2012 IL App (1st) 103351-U

THIRD DIVISION
August 1, 2012

No. 1-10-3351

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. 96 CR 25395
	)	
STEVE HOLLOWAY,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE STEELE delivered the judgment of the court.
Justices Murphy and Salone concurred in the judgment.

O R D E R

¶ 1 *Held*: Where written presentence investigation report was required by statute, defendant's absence at trial and sentencing and his counsel's failure to request such a report did not forfeit his right to that procedure; defendant's sentence was vacated and the case was remanded for resentencing.

¶ 2 Following a jury trial and sentencing, both *in absentia*, defendant Steve Holloway was convicted of possession of a controlled substance with intent to deliver and sentenced to 20 years in prison. On appeal, defendant contends, under a plain error analysis, that he should receive a new sentencing hearing because the trial court did not order and review a written presentence

investigation report as required by statute. We vacate defendant's sentence and remand for a new sentencing hearing.

¶ 3 The report of proceedings indicates that on October 18, 1996, defendant was arraigned on a charge of possessing more than 900 grams of cocaine with the intent to deliver on September 7, 1996. Defendant was represented by counsel at that arraignment. The court advised defendant that he could be tried and convicted in his absence. Defendant posted bond in November 1996.

¶ 4 After defendant failed to appear at trial despite being given notice of the trial date, he was tried *in absentia* in February 1998. The jury convicted defendant of the possession of 900 grams or more of cocaine with the intent to deliver, which is a Class X felony punishable by a sentence of between 15 and 60 years in prison (720 ILCS 570/401(A)(2)(D) (West 1996)).

¶ 5 After the jury returned its verdict, the court held posttrial proceedings in which he asked the assistant State's Attorney for an "updated rap sheet," which was provided. The court then remarked:

> "With the defendant having failed to appear, normally after a trial, a presentence investigation report is required, and that is the law. But as to [] the defendant having failed to appear, there is no way of investigating [him]. So the Court will proceed by way of an updated rap sheet for purposes of discussing aggravation."

¶ 6 The State presented various factors in aggravation of defendant's sentence, including defendant's absence from the proceedings, and argued defendant should receive more than the 15-year minimum sentence. The State asserted that defendant had previous misdemeanor convictions for unlawful use of a weapon and soliciting a prostitute. Defense counsel responded his client had no prior felony convictions and should receive the minimum term.

¶ 7 In imposing sentence, the court stated:

"All right. The Court has considered the aggravation and mitigation presented and the arguments of counsel.

First of all, as to aggravation, the Court finds here that the sentence here is necessary to deter others from committing the same crime. The State has mentioned the three misdemeanors. The fact that there are three, has a history of criminality, is a fact the Court will consider.

Another aggravating factor the Court considers also is the fleeing by Mr. Holloway. As to factors in mitigation, the Court finds that the defendant has no history of prior felonies or otherwise has led a law-abiding life for a substantial period of time before the commission of the present crime."

¶ 8 The court again noted that defendant's previous crimes were misdemeanors. The court continued by addressing defense counsel:

"THE COURT: Does Mr. Holloway have a family?

MR. CUTRONE [assistant public defender]: He does. He resides with a young woman Ms. Tucker with whom he has three children.

THE COURT: The Court, though we can't say with 100 percent, but if he is picked up and is to serve his sentence [], the Court finds, that it would cause hardship to his dependents.

The particular offense for which Mr. Holloway was found guilty was possession with intent to deliver more than 900 grams of a substance containing cocaine.

> There was testimony that the particular items were 91 percent pure in quality. The legislature has determined that a person convicted of this offense at a minimum must be sentenced to 15 years and to a maximum of 60 years."

¶ 9 The court then reviewed the circumstances of the offense, noting that when defendant was shown the search warrant, defendant "did produce the keys, did allow the police to enter into the apartment, did, in fact, show the police where the items were" and did not resist arrest. The court concluded an "appropriate sentence, under the circumstances" was 20 years in prison, followed by a three-year period of mandatory supervised release.

¶ 10 On appeal, defendant's sole contention is that he should receive a new sentencing hearing because the trial court did not receive a written presentence investigation report. Defendant concedes this argument was not raised earlier but asserts the issue should be reviewed as plain error.

