ILLINOIS OFFICIAL REPORTS

Appellate Court

***People v. Abdelhadi*, 2012 IL App (2d) 111053**

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BALAL ABDELHADI, Defendant-Appellant.
District & No.	Second District Docket No. 2-11-1053
Filed	July 18, 2012
Held (*Note: This syllabus constitutes no part of the opinion of the court but has been prepared by the Reporter of Decisions for the convenience of the reader.*)	Resentencing was ordered where the threat of harm to others was improperly considered as an aggravating factor in sentencing defendant following his guilty plea to aggravated arson, since that factor was implicit in the offense and the court's comments did not show how much weight it gave to that factor.
Decision Under Review	Appeal from the Circuit Court of Lee County, No. 09-CF-60; the Hon. Jacquelyn D. Ackert, Judge, presiding.
Judgment	Reversed and remanded.

Counsel on Appeal	Thomas A. Lilien and Bruce Kirkham, both of State Appellate Defender's Office, of Elgin, for appellant.
	Henry S. Dixon, State's Attorney, of Dixon (Lawrence M. Bauer and Edward R. Psenicka, both of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.
Panel	JUSTICE SCHOSTOK delivered the judgment of the court, with opinion. Presiding Justice Jorgensen and Justice Hutchinson concurred in the judgment and opinion.

OPINION

¶ 1 After the defendant, Balal Abdelhadi, pled guilty to aggravated arson (720 ILCS 5/20-1.1 (West 2008)), the trial court sentenced him to 10 years' imprisonment. The defendant appeals from that order, arguing that the trial court relied on an improper factor in sentencing him. We agree and therefore reverse and remand for a new sentencing hearing.

¶ 2 On April 11, 2009, the defendant was charged by criminal complaint with aggravated arson (*id.*). The complaint alleged that the defendant committed arson, partially damaging a residence located at 1604 West 3rd Street in Dixon, Illinois, while he knew or should have known that Shanna M. Withers was present therein. On August 13, 2009, the defendant pled guilty to the charged offense. According to the factual basis for the plea, various witnesses would testify that, on April 11, 2009, the defendant, along with Jennifer Hurd and Robert Cordle, plotted to burn the house where the former boyfriend of Cordle's girlfriend was staying. The defendant had told the police that he threw a lighted bottle of gas at the house, causing it to catch fire. The defendant acknowledged that he knew there were people in the house. The trial court accepted the defendant's guilty plea and set a sentencing date for October 21, 2009.

¶ 3 At the sentencing hearing, the State noted that aggravated arson is a Class X felony punishable by a prison term of 6 to 30 years, or an extended prison term of up to 60 years (*id.*). The State then argued that the trial court should consider in aggravation: (1) the defendant's acts endangered or could have endangered the lives of one or more people inside the building; (2) the defendant had a criminal history; and (3) the defendant was on probation when the crime was committed. In mitigation, the defendant presented several pictures of the damage to the house, which showed only char marks on the house's exterior siding. The defendant also introduced three pieces of artwork that he had drawn, which were intended to show his remorse for the offense. Finally, defense counsel read the defendant's statement of allocution, which expressed the defendant's remorse for his crime, his intention to stay off

of drugs, an apology to Withers, an apology to the defendant's family, and a plea for mercy from the trial court.

¶ 4 At the close of the hearing, the trial court announced that it had considered all of the evidence presented, including the factors in aggravation and mitigation. The trial court then stated:

> "Specifically in aggravation the Court has considered that the conduct caused by the defendant did, in fact, endanger the lives of individuals. That he was on probation at the time of the event. Court has considered his criminal history in aggravation.
>
> The Court in mitigation has considered the defendant's age, his minimal education and other factors in mitigation."

¶ 5 After announcing the factors that it had considered, the trial court sentenced the defendant to 10 years' imprisonment and 3 years' mandatory supervised release. Following the denial of his motion to reconsider the sentence, the defendant filed a timely notice of appeal.

¶ 6 The defendant's sole contention on appeal is that his 10-year sentence is excessive. Specifically, the defendant argues that the threat of harm to others was an improper aggravating factor because that factor was inherent in the offense of aggravated arson.

¶ 7 The State argues that the defendant forfeited this issue by not raising it before the trial court during the sentencing hearing or in his motion to reconsider the sentence. However, an argument not properly preserved for review can be reviewed if plain error occurred. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *People v. Harvey*, 211 Ill. 2d 368, 386 (2004). The plain-error doctrine allows a reviewing court to consider unpreserved error when a clear or obvious error occurred and (1) the evidence was so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) that error was 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. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The second scenario is potentially present here, because when a trial court considers erroneous aggravating factors in determining the appropriate sentence of imprisonment, the defendant's "fundamental right to liberty" is unjustly affected, which is seen as a serious error. (Internal quotation marks omitted.) *People v. James*, 255 Ill. App. 3d 516, 531 (1993). For plain error to exist, however, we must first decide that an error actually occurred. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). Therefore, although the defendant otherwise forfeited the issue by not raising it during the sentencing hearing or in the motion to reconsider the sentence, we will review his contention under the plain-error doctrine. See *James*, 255 Ill. App. 3d at 531.

