2011 IL App (1st) 100688-U

FIFTH DIVISION
December 30, 2011

No. 1-10-0688

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. 09 CR 17125
	)	
NAKIA SMITH,	)	Honorable
	)	Rosemary Grant-Higgins,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: Where trial court determined that a portion of defendant's self-reported income was derived from drug activity and commented upon defendant's failure to accept responsibility for his actions, court did not rely on an improper sentencing factor; defendant's sentence was affirmed.

¶ 2 Following a bench trial, defendant Nakia Smith was convicted of delivery of a controlled substance and was sentenced as a Class X offender to eight years in prison. On appeal, defendant contends he was denied a fair sentencing hearing because the circuit court erroneously speculated that he obtained a portion of his income from drug sales and relied on that factor in imposing his sentence. We affirm.

¶ 3 At trial, the State presented testimony that police were conducting an ongoing narcotics investigation. Chicago police officer Delwin Gadlen testified that on July 1, 2009, he performed an undercover narcotics purchase that involved defendant. Officer Gadlen testified that he handed $40 to Andre Williams, whom the officer knew from previous drug transactions. Williams walked away from the officer and handed the money to defendant, who was standing nearby with several other men. Defendant walked to a nearby vehicle and returned to where Williams stood, handing Williams one or more items. Williams walked back to Officer Gadlen and handed him two small plastic bags labeled "best" that contained a white powdery substance.

¶ 4 The bags received by Officer Gadlen contained a total of .4 gram of heroin. Defendant was convicted of the delivery of less than one gram of heroin under section 401(d) of the Controlled Substances Act, which is a Class 2 felony. 720 ILCS 570/401(d) (West 2008). Defendant's criminal background, which included two additional Class 2 felony convictions, required him to be sentenced as a Class X offender. 730 ILCS 5/5-5-3(c)(8) (West 2008) (mandating that a defendant convicted of a Class 1 or Class 2 felony who has twice been convicted of a Class 2 or greater felony be sentenced as a Class X offender).

¶ 5 The pre-sentence investigation report presented to the trial court stated, *inter alia*, that defendant owned a hauling and industrial cleanup business that he operated from his mother's house since 2005. The report stated that, according to defendant, he earned a gross income of $4,000 per month from that business.

¶ 6 At sentencing, the State argued in aggravation of defendant's sentence that although defendant had "all the tools to be a contributing member of society," including a steady income, defendant instead chose a life of crime. The State presented evidence of defendant's prior convictions.

¶ 7 In mitigation, defense counsel pointed out defendant's ownership of his business and that he held various jobs. Counsel stated she had income records from four businesses where defendant had earned wages. Defendant also addressed the court, acknowledging "mistakes in his life" after he "came home in 2000" from serving a sentence for a previous conviction. Defendant told the court: "I did try to start my own business to straighten my life up, but I still hung around the wrong crowd, and the wrong people is what got me here today [*sic*]".

¶ 8 In imposing defendant's sentence, the court made the following remarks relevant to this appeal:

> "I'm taking into consideration all the factors presented in both aggravation and mitigation as well [as defendant's] representations to the court that he is an addict and that he wishes to continue treatment.
>
> However, [defendant] does not take responsibility for his actions. I did not find that you were an innocent victim of this circumstance, I found that you were an intricate part of this drug operation, in fact the person who was involved with the sales. That four thousand dollars a month that you allege you made from your house cleaning business out of your home [–] you made that from narcotics sales. Had you admitted that to me, I would see you as taking responsibility, but again I see you as saying it's the wrong crowd, it's somebody else's fault, somebody else's responsibility. You still have a lot of learning to do. A whole lot of learning to do."

¶ 9 The court also remarked to defendant that "[y]ou didn't make four thousand dollars a year at the health clinic [–] you made it in selling drugs."

¶ 10 The following exchange then occurred between defendant's counsel and the court:

> "MS. FRANSENE [defense counsel]: [Defendant] wants me to show your Honor his 1099 forms to show that he did earn money while gainfully employed. I wouldn't ask that they be considered exhibits though, Judge.
>
> THE COURT: So the amount of money that is indicated that he earned [–]
>
> MS. FRANSENE: Is in the $26,000 range.
>
> THE COURT: Which doesn't come out to four thousand dollars a month. So this supports my contention that the money that he made for four thousand dollars a month was from drug sales."

