2012 IL App (1st) 102738-U

SECOND DIVISION
July 10, 2012

No. 1-10-2738

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).

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. 06 CR 540
	)	
ELBERT DUNNIGAN,	)	Honorable
	)	Joseph G. Kazmierski,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

O R D E R

¶ 1 *HELD*: Trial court did not err in permitting the State to present evidence during sentencing hearing about defendant's prior criminal act and his misconduct while in custody awaiting trial where such evidence was relevant and reliable. However, trial court did err in sentencing defendant to an extended term sentence for attempted armed robbery count after already sentencing him to an extended term for armed robbery. Further, the clerk of the court is ordered to correct the mittimus to reflect that defendant earned 1712 days of credit for time spent in custody prior to sentencing.

¶ 2 Following a bench trial defendant, Elbert Dunnigan, was convicted of first degree murder, armed robbery, and attempted armed robbery. He was subsequently sentenced by the trial court to natural life in prison with concurrent extended term sentences of 60 years for armed robbery and 30 years for attempted armed robbery. On appeal, defendant contends that his sentence should be vacated and a new sentencing hearing granted because (1) the trial court considered improper hearsay evidence in aggravation and (2) erred in sentencing him to an extended term sentence on the attempted armed robbery count after already sentencing him to an extended term for armed robbery. Defendant also asserts, and the State agrees, that the mittimus should be corrected to reflect 1712 rather than 1709 days of credit for time defendant spent in custody prior to sentencing. For the reasons set forth below, we affirm the conviction but reduce the 30 year extended term sentence to 15 years, the maximum for defendant's attempted armed robbery conviction. We also order the clerk of the court to correct the mittimus to reflect 1712 days of credit for time in custody.

¶ 3 On December 5, 2006, defendant and two other men, Ishmael Clark and Gino Wilson, were arrested in connection with the robbery and shooting death of Lee Richardson, Jr. Defendant was charged by indictment with first degree murder (720 ILCS 5/9-1)(A)(1), (A)(2), (A)(3) (West 2006)), armed robbery (720 ILCS 5/18-2(A)(2) (West 2006)), attempted armed robbery (720 ILCS 5/8-4 (West 2006), unlawful use of a weapon by a felon (720 ILCS 5/24-1.1 (West 2006)), and aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(A)(1)/(3)(A) (West 2006)), in connection with the armed robbery and shooting death of Lee Richardson Jr. Prior to trial, the State filed a notice of intent to seek the death penalty, citing the aggravating factor set

forth in 720 ILCS 5/9-1(b)(6) (West 2006), because defendant killed the victim in the course of another felony.

¶ 4 At trial,[1] the evidence showed that on December 5, 2006, Lee Richardson Sr. was helping his 31-year-old son, Lee Richardson Jr., fix the furnace in his home. Shortly before noon, the two men returned to Lee Jr.'s house from the store, parked the car in the garage, and exited through a side door. As they walked across the backyard, they were confronted by two African American men with guns who forced them to lay face down on the ground. One of the gunmen, who the State posited was codefendant, Ishmael Clark, wore a light-colored coat and was armed with a large, silver semiautomatic gun. The other gunman, who, the State asserted was the defendant, Dunnigan, wore a two-toned blue jacket and was armed with a smaller, darker colored gun. While the Richardsons were laying on the ground, the gunmen searched them for valuables. Lee Richardson Jr. began to struggle with the man in the light-colored jacket and both offenders shot him several times. Lee Richardson Sr. was also shot but the bullet went through his coat pocket, hitting a roll of plumbers tape. He played dead until after the perpetrators fled the scene. Lee Richardson Jr., who suffered four gunshot wounds, died of his injuries.

¶ 5 Across the street, neighbors Louis and Amelia Washington watched the robbery and shooting through their windows. Louis called the police while it was happening and gave a description of the incident, the offenders, and the direction of their flight. Both offenders ran to the corner of 115th and Parnell and got into a waiting gray minivan being driven by codefendant

[1]Defendant's codefendants, Ishmael Clark and Gino Wilson, were convicted of related charges after a simultaneous bench trial and a guilty plea respectively.

Gino Wilson. A report about the robbery and shooting went out over the police radio and a high speed chase ensued, covering several miles and resulting in multiple crashes. The chase reached a dead end on Hoyne Avenue and 95th Street. Police officers saw a man jump out of the passenger side of the moving van with a gun in his waistband. Officers descended on the man, who was later identified as defendant, and apprehended him. They recovered the gun, a 9-mm semiautomatic pistol, from defendant's waistband. They also recovered proceeds from the robbery, including Lee Richardson Jr.'s wallet, cell phone, and cash, which were falling from defendant's pockets as he struggled with the police. The gun recovered from defendant was later determined to be the source of three of the four bullets recovered from Lee Richardson, Jr.'s body.