¶ 8 Imposition of a sentence is normally within a trial court's discretion (*People v. Jones*, 168 Ill. 2d 367, 373 (1995)), and there is a strong presumption that the trial court based its sentencing determination on proper legal reasoning, such that the trial court's sentencing decision is reviewed with great deference. *People v. Dowding*, 388 Ill. App. 3d 936, 942-43 (2009). The presumption is overcome only by an affirmative showing that the sentence imposed varies greatly from the purpose and spirit of the law or manifestly violates constitutional guidelines. *People v. Escobar*, 168 Ill. App. 3d 30, 46 (1988). Nonetheless, the

question of whether a court relied on an improper factor in imposing a sentence ultimately presents a question of law to be reviewed *de novo*. *People v. Chaney*, 379 Ill. App. 3d 524, 527 (2008).

¶ 9 Although the trial court has broad discretion when imposing a sentence, it may not consider a factor implicit in the offense as an aggravating factor in sentencing. *People v. Phelps*, 211 Ill. 2d 1, 12 (2004). Stated differently, 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." *People v. Gonzalez*, 151 Ill. 2d 79, 83-84 (1992). Such dual use of a single factor is often referred to as "double enhancement." *Id.* at 85. The prohibition against double enhancements is based on the rationale that "the legislature obviously has already considered such a fact when setting the range of penalties and it would be improper to consider it once again as a justification for imposing a greater penalty." (Internal quotation marks omitted.) *James*, 255 Ill. App. 3d at 532. The defendant bears the burden of establishing that a sentence was based on improper considerations. *Dowding*, 388 Ill. App. 3d at 943.

¶ 10 We believe that this case is controlled by our recent decision in *Dowding*. In *Dowding*, the defendant, while driving intoxicated, killed a person. The defendant subsequently pled guilty to aggravated driving under the influence. At the sentencing hearing, the State asked for the maximum sentence of 14 years and argued three factors in aggravation: (1) the defendant's conduct caused or threatened serious harm; (2) the defendant had a history of prior delinquency or criminal activity; and (3) the sentence was necessary to deter others from committing the same crime. *Id.* In sentencing the defendant to 10 years in prison, the trial court summarized the factors in aggravation:

> " 'The factors in aggravation that I do find apply in this case are, Number 1, that the Defendant's conduct caused or threatened serious harm. No question, this Defendant's conduct in this offense caused the greatest harm there could be, that is the death of another person.
>
> I find that the Defendant has a history of prior delinquency or criminal activity. I've outlined that previously, and that history goes over a long, long period of time.
>
> And I find that Number 7 also applies, and that is that this sentence is necessary to deter others from committing the same crime.' " *Id*. at 941.

¶ 11 On appeal, this court reversed the trial court's sentencing decision, holding that the trial court had considered a factor inherent in the offense–that the defendant's conduct had caused or threatened serious harm. *Id.* at 944. We found that the aggravating factors that the trial court listed in imposing sentence mirrored the State's recitation of aggravating factors, showing that the inherent factor was not merely mentioned, but was actually relied on by the trial court as a factor in imposing an aggravated sentence. *Id.*

¶ 12 The present case presents the same circumstances as in *Dowding*. The trial court's recitation of the aggravating factors mirrored the factors that the State argued in aggravation. The mirroring, as in *Dowding*, shows not that the trial court merely mentioned the threat of harm to others in its summary of the circumstances of the case or in stressing the seriousness of the offense, but that the trial court actually considered that threat of harm as a factor in

aggravation. Even in the presence of other, legitimate aggravating factors like the defendant's being on probation at the time of the offense and his criminal history, we conclude that the trial court's reliance on the threat of "harm to others" was improper. See *id*.

¶ 13 In so ruling, we find the State's reliance on *People v. Hunter*, 101 Ill. App. 3d 692 (1981), and *People v. Brewer*, No. 1-07-2821 (June 30, 2011), unpersuasive. In *Hunter*, the defendant was convicted of aggravated arson. *Hunter*, 101 Ill. App. 3d at 693. In imposing sentence, the trial court noted that the defendant's conduct had threatened serious harm. *Id.* The trial court further expanded that the defendant's conduct was serious and that he had destroyed his home for insurance proceeds. *Id.* On appeal, the *Hunter* court found that the trial court properly considered the gravity of the defendant's conduct *Id*. at 694. In noting that persons were exposed to serious harm, the *Hunter* court explained, the trial court did not necessarily depend on that fact to impose a sentence greater than the minimum. *Id.* at 694-95. The *Hunter* court further explained that the trial court considered legitimate factors, such as the seriousness of arson generally, that a small child had been endangered, and that the defendant had destroyed his home for insurance proceeds. *Id.* at 695. The *Hunter* court found that these considerations sufficiently amounted to the "nature and circumstances" of the crime and could be considered in aggravation. *Id.* Under the "nature and circumstances" approach, the *Hunter* court held that the trial court merely mentioned the threat of harm posed by the defendant's conduct and that it relied on proper aggravating factors in imposing the sentence. *Id*.

