

No. 1-09-2611

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FIRST DIVISION
DATE March 31, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|--------------------------------------|---|------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 08 CR 9403 |
| |) | |
| ARNOLD ROBERTS, |) | Honorable |
| |) | James B. Linn, |
| Defendant-Appellant. |) | Judge Presiding. |

PRESIDING JUSTICE HALL delivered the judgment of the court.
Justices HOFFMAN and ROCHFORD concurred in the judgment.

O R D E R

HELD: Defendant forfeited his claim of sentencing error; one of two residential burglary convictions vacated based on one-act, one-crime rule and mittimus corrected to that effect; judgment affirmed in all other respects.

Following a bench trial, defendant Arnold Roberts was convicted of two counts of residential burglary and sentenced as a Class X offender to concurrent terms of nine years'

imprisonment. On appeal, defendant contends that he was denied his right to a fair sentencing hearing where the trial court improperly considered possible compensation from his pending federal case as an aggravating factor, and that his mittimus should be amended to reflect that he was convicted of one count of residential burglary.

Defendant was convicted of residential burglary on evidence showing that during the late evening hours of September 15, 2007, he knowingly and without authority entered the home of Elijah and Vernell Wilson located at 7439 South Rhodes Avenue in Chicago, and stole \$2,000 worth of jewelry. During posttrial proceedings on June 19, 2009, defendant informed the court that he was having surgery at Stroger Hospital to remove two cancerous tumors on July 17, 2009, and would like a continuance for sentencing. The court asked defense counsel if this was true, noting that it could not take defendant at "face value" based on his lengthy criminal record. Counsel replied that he was not sure. The court stated that it did not matter if defendant was in State or County incarceration, but that it was "under a Federal court order to not keep people in [defendant's] status in the [C]ounty," so it will need this information verified. The court then continued the matter to June 26, 2009, for verification.

On that date, the court was informed that defendant's surgery was set for July 9, 2009. The matter was continued to

July 28, at which time the court asked defendant if he had something pending in Federal court. Defendant replied that he filed a complaint in Federal court, and that his tumors are turning to cancer "in County." The court responded that it believed it was being "manipulated," as it was trying to help defendant stay here for his surgery, but defendant was trying to "make money and suing [in] Federal Court." Defendant informed the court that it was not a lawsuit, that he did not care about the lawsuit, and he just "want[s] it out." The court then noted that it was repeatedly continuing the matter for this "career criminal," who is Class X mandatory, to have surgery, and was a bit "miffed" that he now has a different agenda of going to Federal court for money. The public defender stated that they could pass the matter for him to talk to the attorney on the Federal matter to see if money was involved. The court responded that money was involved, but then passed the matter. Upon recalling the matter, the court stated that it had received a note from defendant's doctor indicating that his surgery was scheduled for August 7. The court continued the matter for sentencing to August 25.

On that date, the court noted that the case had been continued for defendant to obtain medical treatment in Cook County. The court then asked defendant if he received his medical treatment and was ready to be sentenced, and defendant

responded in the affirmative. The State informed the court that defendant had a prior 2000 felony robbery conviction for which he received eight years' imprisonment, a 1996 felony burglary conviction for which he received six years' imprisonment, and several other older cases. The defense indicated that it would rest on the presentence investigation report, noting that defendant has had alcohol and drug issues. The court then stated,

"[defendant] is getting a little old for this, and he does have his medical issues. But he has a very lengthy criminal history. He has been giving everybody else on the street a tough time too. I will be as moderate as I can, but I have to acknowledge [his] criminal record."

The court sentenced defendant to nine years' imprisonment. Defendant filed a motion to reconsider, which the court denied.

On appeal, defendant first contends that he was denied a fair sentencing hearing because the trial court improperly considered possible compensation from his pending Federal lawsuit as an aggravating sentencing factor. Defendant, acknowledging that he has waived this issue, contends that waiver should be applied less rigidly when the judge's conduct is at issue.

Although judicial misconduct can provide a basis for relaxing the forfeiture rule (*People v. Sprinkle*, 27 Ill. 2d 398 (1963)), the supreme court has clarified that this exception applies only in extraordinary situations such as when the judge makes inappropriate comments to the jury or relies on social commentary instead of evidence in sentencing a defendant to death (*People v. McLaurin*, 235 Ill. 2d 478, 488 (2009)). The fact that forfeiture is rarely relaxed on such a basis in noncapital cases underscores the importance of the uniform application of the forfeiture rule except in the most compelling of situations. *McLaurin*, 235 Ill. 2d at 488. Here, defendant has not presented any extraordinary or compelling reason to relax the forfeiture rule, especially where his counsel was present and had every opportunity to raise a contemporaneous objection before the court. Accordingly, we decline to relax the forfeiture rule.