¶ 6 Clark and Wilson continued to flee in the minivan. Wilson jumped out of the van after it was struck by two trucks in the middle of an intersection. He broke his foot and was subsequently apprehended. Clark continued to flee until he crashed the van into the front steps of a nursing home at 2940 West 87th Street. Clark attempted to flee on foot but was apprehended about two blocks away. Inside the van, the police found several purses, jewelry, tools, and a police scanner. The police also recovered a white and black reversible jacket, which Lee Richardson, Sr. and Amelia Washington identified as the jacket one of the shooters wore. They did not recover the second weapon that was determined to be the source of one of the bullets recovered from the decedent and one of the cartridge casings found at the scene of the shooting.

¶ 7 After the State rested its case, defendant filed a motion for a directed finding of acquittal, which the trial court denied. Defendant did not testify and rested after entering several exhibits

into evidence. The court found defendant guilty of first degree murder, armed robbery, and attempted armed robbery.

¶ 8 The court then proceeded with the death eligibility phase of the sentencing hearing. Defendant waived his right to a jury for sentencing. The State argued that defendant was death eligible because (1) he killed Lee Richardson, Jr. during the course of the armed robbery of Lee Richardson, Jr. and the attempted armed robbery of Lee Richardson, Sr.; (2) defendant was at least 18 years old, and (3) the victim was shot and killed and three of the four bullet wounds were inflicted by the gun recovered from defendant. Defense counsel argued that the State failed to prove beyond a reasonable doubt that defendant was the shooter or that the shooting was intentional. The trial court found that the State proved the aggravating factor beyond a reasonable doubt and that defendant was death eligible. The State then presented witnesses in aggravation.

¶ 9 First, Frank Barker, his aunt Hope Joiner, and his cousin Raphael Keys testified to an incident that occurred at Joiner's home at 7038 South Oakley on August 23, 2005. On that date, Barker was taking out the garbage at approximately 8 a.m. when two men approached with guns and demanded that Barker open the door. The men entered the residence where they and a third man forced the family to lie on the floor, bound them with phone cords and duct tape, and searched the home for valuables. Barker, Joiner, and Keys subsequently identified defendant and Ishmael Clark as two of the gunmen. Keys also testified that defendant threatened to kill him but that Clark told him to put the safety back on his gun and that before leaving, the offenders told them not to call the police because they had police scanners.

¶ 10 Alexis Blakemore testified that at about 11:15 a.m. on October 10, 2005, she was returning to her first-floor apartment at 5511 South Carpenter when she was approached at the door by two black men who put pistols in her face and forced their way into her apartment. She said there was a third man present who also had a pistol. The men tied her up with cords and searched her home for valuables, taking two televisions, jewelry, alcohol, and other items before leaving about 45 minutes later. Blakemore subsequently identified defendant and Clark in a lineup as two of the gunmen and said that she recognized them earlier when she saw them on television in connection with a murder.

¶ 11 Tina Johnson testified that on December 3, 2005, just before 8 p.m., she was leaving a friend's house in Markham and was talking on her cell phone when a gray van pulled up. A man got out, grabbed her shoulders, stuck a gun in her mouth and forced her into the van with two other men and drove off. The men took about $300, her cell phone, purse keys and mink coat before letting her out in an alley near 111th Street with a bag over her head. On December 5, 2005, Johnson saw an evening news broadcast about a shooting and recognized the van and the men who kidnaped her. She called the Markham police and the next day went with police to an auto pound where she identified the gray van used in the kidnaping. On December 22, 2005, she identified the three offenders who kidnaped her in a lineup. In court, she identified the offenders but due to the passage of time could not recall which man had done what. Mike White, a former Markam investigator, testified that at the lineup, Johnson identified Clark as the driver, Wilson as the man who jumped out of the van and stuck a gun in her face, and defendant as the man who stuck a gun in her mouth and told her to shut up.

