2019 IL App (4th) 170543-U

NO. 4-17-0543

Rule 23 filed July 24, 2019

Modified upon denial of Rehearing August 6, 2019

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Pike County
MARLON D. MURPHY,	)	No. 14CF89
Defendant-Appellant.	)	
	)	Honorable
	)	John Frank McCartney,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices DeArmond and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not improperly rely on the inherent nature of the charged offenses as a reason to impose a harsher sentence.

(2) Defendant failed to establish his entitlement to an additional 115 days' sentence credit for time spent on home confinement.

¶ 2 Defendant, Marlon D. Murphy, pleaded guilty to two counts of possessing child pornography (720 ILCS 5/11-20.1(a)(6) and (c-5) (West 2014)), and the trial court sentenced him to 48 months' probation. The court later revoked defendant's probation and resentenced him to two consecutive four-year prison terms. Defendant appeals, arguing the court erred at sentencing by (1) improperly relying on the inherent nature of the charged offenses as a reason to impose a harsher sentence and (2) denying him sentence credit for the number of days he spent in home confinement prior to his sentencing. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In March 2015, the State charged defendant by amended information with two counts of possessing child pornography (720 ILCS 5/11-20.1(a)(6), (c-5) (West 2014)). In connection with each count, it alleged defendant possessed a digital image of a child under the age of 13 "posed in a lewd exhibition of the unclothed buttocks."

¶ 5 In August 2015, defendant entered into a negotiated plea agreement with the State. He agreed to plead guilty to the charged offenses in exchange for a sentence of 48 months' probation. At the plea hearing, the trial court conditionally accepted the parties' agreement and set the matter for sentencing, stating as follows:

> "Assuming everything goes as expected, *** we come back [for the sentencing hearing] in 60 days, I'll probably go along with [the plea] because I don't see anything that's going to raise a flag with that. And I'll have further support to go along with it in that you've done everything you should do over the next 60 days, which I'm fairly confident you can do."

¶ 6 As part of the plea agreement, defendant agreed to serve a six-month period of "home confinement" and monitoring with a global positioning satellite (GPS) device for three months. The trial court entered an "ORDER OF CONDITIONAL CONCURRENCE ON PLEA AGREEMENT," which stated as follows:

> "Defendant to plead guilty ***. Defendant to be placed on probation for 48 months with all conditions as outlined in [the] attached Probation Order and Additional Probation Conditions document. Defendant to be released on [recognizance] bond when GPS device is available and fully comply with all

[p]robation conditions as bond conditions."

The attached "Additional Probation Conditions" document provided as follows:

"12. Defendant will be placed on [six] months' home confinement upon immediate release from jail and remain on the property of his residence which may be either his mother or father's residence as previously approved by [p]robation. Defendant shall admit probation and/or law enforcement into his residence if requested by them during the entire period of probation without prior notice. Defendant may leave the home with prior approval of probation to attend counseling appointments, mental health appointments, physician appointments and probation appointments or as otherwise allowed in paragraph 14 or by [p]robation. This entry is allowed to enable probation/law enforcement to verify compliance with all terms of probation.

13. As part of this Order, Defendant prior to release from jail shall be placed on GPS monitoring for a period of [three] months and follow all recommendations of probation and the monitoring agency. The Probation Department will pay for the GPS initially, but Defendant shall reimburse this cost prior to being discharged from probation.

14. Defendant will be allowed during his period of home confinement to visit the Social Security Disability Office in Quincy, Church (if pre-approved by the church), his sister['s] *** house, the 409 Stanford Street residence in Griggsville if pre-approved by probation and the [Pike County Sheriff's Office]."

¶ 7 In December 2015, defendant moved to withdraw his guilty plea and the trial

court granted the motion. In March 2016, defendant pleaded guilty to the charged offenses for a second time and was, again, sentenced to 48 months' probation. At the plea hearing, the State presented a factual basis that police officers responded to a report of someone taking photos at a laundromat and spoke with defendant. Defendant "made some statements about some things that might be on his phone[,]" and following searches of his residence and various electronic devices, law enforcement officers discovered "images of child pornography" on an SD memory card. The images depicted two separate female children.

