2019 IL App (4th) 170254-U

NO. 4-17-0254

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
July 29, 2019
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
LYARRON T. EMERS,	)	No. 16CF426
Defendant-Appellant.	)	
	)	Honorable
	)	Heidi N. Ladd,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Cavanagh concurred in the judgment.

ORDER

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

¶ 2 In February 2017, a jury found defendant, Lyarron T. Emers, guilty of unlawful possession with intent to deliver a controlled substance (1 gram or more but less than 15 grams of a substance containing cocaine), a Class 1 felony (720 ILCS 570/401(c)(2) (West 2016)). In April 2017, the trial court found defendant subject to mandatory Class X sentencing pursuant to section 5-4.5-95(b) of the Unified Code of Corrections (Code) (730 ILCS 5/5-4.5-95(b) (West 2016)) and sentenced him to 18 years in prison.

¶ 3 Defendant appeals, arguing the trial court improperly considered his refusal to assist in the preparation of a presentence investigation report as a factor in aggravation at

sentencing. He asks this court to reduce his sentence to the minimum term of six years in prison or, alternatively, vacate the sentence and remand for a new sentencing hearing. For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 Defendant does not challenge the sufficiency of the evidence. We thus limit our recitation of the facts to those necessary to resolve defendant's claims.

¶ 6 A. Jury Trial and Conviction

¶ 7 On March 23, 2016, members of the United States Marshals Service located and arrested defendant at Common Ground Food Co-op in Urbana, Illinois, where defendant worked in the delicatessen. Defendant was served with a Champaign County warrant for home invasion and was also the subject of an outstanding Illinois Department of Corrections parole warrant. Upon his arrest, the officers located on defendant's person a total of 18 baggies containing substances that later tested positive for cannabis (approximately 2 grams) and cocaine (approximately 14 grams).

¶ 8 In March, April, and June 2016, the State charged defendant by information with manufacture or delivery of a controlled substance (15 grams or more but less than 100 grams of a substance containing cocaine), a Class X felony (720 ILCS 570/401(a)(2)(A) (West 2014)) (count I); unlawful possession of a weapon by a felon on mandatory supervised release (MSR), a Class 2 felony (720 ILCS 5/24-1.1(a) (West 2014)) (count II); unlawful possession of a controlled substance (15 grams or more but less than 100 grams of a substance containing cocaine), a Class 1 felony (720 ILCS 570/402(a)(2)(A) (West 2014)) (count III); and unlawful possession with intent to deliver a controlled substance (1 gram or more but less than 15 grams of a substance containing cocaine), a Class 1 felony (720 ILCS 570/401(c)(2) (West 2014))

(count IV). In September 2016, the trial court ordered counts I, III, and IV severed from count II for trial, and the State withdrew counts I and III. In February 2017, a jury found defendant guilty of count IV, unlawful possession with intent to deliver a controlled substance (1 gram or more but less than 15 grams of a substance containing cocaine). The court set the sentencing hearing for April 5, 2017, and directed "Court Services *** to prepare a presentence report."

¶ 9 B. Presentence Report

¶ 10 On March 30, 2017, a presentence report was filed. In a section titled "Additional Information," the report indicated the following:

> "The [c]ourt should note this officer appeared at the Champaign County Satellite Jail on 3/30/17 in an effort to interview [defendant] for the preparation of this report. Once there, jail staff in visitation informed this officer the defendant did not want to be interviewed. This officer requested staff explain to [defendant] who was there to see him and that information was needed to prepare a court-ordered report. The visitation jail staff spoke to [c]orrections [o]fficers via telephone, who were relaying information to [defendant]. [Defendant] was told a probation officer was present to interview him for preparation of a presentence report. The defendant advised the [c]orrections [o]fficer he would not see anyone or be interviewed. Therefore, at [defendant's] insistence, he was not interviewed for the preparation of this report. All information included below was obtained from probation records, the Pre-sentence report filed in Champaign Co. case 01-CF-630, and the Social Investigation Report filed in Vermilion Co. cases 98-JD-31 and 98-JD-202."

