *inter alia*, that the court erred in finding that defendant had denied responsibility for the offense. The court denied the motion.

¶ 10 II. ANALYSIS

¶ 11 On appeal, defendant argues that the court abused its discretion by construing his letter and allocution as indicating a lack of remorse. He also contends that the court erred when it considered the threat of serious harm as a factor in aggravation, arguing that it is inherent in the offense of first degree murder. We address these arguments in turn.

¶ 12 A. Lack of Remorse

¶ 13 A defendant's lack of remorse, or his "failure to show a penitent spirit," may be considered in aggravation at sentencing. *People v. Ward*, 113 Ill. 2d 516, 529 (1986). On the other hand, a defendant's remorse for committing the offense must be considered in mitigation. See *People v. Thurmond*, 317 Ill. App. 3d 1133, 1143 (2000).

¶ 14 The weight to be given to aggravating and mitigating factors at sentencing is a matter within the trial court's sound discretion. *People v. Dominguez*, 255 Ill. App. 3d 995, 1004 (1994). It follows that the court's determinations as to the existence or applicability of these factors are also matters of discretion. See *People v. Lefler*, 2016 IL App (3d) 140293, ¶ 31. Accordingly, the court's determination in the present case that defendant did not show remorse for the offense will be disturbed on review only if that decision is arbitrary, fanciful, or unreasonable to the extent that no reasonable person could reach the same conclusion. See *People v. Ramos*, 353 Ill. App. 3d 133, 137 (2004). The trial court's decision is granted such

deference because it is in a far better position than the reviewing court "to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environments, habits, and age." *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). This rationale applies with especially great force in the present case, where the court's conclusion that defendant lacked remorse was a pure credibility determination.

¶ 15 Initially, the State contends that defendant has forfeited the present issue by failing to register a contemporaneous objection. Thus, the State argues that the plain error doctrine is defendant's only recourse. We disagree with the State's characterization. During defense counsel's argument, the trial court interjected to make clear that it did not find defendant remorseful. Counsel then vehemently defended his point that defendant was, in fact, remorseful. When the court later reiterated that it found a lack of remorse or accountability on defendant's part, the court referenced defense counsel by name, making clear that it had considered counsel's argument on the point. Preservation of errors at the trial level is required because "[f]ailure to raise claims of error before the trial court denies the court the opportunity to correct the error immediately and grant a new trial if one is warranted, wasting time and judicial resources." *People v. McLaurin*, 235 Ill. 2d 478, 488 (2009). Here, the trial court was given immediate notice of defense counsel's disagreement, and thus was provided the opportunity to reverse course. To find that counsel failed to preserve the issue merely because he did not utter the word "objection" would be to elevate form over substance.

¶ 16 While we find that counsel properly preserved the present contention of error, we find that the trial court's determination did not amount to an abuse of discretion. To be sure, defendant's acknowledgement that he was legally responsible for Forest's death, even if he did not personally shoot Forest, was consistent with felony murder and accountability principles.

Portions of defendant's letter, as well as his entire allocution, were nevertheless devoted to his insistence that he did not actually kill Forest. The court reasoned that the bare acknowledgement of legal responsibility was not necessarily indicative of true remorse. This conclusion, in the trial court's opinion, was bolstered by defendant's letter, which opened not with an apology for murdering Forest, but merely "for the situation [defendant] was involved in."

¶ 17 While portions of defendant's letter were more apologetic or remorseful, the court ultimately concluded that those professions were not credible. Given that the trial court was in the best position to observe defendant's demeanor and judge his credibility, we cannot say that its conclusion was arbitrary, fanciful, or unreasonable. Accordingly, we find that the trial court did not abuse its discretion in finding that defendant lacked remorse.

¶ 18 B. Threat of Severe Harm

¶ 19 Defendant next argues that the threat of serious harm is inherent in the offense of first degree murder. Thus, he contends that it was improper for the trial court to consider that factor in aggravation when imposing sentence.

¶ 20 Section 5-5-3.2(a) of the Unified Code of Corrections (Code) sets out a list of 32 factors to be consider in aggravation at sentencing. 730 ILCS 5/5-5-3.2(a) (West 2016). First on that list is that "the defendant's conduct caused or threatened serious harm." *Id.* § 5-5-3.2(a)(1). "Generally, a trial court may not consider as an aggravating factor in sentencing a fact that is inherent in the offense with which the defendant was charged." *People v. Sanders*, 2016 IL App (3d) 130511, ¶ 13. Whether an aggravating factor is inherent in the offense is a question of statutory construction that we review *de novo*. *People v. Phelps*, 211 Ill. 2d 1, 12 (2004).

¶ 21 Notably, defendant did not object at sentencing when the court found that the threat of serious harm was a factor in aggravation, nor was the issue raised in defendant's motion to

reconsider sentence. Defendant thus seeks review of his claim under the rubric of plain error. Alternatively, he argues that counsel's failure to preserve the issue amounted to ineffective assistance. The first step in any plain error analysis is determination of whether any plain or obvious error has been committed. See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). We therefore begin with *de novo* consideration of whether the trial court considered a factor inherent in the offense.