¶ 8 In October 2016, the State filed a petition for revocation of defendant's probation. It alleged he violated the terms of his probation because (1) he was unsuccessfully discharged from sex offender treatment due to excessive absences and (2) his treatment provider determined he was "not amenable to community treatment at [that] time." Following a hearing the same month, the trial court found the State proved the allegations in its petition by a preponderance of the evidence. In reaching its decision, the court noted, in part, defendant's "unwillingness" to engage in treatment.

¶ 9 In January 2017, the trial court conducted defendant's resentencing hearing. At the outset of the hearing the court and the parties addressed the issue of defendant's sentence credit. Defendant's counsel asked the court to give defendant "additional jail credit for the time [defendant] was on house arrest" from August 24, 2015, to December 17, 2015. The court denied that request, stating it did not find home confinement to be "near as restrictive as jail."

¶ 10 The record reflects that in resentencing defendant, the trial court considered his presentence investigation (PSI) report. The report showed defendant was 45 years old and "suffer[ed] from mild mental retardation and some personality issues." He was unemployed,

could not read or write, and reported that he had depression and "anger issues." Defendant's criminal history consisted of convictions of various traffic related offenses; misdemeanor convictions for resisting or obstructing a peace officer (1991), littering on a highway (1995), battery (1997 and 1998), theft (1998), and violation of an order of protection (2010); and felony convictions for burglary and criminal damage to property (1995).

¶ 11 The PSI report further showed that defendant had been unsuccessfully discharged from sex offender treatment on two occasions. Initially, he was unsuccessfully discharged "because of his contact with minor children." In March 2016, defendant was accepted back into treatment. He had "sufficient" attendance from March to July 2016 but reportedly "provided minimal effort" and "made minimal progress." Then, in October 2016, defendant was unsuccessfully discharged due to excessive absences. His treatment provider also described him as being "not amenable to treatment." The author of defendant's PSI report recommended that defendant be resentenced to a term of imprisonment in the Illinois Department of Corrections (DOC).

¶ 12 Neither party presented any additional evidence at the resentencing hearing. The State asked that the trial court impose consecutive sentences of 3½ years' imprisonment on both counts, arguing defendant was unlikely to comply with probation and that "the nature of the offense [was] too serious for a minimum sentence." Defendant's counsel asked the court to give defendant another opportunity at probation. She noted defendant's mental "limitations" and argued that he could be successful on probation with "more intensive services" and a more structured environment.

¶ 13 Ultimately, the trial court imposed two consecutive four-year prison terms. In

setting forth its resentencing decision, the court began by stating that it considered the financial impact of imprisonment, evidence in mitigation and aggravation, and defendant's statement in allocution. It then noted information contained in defendant's PSI report that it found "significant," including references to "threats" defendant made to officers involved in the case and assertions that he wanted to do harm to "sex offenders"; efforts by the probation department to assist defendant; indications that defendant was unwilling to engage in treatment; and defendant's difficulties in complying with the requirements of his previous probation sentences. The court also addressed the circumstances that resulted in the charged offenses, stating as follows:

> "I indicated to [defendant] on multiple occasions that I was hopeful that he would engage in treatment because I think it would benefit him. The reason I say that is even through the police report through some of his statements, he mentions having an addiction of videotaping children, not necessarily what he was charged with, but that's what led [law enforcement] that day to start the investigation was videotaping the children.
>
> He also references in the police report about also [*sic*] he's videotaped adult women. He mentions *** about sometimes having to be sneaky in public when he's video-recording children which suggests to me that he knows he shouldn't be doing that ***."

The court also stated its belief that "the [S]tate had a fairly strong case" against defendant, noting that "we've all seen the pictures."