¶ 11 On April 4, 2017, defendant filed written objections to the presentence report. Specifically, defendant objected on the grounds the report (1) contained an incorrect calculation of his presentence incarceration credit; (2) referenced unverified Vermilion County probation records; (3) contained inaccurate information regarding a conviction for unlawful consumption of alcohol; (4) improperly referenced non-misdemeanor traffic offenses; (5) improperly referenced an ordinance violation; (6) contained inadmissible hearsay regarding what jail staff told the probation officer when defendant refused to be interviewed for the report; (7) used "stale" information regarding defendant's alleged gang affiliation; (8) improperly used the word "victim"; and (9) included an unauthorized "Analysis" section that "usurp[ed] the [c]ourt's proper function." Defendant moved to strike the allegedly objectionable material in the report.

¶ 12 On April 5, 2017, the trial court conducted defendant's sentencing hearing. The trial court first acknowledged its receipt of defendant's written objections to the presentence report. Defense counsel made the following statement to supplement defendant's written objections to the presentence report:

> "[S]ome of the issues that were presented in the [presentence report] in terms of the [d]efendant's background and information concerning his background with his parents and his—his family we don't think should be considered at all because it tends to indicate that the [d]efendant has children that he is not involved with. And we think that is prejudicial to the [d]efendant.
>
> Also, Judge, in terms of employment status, we don't feel that there was enough information in terms of the [d]efendant working at Common Grounds right up the street. We think that the reporter could have contacted Common

Grounds and found out that the [d]efendant was working at Common Grounds until he was taken into custody after the jury found him guilty of the offense.

And [d]efendant also indicates that he has a college degree and that that could have also been determined that the investigator done a basic evaluation of the court records and the records that are available."

¶ 13 In response, the State argued:

"Your Honor, I would ask that the motion be denied and also suggest that it is ironic that the [d]efendant would contend there are a lack of detail in certain areas that he would have wished to have been included in the presentence report considering that he declined to meet with the interviewer at all even on the basis of family background or employment or prior substance abuse, so therefore we would ask the motion be denied and not be well taken."

¶ 14 The trial court addressed in detail each of defendant's nine objections to the presentence report. Specifically, with regard to defendant's assertion to "a right against self-incrimination," the court stated:

"[W]ith regards to [defendant's] suggestion that it's improper to consider the fact the [d]efendant refused to be interviewed for the presentence report has no basis whatsoever in law, and, in fact, the citation for *Kunce*, K-u-n-c-e, *vs.* *Hogan*, H-o-g-a-n, is not correct. It was a Supreme Court decision that addressed filing an action in bad faith against counsel for contempt. It doesn't deal with any of those issues, but hearsay's allowed.

It's a presentence hearing. The officer was acting as an agent of the court in obtaining that information. While the [d]efendant has the right to refuse, he

does so with no guarantee that the Court won't consider that. And, in fact, he does so at his own peril because for the precise reasons here then the information has to be gleaned as best as the officer can using all of her abilities and resources to a reasonable degree, so the fact that he chose not to cooperate is something the court can consider. None of these questions implicated his Fifth Amendment rights or his right to continue to attack the conviction and preserve his appellate rights, and he simply chose not to cooperate with an officer who was fulfilling her court obligation to interview the [d]efendant. So I am going to consider that for those purposes. It certainly goes to his attitude and his rehabilitative potential.

* * *

With regards to the issues raised here in supplement then, the reason [the investigator] doesn't have information about his employment status or his college degree is because he chose not to give it to her. There's no way an officer can call every university in the country to determine whether or not someone's obtained a degree from there. There's no way she could have sat through the trial evidence because she didn't know she was going to be assigned the case. She has multiple other cases and responsibilities, and [defendant] could have made all of this very easy by simply supplying that information to her and he chose not to at his own peril. So I find that there's no merit to any of those arguments, and he is reaping what he sowed. *** I will call the matter then for sentencing based on the presentence report."