¶ 11 The court sentenced defendant to eight years in prison and ordered him to complete a drug treatment program. Defense counsel immediately filed a previously prepared motion to reconsider defendant's sentence, which the court denied. After completing its remarks, the court asked if defense counsel had further arguments on the motion to reconsider. Defense counsel responded that she would rest on the motion.

¶ 12 On appeal, defendant contends he was denied a fair sentencing hearing because the circuit court relied on an erroneous factor. He argues the court improperly speculated that his income derived from drug sales and used that presumption as an aggravating factor in imposing his sentence.

¶ 13 Defendant acknowledges his trial counsel did not object to any of the remarks made by the court during sentencing or file a written motion asking the court to reconsider his sentence based on his current argument. He asserts, however, that he has not waived this issue for review because the basis for his objection lies in the conduct of the court and it would have been impractical for his counsel to voice disagreement with the court's remarks during sentencing.

¶ 14 Defendant apparently attempts to invoke the *Sprinkle* doctrine, though he does not cite to that decision in which our supreme court relaxed the forfeiture rule to ensure the defendant received a fair trial. See *People v. Sprinkle*, 27 Ill. 2d 398, 400-01 (1963); see also *People v. McLaurin*, 235 Ill. 2d 478, 487-88 (2009). Trial counsel cannot be said to have forfeited a claim of error that "would have fallen on deaf ears" had it been contemporaneously raised to the court. *McLaurin*, 235 Ill. 2d at 487-88. Although *Sprinkle* addressed the difficult position of trial counsel in questioning the court's rulings or comments in the presence of the jury, the *Sprinkle* doctrine has been applied in a limited number of cases where, as in the case at bar, no jury was present. *McLaurin*, 235 Ill. 2d at 487-88 (and cases cited therein).

¶ 15 In sentencing decisions, the *Sprinkle* doctrine primarily has been invoked in cases involving the death penalty. As the supreme court noted in *McLaurin*, "[t]hat we have seldom applied *Sprinkle* to noncapital cases further underscores the importance of uniform application of the forfeiture rule except in the most compelling of situations." *McLaurin*, 235 Ill. 2d at 488.

¶ 16 In the instant case, defendant argues his counsel could not have been expected to "interrupt the judge and point out" the court's consideration of an improper sentencing factor. However, the colloquy set out above reveals that defense counsel had ample opportunity to present that argument without interrupting the court. Defense counsel argued that defendant earned the money in question through legitimate employment and presented the court with 1099 forms showing his income. The court reviewed that documentation and noted a discrepancy between the amount of defendant's listed earnings of $26,000 per year and defendant's self-reported income of 4,000 per month, nearly twice his listed earnings.

¶ 17 After the court imposed defendant's eight-year sentence and admonished defendant of his appeal rights, defense counsel filed a motion to reconsider the sentence, which the court noted and denied. After concluding its remarks, the court asked if defense counsel had further

argument on the motion to reconsider. Defense counsel responded that she would rest on the motion. The court again stated it was denying the motion to reconsider sentence, noting that its ruling "very seriously took into consideration [defendant's] participation in the offense, and the fact that he was an intricate part of that participation."

¶ 18 Defense counsel therefore had the opportunity to object to the court's analysis of defendant's income without interrupting the court but chose to rest on her previously prepared motion to reconsider. Although defendant contends counsel's "further objection would have been fruitless," that standard would excuse forfeiture to all circumstances where the trial court rejects an argument and counsel does not preserve the issue. The need to excuse the defendant's forfeiture that prompted the rule in *Sprinkle* does not exist in this case.

¶ 19 The situation at defendant's sentencing hearing can be compared to *People v. Bailey*, 409 Ill. App. 3d 574, 587 (2011), where this court rejected the defendant's contention that his counsel was prevented from raising a contemporaneous objection to evidence. The court in *Bailey* found no compelling reason to apply the forfeiture rule of *Sprinkle* where, during the bench trial, defense counsel had objected to several rulings of the court and had "every opportunity to raise an objection." *Bailey*, 409 Ill. App. 3d at 587.