¶ 14 The trial court found defendant was unlikely to comply with another sentence of

probation and stated it "reluctantly went along with" with the previous plea agreements for probation. The court noted that defendant did "have some criminal history" and then stated as follows:

> "The court is to consider probation unless having regard to the nature and circumstances of the offense, which is *** one of the more serious offenses, and the history and character and condition of the offender, which I've spoken about[, that t]he court is of the opinion that imprisonment is necessary for the protection of the public. I do make that finding here; I do believe that. And, as importantly [*sic*], that further probation would deprecate the seriousness of the offender's conduct and would be inconsistent with the ends of justice. That's probably a strong factor here due to the nature of these charges."

¶ 15 The trial court next discussed factors in mitigation, which it found included that defendant's conduct neither caused nor threatened serious physical harm and that he had "intellectual issues." The court found that the factors in aggravation included that defendant had "some criminal history" and the issue of "deterrence." The court also stated as follows:

> "I think slightly over the minimum is an appropriate sentence, given the nature of these offenses, given his criminal history. I do not think something on the high side of this range is appropriate, primarily based on what [defendant's counsel] has said today that I think on the lower end [*sic*]. I think eight years is appropriate for the aggregate."

¶ 16 The trial court stated its hope that confinement in DOC would give defendant the structure and the help that he needed. Finally, it noted defendant's entitlement to day-for-day

credit, which would result in his prison time being "cut in half" and an ultimate sentence of "less than three years."

¶ 17 In July 2017, defendant filed an amended motion to reconsider his sentences, arguing the sentences imposed by the trial court were excessive in light of the evidence presented. Following a hearing, the court denied defendant's motion.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 A. Improper Sentencing Factor

¶ 21 On appeal, defendant first argues that the trial court improperly relied on the inherent nature of the charged offenses as a reason to impose a harsher sentence. He contends that, as a result, this court should reduce his aggregate sentence. Defendant acknowledges his forfeiture of this issue but asserts it is reviewable as plain error.

¶ 22 "[T]o preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required." *People v. Harvey*, 2018 IL 122325, ¶ 15, 115 N.E.3d 172. However, under the plain-error doctrine, forfeited claims may be addressed in the following circumstances:

> "(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, regardless of the closeness of the evidence." (Internal quotation marks omitted.) *Id.*

"The initial step under either prong of the plain-error doctrine is to determine whether the claim presented on review actually amounts to a 'clear or obvious error' at all." *Id.*

¶ 23 When imposing a sentence, "[t]he trial court must base its sentencing determination 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). The court also "may consider the nature and circumstances of the offense." *People v. Catron*, 285 Ill. App. 3d 36, 38, 674 N.E.2d 141, 143 (1996)). However, it may not use a factor implicit in the offense for which the defendant is convicted as an aggravating factor at sentencing. *People v. Phelps*, 211 Ill. 2d 1, 11, 809 N.E.2d 1214, 1220 (2004). In other words, "a single factor cannot be used both as an element of an offense and as a basis for imposing a harsher sentence than might otherwise have been imposed." (Internal quotation marks omitted) *Id.* at 11-12. The rationale for this "double enhancement" rule "is based on the assumption that, in designating the appropriate range of punishment for a criminal offense, the legislature necessarily considered the factors inherent in the offense." *Id.* at 12.

¶ 24 On review, "[t]here is a strong presumption that the trial court based its sentencing determination on proper legal reasoning, and 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. Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 22, 979 N.E.2d 1014. The issue of whether the court violated the double enhancement rule is subject to *de novo* review. *People v. McGath*, 2017 IL App (4th) 150608, ¶ 64, 83 N.E.3d 671.

¶ 25 Here, the record shows defendant was convicted of two, Class 2 felony offenses.

As a result, he was subject to a sentencing range of three to seven years in prison for each count. 730 ILCS 5/5-4.5-35(a) (West 2016). As stated, the trial court imposed two consecutive four-year sentences.