¶ 15 D. Sentencing

¶ 16 The State then presented evidence in aggravation. Detective Jim Bednarz of the Champaign police department testified over defendant's objection regarding his involvement in an investigation that led to charges against defendant in Champaign County Case No. 16-CF-389. The charges involved an incident on March 9, 2016, in which defendant allegedly attacked a woman named Tamara Stanberry. Bednarz testified he spoke with Ms. Stanberry following the incident. Ms. Stanberry claimed she met defendant at a bar and later left with him in his car. They eventually stopped at a friend's residence where defendant became angry with Ms. Stanberry after she refused to have sex with him and he discovered some of his money and a cell phone were missing. They went outside to the car to look for the missing phone, and Ms. Stanberry refused once again to have sex with defendant. At this point, defendant allegedly "began to beat her on the head and face with closed fists, both left hand and right hand." After Ms. Stanberry exited the vehicle and reentered the house, defendant followed her and continued to beat her while she was curled up in a ball on the couch. Defendant then removed his belt and struck Ms. Stanberry with it approximately 20 times. Ms. Stanberry's claims were later corroborated by another witness who was at the residence. The State charged defendant with aggravated battery, home invasion, and intimidation of a witness, but the charges were later dismissed.

¶ 17 Defendant did not present any evidence in mitigation. Based on his prior convictions, defendant was subject to Class X sentencing (730 ILCS 5/5-4.5-95(b) (2014)). The State recommended a 30-year sentence, and defense counsel asked for the minimum sentence of 6 years in prison.

¶ 18 In determining defendant's sentence, the court stated it considered the presentence report; the evidence in aggravation and mitigation; defendant's character, history, and rehabilitative potential; and the arguments of counsel. The court noted the following:

> "Much of the information obtained in the presentence report was gleamed [*sic*] from public records and previous reports and interviews because [defendant] has refused to cooperate with the presentence procedure and be interviewed. And to that extent then, I'm relying on that information, and it has not supplemented by [*sic*] any additional information offered by [defendant] today.
>
> [Defendant] is 35 years of age. He has a prior record that consists of 4 felony convictions, 6 prior misdemeanors and 16 petty traffic offenses. He has received virtually every permutation of sentencing options available in the criminal justice system from fine only to county jail time. He successfully completed court supervision for unlawful possession of alcohol as a minor. He has received conditional discharge, probation, intensive probation as a juvenile and has had four terms of incarceration to the Department of Corrections.
>
> * * *
>
> I would note as evidence in aggravation I heard testimony of Officer Bednarz with regards to the investigation with Ms. Stanberry. It's apparent that her statement is corroborated by the physical observations that Officer Bednarz made as well as the fact that there were photographs that document the injuries consistent with what she described. When the detective took her statement I would note that she was willing to be audio and video recorded. Also note it was

corroborated by two independent witnesses, one who was in the residence and one who was actually residing in the residence.

It is also uncontradicted that the [d]efendant chased her back into the residence. So regardless of whether the argument was precipitated over property or perceived theft or someone biting the [d]efendant, none of that would justify or suggest any sufficient provocation to rise to the level of self-defense. This was a man who chased this woman into the residence in rage beating her with her [*sic*] fists as she fled, and as she curled up into a ball then beat her with a belt some 20 times, humiliating and degrading her in the most dehumanizing way. And that makes protection of the public a factor at this point. He has two prior aggravated battery convictions and a robbery conviction.

* * *

I would note that we can't determine if he has any current substance abuse issues because he did not cooperate with the Court Services Department in describing those or illuminating them in any way. We know as a juvenile he—or, as a young adult he had two chances for treatment and evaluation, and that's all we know about that. We do know that he was caught in the place of work, again, where families go to shop and individuals go to shop with a bag that contained 16 individual packaged baggies that contained cocaine. It was 14.3 grams according to the testimony of the forensic scientist from the state lab, and that was uncontradicted. On the continuum that defines the amount for the offense it's on the high end. It almost—is almost to the maximum amount that would define that range of offense.

* * *

Deterrence becomes a compelling factor then for individuals who view the sale of drugs as an option to gainful employment or a supplement to gainful employment and who *** trade in places where people go to shop and buy food and conduct their life assuming that there is not going to have—they're not going to be exposed to this around them, and the [c]ourt has an obligation to make clear to others so inclined this is unacceptable.