¶ 20 Having rejected that theory of excusing defendant's forfeiture, we next consider his argument that this claim can be reviewed as plain error. The plain error doctrine creates a limited exception to the general rule of forfeiture in the interest of protecting the rights of the defendant and the integrity and reputation of the judicial process. *People v. Kitch*, 239 Ill. 2d 452, 461 (2011). Defendant invokes the second prong of plain error, which involves an error is so serious as to deny the accused a substantial right. See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The defendant bears the burden of persuasion in a plain error analysis. *People v. Herron*, 215 Ill. 2d 167, 177 (2005).

¶ 21 The first step in plain-error review is to determine whether an error occurred. *Kitch*, 239 Ill. 2d at 461. Defendant's claim of the court's sentencing error is two-fold: (1) the court improperly presumed that a portion of his income came from drug sales and not legitimate employment, and (2) the court erred in using its conclusion about his drug-related income as an aggravating factor in imposing his eight-year sentence.

¶ 22 Defendant's first assertion involves a factual finding by the trial court, *i.e.*, that defendant's $4,000 self-reported monthly income was partially derived from drug sales. At a sentencing hearing, the trial court acts as the finder of fact. *People v. Reeves*, 385 Ill. App. 3d 716, 732 (2008), citing *People v. Wiley*, 205 Ill. 2d 212, 223 (2001). The trial court considered the evidence of defendant's legitimately earned wages but also noted the discrepancy between that amount and defendant's income as estimated in the pre-sentence investigation report. The trial court's determination that a portion of defendant's income came from drug activity was a reasonable conclusion from the evidence.

¶ 23 We next consider the trial court's use of its conclusion as to the source of defendant's income in arriving at defendant's eight-year sentence. A trial court may not use a factor implicit in the offense as an aggravating factor in sentencing. *People v. Robinson*, 391 Ill. App. 3d 822, 842 (2009). Receiving compensation is inherent in most drug transactions; therefore, it is generally improper to consider the fact that a defendant has been compensated as a factor in aggravation. *Robinson*, 391 Ill. App. 3d at 844; *People v. M.I.D.*, 324 Ill. App. 3d 156, 159 (2001); see also *People v. McCain*, 248 Ill. App. 3d 844, 851 (noting, as a practical matter, that "few drug deliveries are made as gifts").

¶ 24 Nevertheless, this court also has held that a factor that is implicit in a crime, such as the amount of profit derived from a criminal enterprise, may relate to proper sentencing considerations including the extent and nature of the defendant's involvement, the defendant's

underlying motivation for committing the offense, the likelihood of the defendant's commission of similar offenses in the future, and the need to deter others from committing similar crimes. *M.I.D.*, 324 Ill. App. 3d at 159-60 (court did not err in considering defendant's compensation from drug enterprise in its sentencing determination); *McCain*, 248 Ill. App. 3d at 851 (court did not unduly focus on compensation solely to increase defendant's sentence; rather, court mentioned compensation in commenting on defendant's role in drug transactions and motivation by greed). Here, the trial court considered defendant's income in noting the nature of his involvement in the drug activity and defendant's failure to take responsibility for his actions.

¶ 25 The sentence imposed by the trial court did not rest on improper factors, and because no error occurred in sentencing, there can be no plain error. We further note the trial court has broad discretion in determining an appropriate sentence, and this court will reverse a sentence only where an abuse of that discretion has occurred. See *People v. Willis*, 409 Ill. App. 3d 804, 815 (2011) (sentence within applicable statutory range does not constitute an abuse of discretion unless it varies from purpose of the law or is disproportionate to nature of offense). Defendant was sentenced as a Class X offender and therefore was eligible for a term of between 6 and 30 years in prison, pursuant to section 5-4.5-25 of the Unified Code of Corrections, which became effective on July 1, 2009. 730 ILCS 5/5-4.5-25 (West 2010); see also 730 ILCS 5/5-8-1(a)(3) (West 2008) (same). Therefore, defendant's eight-year sentence not only fell within the statutory range for a Class X offender but was just two years greater than the minimum possible term.

¶ 26 Accordingly, the judgment of the circuit court is affirmed.

¶ 27 Affirmed.