¶ 12 Chicago Police Commander Dennis Keane testified that on April 16, 1996, he was a Chicago police detective assigned to investigate an armed robbery that occurred at Carteaux Jewelers at 31 North Wabash. On their police radio, Keane and his partner monitored the car chase that followed the robbery and ended in a crash at Maxwell Street, west of Halsted Street. Immediately afterwards, Keane went to the jewelry store and spoke with a police sergeant and several witnesses of the armed robbery. He testified that he learned that three or four individuals entered the store and one of them had a mask over his face and a gun in his hand. The security guard yelled for everyone to get down and fired one shot, striking one of the offenders. The same offender struggled with the security guard and several more offenders entered the store, broke the glass cases, stole watches, and fled. An off-duty police officer who was on the scene had chased the fleeing offenders.

¶ 13 Five men were captured following the car chase, and Keane identified defendant as one of the men arrested. While in custody, defendant identified himself as Shermonders Sanders and falsely claimed to be 16 years old. Initially, defendant told Keane he was in the car with the other offenders but did not know they were going to commit a robbery. During a second conversation with Keane, defendant admitted his involvement in the planning and commission of the robbery, and said that he and another cooffender were supposed to "take care of the security guard," while two other offenders broke the glass and took Rolex watches. Defendant gave a handwritten statement detailing his role in the armed robbery, which was admitted into evidence at the sentencing hearing, along with photo exhibits that memorialized defendant's involvement in the crime. Defendant pled guilty to armed robbery and was sentenced to 11 years in prison.

¶ 14 Next, Assistant State's Attorney Dawn Welkie testified that she prosecuted defendant in case 01 CR 30441, after which defendant was found guilty of aggravated unlawful use of a weapon while on parole from his armed robbery case and was sentenced to seven years in prison. The State also introduced defendant's prior juvenile convictions, including residential burglary in 1988, unlawful use of a weapon, unlawful possession of a firearm, and theft, also in 1988, and unlawful use of a weapon and unlawful possession of a firearm in 1990.

¶ 15 The parties stipulated that on December 6, 2005, at 10:22 a.m., defendant was alone in an interrogation room and stated, "I be out boy, I be out, I'm telling you. I'm telling you, I'm escaping this motherfucker, I'm telling you. I'm telling you, man." Later that same day he stated, "Hey, man, I need no room for me to get away, I promise. Fuck, I don't give a fuck man, for real. I don't care." The parties further stipulated that defendant was in the custody of the Department of Corrections since December 5, 2005 and had not attempted to escape.

¶ 16 Lieutenant Earl Tucker of the Cook County Sheriff's Department testified that it was his job to ascertain problems with inmates at Cook County Jail, to move around the building to see what was happening, and to report any problems to his captain. Tucker identified defendant in court as an inmate he was familiar with and said he had been informed that defendant was a Gangster Disciple. Over defense counsel's hearsay objection, he opined that defendant held some ranking in the gang but did not know what level. Tucker explained that at the jail, the Emergency Response Team (ERT) handled problems of an overwhelming nature and conducted random searches and reported their findings back to him. Tucker identified People's Exhibit BB as an ERT report that detailed an incident involving defendant on February 2, 2010. Over

defense counsel's hearsay objection, Tucker testified that on that date, defendant was caught with a small amount of a green leafy substance, suspected to be cannabis and a "kite" or jailhouse note, both of which were considered contraband in the jail. On cross-examination, Tucker acknowledged that he did not know if the chemical composition of the substance was tested or the contents of the note. He also did not know if defendant was disciplined for this incident.

¶ 17 Tucker next identified People's exhibit CC as another ERT report and, over defense counsel's objection, testified that it indicated that a search of defendant's cell revealed a set of nail clippers, which are considered contraband. On cross-examination, Tucker said he had no personal knowledge of the nail clipper incident or information that defendant was using the object to hurt anyone. Tucker agreed that the clippers were taken from defendant, who received four days in solitary. Next, Tucker identified People's Exhibit DD as a report stating that a razor blade, which is also contraband, had been found in defendant's mail. On cross-examination, Tucker acknowledged that the report stated that defendant was found not guilty in that incident. Tucker identified People's Exhibit EE as a report regarding an incident where defendant made intimidating remarks to a guard about the jailhouse food, stating that he would break the guard's neck. Lastly, People's Exhibit FF was another ERT report regarding a riot that occurred in Division 9 on November 9, 2006. Over defense counsel's objection, Tucker testified that the defendant had been written up for being a participant in the riot and, after a hearing before the disciplinary hearing board, was given 29 days of isolation. On cross-examination, Tucker acknowledged he did not personally observe the incident and that defendant had pled not guilty to involvement in the incident.