¶ 26 On appeal, defendant cites to two specific instances at his resentencing when the trial court referenced the "nature" of the offenses. He contends that the court erred because it relied on the "general nature of the offenses" to impose harsher sentences. Defendant asserts there was "nothing aggravating about the 'nature' of [his] specific conduct beyond what is inherently wrong about knowingly possessing child pornography ***." We disagree with defendant's argument and find that when placed in context and considered as a whole, the court's comments reflect no improper double enhancement.

¶ 27 In this instance, the trial court's comments at resentencing extend over approximately 10 pages of the transcript. Those comments reflect that the court considered several different factors when fashioning appropriate sentences, including the circumstances that resulted in the charged offenses, the seriousness of the charged offenses, defendant's attitude regarding the charged conduct and his need for treatment, defendant's conduct on probation, defendant's criminal history, and defendant's intellectual abilities. When explicitly identifying the aggravating factors in the case, the court referenced only defendant's criminal history and the need for deterrence.

¶ 28 Defendant correctly points out that the trial court made two separate references to the "nature" of the offenses at issue when imposing his sentences. However, the nature and circumstances of the offenses of which defendant was convicted were appropriate considerations for the court. Additionally, when the court's comments are considered in their entirety and not in

isolation, it is apparent that the court's sentencing decision was based upon a combination of various factors that were *specific* to defendant's circumstances. The record does not support a finding that the court sentenced defendant more harshly simply because of the general nature of possessing child pornography. Instead, it reflects that court considered appropriate sentencing factors. Accordingly, we find no "clear or obvious error" and decline to excuse his forfeiture of this issue.

¶ 29 B. Sentence Credit

¶ 30 On appeal, defendant also argues the trial court erred by denying his request for sentence credit for the 115 days he spent in home confinement following his first guilty plea. He argues that such credit was mandatory under section 5-4.5-100((b) of the Unified Code of Corrections (Code) (730 ILCS 5/5-4.5-100 (West 2016)) and could not be withheld by the court.

¶ 31 Initially, the State asserts that, pursuant to Illinois Supreme Court Rule 472 (eff. Mar. 1, 2019) the circuit court, not this court, has jurisdiction to address defendant's sentence credit issue. Rule 472 provides that in criminal cases, the circuit court retains jurisdiction to correct certain sentencing errors, including errors in the calculation of presentence custody credit, "at any time following judgment and after notice to the parties, including during the pendency of an appeal, on the court's own motion, or on the motion of any party." Ill. S. Ct. R. 472(a) (eff. Mar. 1, 2019). Under the rule, "[n]o appeal may be taken by a party from a judgment of conviction on the ground of any sentencing error specified *** unless such alleged error has first been raised in the circuit court." Ill. S. Ct. R. 472(c) (eff. Mar. 1, 2019).

¶ 32 Here, the State overlooks the fact that defendant's sentence credit issue is *not* being raised for the first time on appeal. Rather, the record reflects that at resentencing defendant

asked the trial court to award him presentence credit for the time he spent in home confinement. The court addressed the merits of defendant's request and denied him the credit on the basis that home confinement was not "near as restrictive as jail." Under these circumstances, Rule 472 does not preclude defendant from raising his sentence credit issue on appeal. Thus, we have jurisdiction to address the merits of defendant's claim.

¶ 33 We note that on appeal defendant also addresses issues of forfeiture—based on his failure to raise his sentence credit issue in a postsentencing motion—and plain-error review. However, aside from challenging this court's jurisdiction under Rule 472, the State otherwise addresses the merits of defendant's sentence credit claim and does not argue forfeiture. Accordingly, we do not find the issue forfeited and will consider its merits. See *People v. Whitfield*, 228 Ill. 2d 502, 509, 888 N.E.2d 1166, 1170 (2007) (finding that the State may forfeit a claim that an issue raised by the defendant was not properly preserved for appellate review when it does not argue forfeiture on appeal).