The suggestion that [defendant] is a victim of cocaine doesn't ring true when he was one of the ones that was pushing it and supplying it to the community. I would note as well when looking at rehabilitative potential it is certainly troubling. The poor record of compliance we have with the most basic requirements of mandatory supervised release and probation, and he has not been successful. We see him over and over again committing new offenses and violating it. And to violate parole four separate times with much less stringent requirements than probation after coming out of the Department of Correction and realizing what's at stake is also deeply troubling. And the fact he was on parole for a drug offense when he committed this offense is also a factor in aggravation. The evidence in aggravation is significant in that it certainly creates a risk to the public for someone who's willing to do that to another individual regardless of what the provocation he perceived as, and it just enhances then the need for a significant sentence that would protect the public.

I've considered all the factors in aggravation and mitigation. Having regard to the nature and circumstances of the offense, the history, character and

> rehabilitative potential of the [d]efendant. I've noted his lack of cooperation with this process. I do find that a community based sentence is, obviously, not an option here nor would it be appropriate if it were. Imprisonment is necessary for the protection of the public, and a significant sentence is called for for the reasons that I've identified."

The court then sentenced defendant to 18 years in prison.

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 On appeal, defendant argues his case should be remanded for a new sentencing hearing because the trial court improperly considered his refusal to assist in the preparation of a presentence investigation report as a factor in aggravation at sentencing. We disagree.

¶ 22 We note defendant admits he did not raise this issue in a motion to reconsider his sentence. Normally, this would result in forfeiture of the issue on appeal. See *People v. Hillier*, 237 Ill. 2d 539, 544, 931 N.E.2d 1184, 1187 (2010) (holding the defendant must object and file a written motion raising the issue to preserve an alleged sentencing error on appeal). However, the rules of forfeiture in criminal proceedings are applicable to the State as well as the defendant. *People v. Williams*, 193 Ill. 2d 306, 347, 739 N.E.2d 455, 477 (2000). In this case, the State has not made any argument based on defendant's forfeiture of the issue. Thus, we address the forfeited issue on the merits.

¶ 23 A trial court's sentencing decision will not be altered on appeal absent an abuse of discretion. *People v. Reed*, 376 Ill. App. 3d 121, 127, 875 N.E.2d 167, 173 (2007). "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.

¶ 24 In sentencing a defendant, the trial court "may search anywhere within reasonable bounds for facts which may serve to aggravate or mitigate the offense." *Reed*, 376 Ill. App. 3d at 128. The sentence shall be based "on the particular circumstances of each case, considering such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *People v. Fern*, 189 Ill. 2d 48, 53, 723 N.E.2d 207, 209 (1999). However, the trial court may not consider an improper factor in sentencing the defendant. *Reed*, 376 Ill. App. 3d at 128.

> "Consideration of an improper factor in aggravation clearly affects the defendant's fundamental right to liberty, and a court of review must remand such a cause for resentencing, except in circumstances where the factor is an insignificant element of the defendant's sentence. [Citation.] In determining the correctness of a sentence, the reviewing court should not focus on a few words or statements made by the trial court, but is to consider the record as a whole. [Citation.] To obtain a remand for resentencing, therefore, defendant must show more than the mere mentioning of an improper fact. [Citation.] An isolated remark made in passing, even though improper, does not necessarily require that defendant be resentenced. [Citation.] Rather, defendant must show that the trial court relied on the improper fact when imposing sentence. [Citation.]" (Internal quotations omitted.) *Id*.

Accordingly, remand is required where the trial court's reliance on an improper sentencing factor was significant and led to a greater sentence. *Maggio*, 2017 IL App (4th) 150287, ¶ 49.

¶ 25 The United States and Illinois Constitutions provide that no person shall be compelled in any criminal case to be a witness against himself. See U.S. Const., amend. V; Ill.

Const. 1970, art. I, § 10. This privilege against self-incrimination extends through the sentencing phase of trial until a sentence has been ordered and the judgment of conviction has become final. See *People v. Ashford*, 121 Ill. 2d 55, 80, 520 N.E.2d 332, 342 (1988). A defendant has the 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. However, the trial court may consider a presentence report's statements that a defendant refused to cooperate in a presentence investigation as it pertains to the sources of the information used to prepare the report. See *Ashford*, 121 Ill. 2d at 80.