¶ 18 After the State rested in aggravation, defendant called his mother, sister, girlfriend, and two sons to testify in mitigation. Defendant's mother testified that defendant's father had been in and out of the penitentiary when defendant was a child, that defendant was hit by a car when he was 8-years old and suffered a head injury, and when he was 17 he was jumped by several boys and beaten with a bat. She said that in fifth grade, defendant started having behavioral problems, smoked pot, attended special education classes, and received disability payments. Defendant's other family members testified that he treated them well.

¶ 19 Lastly, it was stipulated that Robert Hanlon, PhD, a board certified clinical neuropsychologist qualified to testify as an expert in that area, would testify that he reviewed various materials in the case, interviewed defendant, administered several psychological tests and concluded within a reasonable degree of certainty that defendant manifests a longstanding intellectual impairment, specifically, borderline intellectual functioning and a learning disorder. These limitations represent a significant neuropsychological impairment and constitute longstanding functional disability. Defendant's I.Q. is 74, but the parties stipulated that Dr. Hanlon opined that defendant was not mentally retarded, because his I.Q. is not accompanied by significant deficits in communication, self-care, social or interpersonal skills, home living, self-direction, academics, health and safety, use of community service, and work.

¶ 20 After the defendant rested in mitigation, the trial court sentenced him to natural life in prison without the possibility of parole for first degree murder, an extended term of 60 years for armed robbery, and an extended term of 30 years for attempted armed robbery, with the latter sentences running concurrent with the life sentence. Defendant filed a motion for a new trial and

a motion for a new sentence, which were both denied. This appeal followed.

¶ 21 On appeal, defendant first asserts that his sentences should be vacated and the case remanded for a new sentencing hearing because during the sentencing hearing, the trial court improperly permitted the State to present hearsay testimony, over defense counsel's objections, of defendant's prior criminal conduct by witnesses who had no first hand knowledge of that conduct. Specifically, defendant asserts that Lieutenant Earl Tucker of the Cook County Sheriff's Department was permitted to testify, over defense counsel's objections, about five jail infractions committed by defendant while in custody even though he was not present for any of the incidents and had no personal knowledge about them. Further, Tucker was permitted to testify that defendant was a Gangster Disciple member even though he had no personal knowledge of any gang affiliation. Similarly, defendant asserts, Commander Dennis Keane was permitted to testify, over defense counsel's objection, about the 1996 armed robbery of the jewelry store, even though he had no personal knowledge of the incident. Defendant concedes that evidence of past criminal conduct may be considered at sentencing, including criminal conduct for which there was no prosecution or conviction, but contends that such evidence must be presented by witnesses who have personal knowledge about the incidents, rather than through hearsay. *People v. Jackson*, 149 Ill. 2d 540, 548 (1992).

¶ 22 It is well-settled that to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required. *People v. Freeman*, 404 Ill. App. 3d 978, 995 (citing *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Defendant acknowledges that although his attorney made a contemporaneous objection, he forfeited the

issue by failing to raise it in his postsentencing motion. However, defendant asserts that a judge's consideration of improper factors at sentencing affects a defendant's fundamental right to liberty (Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967)) and asks this court to address the issue as plain error.

¶ 23 Forfeited claims related to sentencing issues may be reviewed for plain error. *Hillier*, 237 Ill. 2d at 545. The plain-error rule allows a reviewing court to consider trial errors not properly preserved in a criminal case when (1) the evidence at the sentencing hearing was closely balanced or (2) the error was so egregious as to deny defendant a fair sentencing hearing. *Id*. at 545. Before we consider application of the plain-error doctrine, however, we must determine whether the trial court committed error. *People v. Staple*, 402 Ill. App. 3d 1098, 1105 (2010).

¶ 24 The ordinary rules of evidence are relaxed at the aggravation/mitigation stage of a capital sentencing hearing. *People v. Banks*, 237 Ill. 2d 154, 201 (2010). The only requirement for the admissibility of evidence at this stage of a capital sentencing hearing is that the evidence be relevant and reliable, the determination of which lies in the sound discretion of the trial court. *People v. Lovejoy*, 235 Ill. 2d 97, 152 (2009). It is well-settled that the introduction of hearsay evidence in a capital sentencing hearing violates neither the due process clause nor the confrontation clause. *Banks*, 237 Ill. 2d at 201. Further, it is well established that "evidence of criminal conduct can be considered at sentencing even if the defendant previously had been acquitted of that conduct." *People v, Deleon*, 227 Ill. 2d 322, 340 (2008) quoting *Jackson*, 149, Ill. 2d at 549-55. Hearsay statements taken during the course of an investigation and that are not directly challenged are admissible at sentencing as reliable. *People v. Hall*, 194 Ill. 2d 305, 353

(2000).