¶ 22 The State does not dispute that the threat of serious harm *to the victim* is inherent in the offense of first degree murder. It contends, however, that defendant's conduct in the present case threatened harm to all of the occupants of the house at 2405 North Flora. Defendant takes exception with this construction. Relying on *People v. Saldivar*, 113 Ill. 2d 256 (1986), he maintains that "[f]or first degree murder, whether defendant's conduct caused or threatened serious harm should be confined to only defendant's conduct regarding the force and manner he used to cause Tommie Forest's death."

¶ 23 We disagree with defendant's interpretation. Initially, section 5-5-3.2(a)(1) of the Code provides simply that the trial court may impose a more severe sentence where "the defendant's conduct caused or threatened serious harm." 730 ILCS 5/5-5-3.2(a)(1) (West 2016). The statute does not specify that this harm be suffered by the victim. Further, it is telling that factor (a)(1) refers broadly to "conduct," rather than purely to a defendant's "offense." This language suggests that a broader look at defendant's behavior is mandated. Indeed, many of the other statutory aggravating factors refer only to the specific "offense" or "crime" committed. *Id.* § 5-

5-3.2(a)(2) to (31). Finally, it is well-settled that uncharged conduct is relevant at sentencing. *E.g.*, *People v. Flores*, 153 Ill. 2d 264, 296 (1992).[1]

¶ 24 The only citation defendant offers in support of his contention that the threat of serious harm must be limited to the victim is to our supreme court's decision in *Saldivar*. His reliance upon that case is misplaced. In *Saldivar*, the trial court considered in aggravation the serious harm inflicted by the defendant convicted of manslaughter. *Saldivar*, 113 Ill. 2d at 264. The defendant later argued that such a consideration was improper, where the serious harm of death was plainly inherent in the offense of manslaughter. The *Saldivar* court held that consideration of the mere fact of death was an improper double enhancement, but that a sentencing court may nevertheless consider the degree of harm done, or the egregiousness in how the victim's death was brought about. *Id*. at 271-72. The court noted:

> "While the classification of a crime determines the sentencing range, the severity of the sentence depends upon the *degree of harm* caused to the victim and as such may be considered as an aggravating factor in determining the exact length of a particular sentence, *even in cases where serious bodily harm is arguably implicit in the offense for which a defendant is convicted.*" (Emphases in original.) *Id*. at 269.

Later, the *Saldivar* court concluded: "[I]n applying the statutory aggravating factor that the defendant's conduct caused serious harm to the victim, [the court may] consider the force employed and the physical manner in which the victim's death was brought about." *Id*. at 271.

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[1]We note that this court has reached a similar conclusion at least once before. In *People v. Solano*, 221 Ill. App. 3d 272, 272-73 (1991), the defendant was convicted of reckless homicide and driving under the influence after a car he was driving collided with a train. One passenger in the car died while another suffered serious injuries. *Id*. at 273. The trial court considered in aggravation the serious harm suffered by the surviving passenger—not the victim of the reckless homicide—and this court affirmed. *Id*. at 274.

¶ 25 It is evident that the *Saldivar* court, in referring at times to serious harm caused "to the victim," did not intend to announce a rule that such harm was the sole type of harm that may be considered by the sentencing court. First, as we observed above, such a requirement is plainly not found in the statutory language. Moreover, the facts in *Saldivar* show that the only person who could have suffered any serious harm was the victim, and the verbiage employed by the court simply reflects that fact. The *Saldivar* court had no reason to address the appropriateness of considering harm or the threat of harm to others, because the facts of the case did not call for it. Thus, we conclude that our supreme court allowed that the sentencing court may consider the degree of harm done to a murder victim, it was not holding that such harm is *exclusively* the only harm that may be considered.

¶ 26 The factual basis presented at defendant's guilty plea established that defendant, carrying a .22-caliber long rifle handgun, entered a house with five occupants, later revealed to be teenagers. Defendant fired at least eight shots from his gun. As the trial court described the scene at sentencing, defendant and others entered the house "[g]uns a blazing." While it was not established that any of the three gunshot victims were hit by bullets from defendant's gun, there can be no doubt that defendant's conduct at least threatened serious harm to every person in that house. It was not error for the trial court to consider that fact in aggravation.

¶ 27 Having found not clear or obvious error, we must honor defendant's forfeiture of this issue. Additionally, it follows that where the trial court did not err, any objection on the part of defense counsel would have been unavailing. *E.g.*, *People v. Easley*, 192 Ill. 2d 307, 329 (2000) ("[I]t is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong."). Accordingly, we also reject defendant's argument that counsel was constitutionally ineffective.

¶ 28 III. CONCLUSION

¶ 29 The judgment of the circuit court of Peoria County is affirmed.

¶ 30 Affirmed.