¶ 14 In the present case, we find that the trial court's reference to the defendant's threat of harm to others, with no elaboration or description of that factor, did not amount to merely a mentioning within the "nature and circumstances" of the crime. Instead, the mirroring between the factors the State argued in aggravation and the factors used by the trial court in sentencing shows that there was, in fact, reliance by the trial court on the implicit factor. Additionally, the fact that the defendant was on probation and had a criminal history was not sufficient to describe the "nature and circumstances" of the crime as that factor has been applied in the past. See *id.* at 694-96; *People v. Tolliver*, 98 Ill. App. 3d 116, 117-18 (1981).

¶ 15 In *Brewer*, the defendant argued that his 80-year sentence for first-degree murder was excessive where the trial court placed emphasis on a factor that was inherent in the offense–his conduct threatened or caused serious harm. The *Brewer* court rejected the defendant's argument, finding that the record did not indicate that the trial court emphasized a factor inherent in the offense. *Brewer*, slip op. at 8. The *Brewer* court held that, contrary to the defendant's assertions, the fact that the defendant's conduct threatened or caused serious harm was not a factor inherent in the crime of first-degree murder and therefore was a proper aggravating factor for the trial court to consider. *Id.*

¶ 16 *Brewer* is also distinguishable from the instant case. In support of its decision, the *Brewer* court relied upon *People v. Saldivar*, 113 Ill. 2d 256 (1986), *People v. Solano*, 221 Ill. App. 3d 272 (1991), and *People v. Spencer*, 229 Ill. App. 3d 1098 (1992), all of which use the "degree or gravity of the defendant's conduct" approach. See *Saldivar*, 113 Ill. 2d at 271-72; *Solano*, 221 Ill. App. 3d at 274; *Spencer*, 229 Ill. App. 3d at 1102. This is similar to the "nature and circumstances" approach used in *Hunter*. The *Brewer* court applied this logic in considering the trial court's use of factors in aggravation when it discussed how the harm to

others resulted from a "robbery that turned into murder, felony murder." *Brewer*, slip op. at 8. We interpret the *Brewer* court's analysis to be consistent with a "degree or gravity of the defendant's conduct" approach, and thus distinguishable from the instant case where the improper factor was relied on with no discussion of the "degree or gravity of the defendant's conduct."

¶ 17 It is important to note that there is no requirement that the minimum sentence be imposed in the absence of aggravating factors. The requirement of section 5-4-1(c) of the Unified Code of Corrections (730 ILCS 5/5-4-1(c) (West 2008)), that the trial court specify on the record the factors that led to its sentencing determination, was not intended to be a trap for the trial court. "It is unrealistic to suggest that the judge sentencing a convicted murderer must avoid mentioning the fact that someone has died or risk committing reversible error." *People v. Barney*, 111 Ill. App. 3d 669, 679 (1982). However, it is reversible error for a sentencing judge to not merely mention, but rely on, an improper aggravating factor in sentencing, as occurred in this case. See *Dowding*, 388 Ill. App. 3d at 944.

¶ 18 Having found that the trial court improperly considered the threat of harm as an aggravating factor, we turn to the question of whether remand is required. When a trial court considers an improper factor in aggravation, the case must be remanded unless it appears from the record that the weight placed upon the improper factor was so insignificant that it did not lead to a greater sentence. *Id.* at 945. This court has used the following considerations in determining whether a trial court has afforded significant weight to an improper factor such that remand would be required: (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. *Id*.

¶ 19 Here, the trial court's short comments, which were neither dismissive nor emphatic, do not demonstrate how much weight it placed on the improper factor. Additionally, although the defendant's sentence was substantially below the maximum sentence, it was also four years above the minimum sentence and thus does not allow us to discern how much weight the trial court placed on that factor. *Cf. People v. Heider*, 231 Ill. 2d 1, 24-25 (2008) (remanding for resentencing when trial court, relying on improper factor in aggregation, imposed sentence four years above the minimum). Accordingly, we must remand for a new sentencing hearing.

¶ 20 The State argues that, unlike in *Dowding*, a remand is unnecessary because the trial court merely made reference to the improper aggravating factor in passing. However, the State's argument misses the mark, as our concern on appeal is determining how much weight the trial court placed on the improper factor. As explained above, since we cannot determine how much weight was placed on that factor, we must remand for a new sentencing hearing.

¶ 21 For the foregoing reasons, the judgment of the circuit court of Lee County is reversed, and the case is remanded for a new sentencing hearing.

¶ 22 Reversed and remanded.