Nonetheless, defendant claims that we should consider the issue as plain error. The plain error doctrine is a narrow and limited exception to the general waiver rule allowing a reviewing court to consider a forfeited issue that affects substantial rights. *People v. Herron*, 215 Ill. 2d 167, 177-79 (2005). In the context of a sentencing hearing, we will review an error that is not properly preserved as plain error where the evidence is closely balanced or the error is so fundamental that it may have deprived defendant of a fair sentencing hearing. *People v.*

Thomas, 178 Ill. 2d 215, 251 (1997). Here, the evidence at sentencing was not closely balanced. The evidence showed that defendant was guilty of residential burglary, and that he had an extensive criminal history spanning three decades. In addition, and for the reasons that follow, we find there was no fundamental error.

Defendant claims that the court improperly considered as an aggravating sentencing factor that he was possibly receiving compensation for a Federal lawsuit he had filed. He maintains that the court's comments that it was "miffed" for being "manipulated" showed that it had an unfair, improper and unfounded bias against defendant and that it took the issue of him possibly receiving compensation personally. These assertions are not supported by the record.

The court's comments regarding the Federal lawsuit and the possible compensation defendant would receive from it were made while it was trying to schedule defendant's sentencing hearing. The court had previously explained to defendant that it needed verification of his scheduled surgery because it could not just keep him "in the [C]ounty," and that it felt manipulated where defendant asked for continuances based on needing surgery but then filed a Federal lawsuit for compensation. The court's comments, contrary to defendant's contention, did not, in any way, reflect that it was biased against defendant in sentencing.

Rather, they reflected the court's attempt to verify the truth behind defendant's requests for multiple continuances as it was "under a Federal court order to not keep people in his status in the [C]ounty." Furthermore, once the court received a letter from defendant's doctor verifying that surgery was scheduled for defendant on August 7, 2009, it granted another continuance and did not make any additional reference to the Federal lawsuit.

Defendant, however, claims that the court's comments regarding his medical treatment at the sentencing hearing show that its prior comments about his Federal lawsuit were still on its mind. The court's comments at the sentencing hearing show that it considered defendant's medical issues along with his age in mitigation and solely considered in aggravation defendant's criminal history where, in noting that defendant had medical issues and was older, it stated that it would try to be moderate in sentencing defendant but had to take into account his lengthy criminal history. The record thus shows that the comments about the Federal lawsuit had no bearing on defendant's sentence.

We further find no impropriety in the court's comment that defendant was a "career criminal." This comment was logically prompted (*People v. Bosley*, 197 Ill. App. 3d 215, 222 (1990)), based on defendant's extensive criminal history (*People v. Wilson*, 257 Ill. App. 3d 670, 705 (1993)). We also note that the 9-year sentence the court imposed was closer to the minimum,

where the sentencing range for defendant, a Class X offender, was 6 to 30 years' imprisonment. 730 ILCS 5/5-8-1 (West 2006). The record thus shows no impropriety on the court's part and that it followed the proper statutory sentencing standards. We find that the court's comment was not of such magnitude as to deprive defendant of a fair sentencing hearing, and, as explained above, the evidence was not closely balanced. *Thomas*, 178 Ill. 2d at 251-52. Defendant's claim of error is waived. *Thomas*, 178 Ill. 2d at 252.

Defendant finally contends, the State concedes, and we agree that one of his two residential burglary convictions (counts I and II) should be vacated under the one-act, one-crime rule. Under count I, defendant was charged with burglarizing the residence of Elijah Wilson at 7439 South Rhodes Avenue in Chicago, and under count II, he was charged with burglarizing the home of Vernell Wilson, the wife of Elijah, who resided at the same address.

Our supreme court has held that multiple convictions cannot stand where the same, single physical act is the basis for both charged. *People v. King*, 66 Ill. 2d 551, 565-66 (1977). A person commits residential burglary when he, without authority, knowingly enters and remains in the dwelling of another with the intent to commit a theft therein. 720 ILCS 5/19-3(a) (West 2006). A defendant may be convicted of only one count of

residential burglary where he made but one entry into the home (see generally *People v. Braboy*, 393 Ill. App. 3d 100, 113 (2009) (discussing home invasion)), regardless of the number of homeowners as the number of homeowners is not an element of the offense (720 ILCS 5/19-3(a) (West 2006)). Here, defendant entered the home at 7439 South Rhodes Avenue where Elijah and Vernell Wilson lived, only once. As there was only one physical act, defendant cannot be convicted of more than one residential burglary. We, therefore, vacate defendant's conviction under count II (*Braboy*, 393 Ill. App. 3d at 113), and pursuant to our authority under Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), correct the mittimus (*People v. McCray*, 273 Ill. App. 3d 396, 403 (1995)).

In light of the foregoing, we vacate defendant's conviction under count II, correct the mittimus to that effect, and affirm the judgment of the circuit court of Cook County in all other respects.

Affirmed in part and vacated in part; mittimus corrected.