¶ 26 Defendant argues the facts in this case are "identical" to *Maggio*. We disagree.

¶ 27 In *Maggio*, 2017 IL App (4th) 150287, ¶ 46, the defendant argued the trial court erred in considering his refusal to cooperate with the presentence investigation as an aggravating factor at sentencing. In determining the defendant's sentence, 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. 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." *Id.* ¶ 49. Because the defendant had a right to remain silent, "invocation of the right cannot be used as an aggravating factor at sentencing." *Id.* Further, this court found it clear the trial court's remarks "*weighed heavily* in the court's sentencing decision," noting "the court specifically stated defendant's refusal to participate in the presentence investigation was 'significant *** and troubling' and 'a telling indication of defendant's attitude.' " (Emphasis added.) *Id.* ¶ 50. 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. *Id.*

¶ 28 The facts in this case are distinguishable from *Maggio*. Here, the only allegedly improper comment made by the trial court while determining defendant's sentence was, "I've noted his lack of cooperation with this process." The comment referenced a statement in the presentence report directed to the court. The court services officer noted defendant's uncooperativeness to explain to the court why the sources of the information for the report's contents were secured by means other than an interview with defendant. The court's comment was not directed at defendant's right to remain silent. With regard to the trial court's statement it would consider defendant's refusal to cooperate as relevant to his attitude and rehabilitative potential, the court's remarks did not occur when it was making its sentencing determination but rather when ruling on defendant's objections to the presentence report. Defendant raised multiple objections to the information in the report as being outdated or incomplete. Generally, a party cannot "take advantage of his own wrong or of an error of the court induced by his own motion." *People v. Clements*, 316 Ill. 282, 284, 147 N.E. 99, 99-100 (1925). It is clear the court's allegedly improper comments were not made for the purpose of punishing defendant but rather to explain to defendant he could not simultaneously refuse to cooperate in the preparation of a presentence investigation report and also complain that the information in the report was inaccurate or incomplete. As indicated above, the other brief references to defendant's refusal to cooperate were made to explain the sources of information upon which the court relied as it considered the various sentencing factors.

¶ 29 In determining whether the trial court based the sentence on proper aggravating and mitigating factors, we consider the record as a whole rather than focusing on a few words or statements by the trial court. See *Reed*, 376 Ill. App. 3d at 128. In sentencing defendant, the trial court expressly noted its consideration of the presentence report, the statutory factors in

aggravation and mitigation, and the particular facts of the case before imposing an 18-year sentence. The court detailed defendant's criminal history, noting he had received "virtually every permutation of sentencing options available in the criminal justice system."

¶ 30 Even if we were to consider the trial court's statements improper, the record shows the weight the court assigned to defendant's refusal to cooperate was so insignificant it did not lead to a greater sentence. In making its sentencing determination, the court considered the statutory factors and discussed in detail defendant's extensive criminal history. Specifically, the court noted defendant had four felony convictions and six misdemeanor convictions. The court also emphasized defendant's poor record of compliance with the terms of his MSR in the past and the fact this offense occurred while defendant was on MSR for a drug-related offense. The court noted the amount of cocaine found on defendant's person was at the higher end of the range defining the offense. Finally, the court explained defendant's violent behavior in the incident involving Ms. Stanberry—which occurred just weeks before the events in this case—justified a longer prison sentence for the protection of the public. The record clearly reveals the court relied on a number of serious aggravating factors in determining defendant's sentence rather than his lack of cooperation.

¶ 31 Defendant's sentence was 18 years—well below the maximum sentence of 30 years to which he was otherwise subject. This fact alone may be considered sufficient to refute any claim of the trial court's consideration of improper factors. *People v. Bourke*, 96 Ill. 2d 327, 333, 449 N.E.2d 1338, 1341 (1983). Thus, we find defendant's sentence was not improperly increased based on the court's statements and remand is not required.

¶ 32 III. CONCLUSION

¶ 33 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. See 55 ILCS 5/4-2002(a) (West 2016).

¶ 34 Affirmed.