¶ 25 Defendant does not challenge the relevance of the testimony of Commander Keane or Lieutenant Tucker but instead argues that neither witness' testimony was reliable and therefore, should not have been admitted. We disagree. First, Keane testified regarding defendant's involvement in a prior armed robbery for which he pled guilty. In *People v. Foster*, 119 Ill. 2d 69, 98 (1987), our supreme court held that testimony of police investigator concerning a robbery was reliable where it was corroborated by other evidence, including the defendant's conviction for the crime. Similarly, in this case, Keane was investigating the armed robbery of the jewelry store. He arrived almost immediately after the crime occurred and interviewed multiple witnesses. During the sentencing hearing, he testified as to what those witnesses told him. Although the witnesses' statements constitute hearsay, they were admissible at sentencing as reliable, since they were taken during the course of an investigation and were not directly challenged. *Hall*, 194 Ill. 2d at 353. Further, those witnesses' accounts were corroborated by defendant's guilty plea to the armed robbery.

¶ 26 Tucker's testimony regarding defendant's misconduct while in custody and awaiting trial and his gang membership was also reliable and admissible. Although Tucker did not witness the incidents or have personal knowledge about them, each incident was detailed in a report from the Emergency Response Team. Those reports were generated in the normal course of business at the jail and each one, which Tucker testified about, was admitted into evidence. Defendant's gang membership was corroborated by defendant's own admission in the Presentence Investigation Report, which was also admitted into evidence. Therefore, because this evidence

was both relevant and reliable, we find that the trial court did not abuse its discretion in admitting the testimony of either Keane or Tucker. Since there was no error in admitting the testimony, there can be no plain error and, thus, defendant's argument is procedurally defaulted.

¶ 27 Alternatively, defendant contends that his counsel was ineffective for failing to include this issue in his motion to reconsider sentence. Claims of ineffective assistance of counsel at a capital sentencing hearing are reviewed under the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Hall*, 194 Ill. 2d 305, 354 (2000). To demonstrate ineffective assistance, a defendant must show that: (1) the attorney's performance fell below an objective standard of reasonableness, and (2) the attorney's deficient performance prejudiced the defendant in that, absent counsel's errors, there is a reasonable probability that the sentencer would have concluded that death was not an appropriate sentence. *Id*. Because the defendant must satisfy both prongs of this test, the failure to establish either is fatal to the claim. *Strickland*, 466 U.S. at 687.

¶ 28 Here, the trial judge concluded that death was not an appropriate sentence and instead sentenced defendant to natural life imprisonment for first degree murder. Hence, because defendant cannot establish that he was prejudiced by any alleged deficiency in his counsel's performance, we find that he has failed to establish a claim of ineffective assistance of counsel.

¶ 29 Next, defendant contends that the trial court erred in sentencing him to an extended term on the attempted armed robbery count after sentencing him to an extended term for armed robbery and asks this court to vacate the sentence and remand for resentencing. Pursuant to 730 ILCS 5/5-8-2 (West 2005), when a defendant is sentenced to natural life for murder, the trial

court may impose an extended term sentence on the next most serious offense for which defendant was convicted. *People v. Terry*, 183 Ill. 2d 298, 302-303 (1998). Therefore, defendant asserts, the trial court could only sentence him to an extended term on the next most serious charge, armed robbery and not for the attempted armed robbery. The State agrees. Therefore, we vacate that portion of defendant's sentence and reduce to 15 years the maximum nonextended term for defendant's attempted armed robbery conviction. "Pursuant to Supreme Court Rule 615, a reviewing court may correct the mittimus without remanding the cause to the trial court." *People v. Hill*, 402 Ill. App. 3d 920, 929 (2010).

¶ 30 Lastly, defendant contends that the trial court entered a mittimus that incorrectly reflects that he is entitled to 1709 days of credit for the time he spent in custody prior to sentencing, when he is actually entitled to 1712 days of credit. The State concedes the error. Accordingly, we order the clerk of the court to correct the mittimus to reflect the correct sentence. 134 Ill.2d R. 615(b)(1).

¶ 31 For the foregoing reasons, we affirm defendant's conviction but reduce to 15 years the sentence on defendant's attempted armed robbery conviction. We also order the clerk of the court to correct the mittimus to reflect that defendant is entitled to 1712 days of credit for the time he spent in custody prior to sentencing

¶ 32 Affirmed as modified.