¶ 34 Relevant to this appeal, section 5-4.5-100(b) of the Code (730 ILCS 5/5-4.5-100(b) (West 2016)) provides that "the trial court shall give credit to the defendant for time spent in home detention on the same sentencing terms as incarceration as provided in Section 5-8A-3 [of the Electronic Monitoring and Home Detention Law (Electronic Home Detention Law) (730 ILCS 5/5-8A-3 (West 2016))]." Whether a defendant is entitled to receive presentence custody credit against his sentence is subject to a *de novo* standard of review. *People v. Clark*, 2014 IL App (4th) 130331, ¶ 15, 15 N.E.3d 539.

¶ 35 Under the plain language of section 5-4.5-100(b), a determining factor in defendant's entitlement to additional sentence credit is whether he was detained or confined as

set forth in the Electronic Home Detention Law. Here, the record fails to show that defendant's "home confinement" amounted to "home detention" under that statute, and as a result, he cannot establish his entitlement to an additional 115 days' credit.

¶ 36 In this case, defendant initially pleaded guilty in August 2015 to the charged offenses in exchange for a sentence of 48 months' probation. The trial court only conditionally accepted defendant's plea and released him on bond pending its final acceptance of the plea and sentencing. As a condition of defendant's bond, he was required to serve a period of "home confinement," which also included three months of GPS monitoring. Initially and most obviously, the record in this case contains no reference to the Electronic Home Detention Law or its requirements. It also reflects no intention by either the trial court or the parties that defendant's periods of electronic monitoring and home detention would be as contemplated by that statute and its specific provisions.

¶ 37 Further, the home confinement ordered in this case fails to meet the substantive requirements of the Electronic Home Detention Law. Under the statute, "home detention" is defined as "the confinement of a person convicted or charged with an offense to his or her place of residence under the terms and conditions established by the supervising authority." 730 ILCS 5/5-8A-2(C) (West 2016). " 'Supervising authority' means [DOC], the Department of Juvenile Justice, probation department, sheriff, superintendent of municipal house of corrections or any other officer or agency charged with authorizing and supervising electronic monitoring and home detention." *Id.* § 5-8A-2(E). A "supervising authority" does not include the trial court. However, in this instance, it was the trial court that set the terms and conditions for defendant's periods of GPS monitoring and home confinement. Specifically, the terms and conditions of defendant's

GPS monitoring and home confinement were contained in the trial court's "ORDER OF CONDITIONAL CONCURRENCE ON PLEA AGREEMENT" and the attachments to that order. Although the record shows defendant was supervised by the probation department while on bond, defendant has failed to direct our attention to any "terms and conditions" of his confinement that were "established" by the probation department. *Id.* § 5-8A-2(C).

¶ 38 Finally, the trial court's order for GPS monitoring also did not follow the substantive requirements for electronic monitoring set forth in the Electronic Home Detention Law. First, the statute sets forth various rules under which an electronic monitoring and home detention program must operate "[w]hen using electronic monitoring for home detention." *Id.* § 5-8A-4. The record in this case fails to reflect that defendant's GPS monitoring and home confinement operated under all of the mandatory rules set forth in the statute. Most notably, section 5-8A-4(H) of the Electronic Home Detention Law requires "[n]otice to the participant that violation of the order for home detention may subject the participant to prosecution for the crime of escape ***." *Id.* § 5-8A-4(H). Here, although electronic monitoring was ordered in conjunction with defendant's home confinement, the record does not show that he was so notified or that such consequences were even contemplated by the court and the parties.

¶ 39 Second, the Electronic Home Detention Law provides that "[b]efore entering an order for commitment for electronic monitoring" written consents for the program must be obtained from the participant and, where possible, other persons residing in the home. *Id.* § 5-8A-5. Again, the record fails to support a finding that such consents were obtained in the instant case.

¶ 40 Under the circumstances presented, defendant's home confinement did not

amount to "home detention" as set forth in the Electronic Home Detention Law. Accordingly, he is not entitled to an additional 115 days' sentence credit.

¶ 41 III. CONCLUSION

¶ 42 For the reasons stated, we affirm the trial court's judgment.

¶ 43 Affirmed.