¶ 11 Pursuant to section 5-3-1 of the Unified Code of Corrections (the Code), a defendant "shall not be sentenced for a felony before a written presentence report of investigation is presented to and considered by the court," except where the parties have agreed to the imposition of a specific sentence. 730 ILCS 5/5-3-1 (West 1998). The report shall include the defendant's "history of delinquency or criminality, physical and mental history and condition, family situation and background, economic status, education, occupation and personal habits." 730 ILCS 5/5-3-2(a)(1) (West 1996). The report also shall set forth information about community resources that could assist in the defendant's rehabilitation, the effect the offense has had upon the victim, and information concerning the defendant's status since arrest. 730 ILCS 5/5-3-2(a)(2), (3) (West 1996). In addition, the report must include "when appropriate, a plan based upon the personal, economic and social adjustment needs of the defendant" and "any other matters that the investigatory officer deems relevant or the court directs to be included," as well as "information

concerning defendant's eligibility for a sentence to a county impact incarceration program." 730 ILCS 5/5-3-2(a)(5) through (7) (West 1996).

¶ 12 The Illinois Supreme Court has held that under section 5-3-1 of the Code, a written presentence report is mandatory unless the parties have reached a sentencing agreement. *People v. Harris*, 105 Ill. 2d 290, 299 (1985); see also *People v. Youngbey*, 82 Ill. 2d 556, 564 (1980) (holding that such a report is a "mandatory legislative requirement"). Rejecting the argument that the failure to provide a written presentence report is excused where the record shows that the court was verbally presented with much or all of the required information, the supreme court in *Harris* reasoned that a rule of substantial compliance conflicted with the statutory requirement of a "written" presentence report, which "not only serves to supplement the information offered by the parties in aggravation and mitigation," but also verifies that information for the court. *Id.* at 302-03 (noting a *per se* rule of a written report was preferred over a varying standard for each case); see also *People v. Walton*, 357 Ill. App. 3d 819, 822 (2005) (compliance with section 5-3-1 of the Code is mandatory; case remanded for resentencing in absence of written report).

¶ 13 Contrary to the State's assertion on appeal, a defendant's absence from the court proceedings does not automatically excuse the parties from providing a written presentence report pursuant to section 5-3-1of the Code. In *People v. Lynch*, 122 Ill. App. 3d 121, 124 (1984), as in the instant case, the defendant was tried and sentenced *in absentia*, and a certified copy of the defendant's prior robbery conviction was given to the trial court at sentencing. The appellate court vacated the defendant's sentence and remanded for resentencing, stating that the rule set out in section 5-3-1 of the Code was controlling. *Id.* at 124. The court rejected the State's position that the defendant's absence hampered the preparation of a written report, which only would have contained the conviction that was presented to the court, noting that creating

such an exception to section 5-3-1 of the Code would avoid the statute's "clear intent." *Id*. at 122-24.

¶ 14 A defendant has a right to be lawfully sentenced. *People v. Cotton*, 393 Ill. App. 3d 237, 265 (2009). In the case at bar, it is undisputed that no presentence report was provided to the court. In fact, the portions of the record set out above reflect that the judge, with the apparent agreement of the State and defense, proceeded to sentencing under the theory that a presentence report could not be prepared due to defendant's absence. We conclude that the court committed error in this case by sentencing defendant in the absence of a written presentence report in violation of section 5-3-1 of the Code.

¶ 15 A sentencing issue is forfeited unless the potential error is objected to at the sentencing hearing and raised in a postsentencing motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Defendant raises this issue on appeal for the first time and therefore faces the hurdle of procedural default, for which the plain error doctrine provides a "narrow exception" to that general rule. See *People v. Walker*, 232 Ill. 2d 113, 124 (2009). Plain error allows this court to consider a forfeited error when: (1) the evidence is closely balanced; or (2) if the error is so fundamental that it may have deprived defendant of a fair sentencing hearing. *People v. Hall*, 195 Ill. 2d 1, 18 (2000). Defendant invokes the second alternative, without offering a detailed explanation, stating merely that the absence of a written presentence report violated his right to a fair sentencing hearing and his "fundamental constitutional right to liberty."

¶ 16 Defendant's cursory plain error argument is largely of no moment, however, because the requirement of a written presentence report is not subject to forfeiture. Although no objection was raised here when the court proceeded without a written report, the supreme court held in *Youngbey* that the presentence investigation and written report do not constitute a personal right of the defendant, and thus, cannot be waived other than by the exception set out in the statute,

i.e., an agreement as to the defendant's sentence. See *Youngbey*, 82 Ill. 2d at 561; see also *Harris*, 105 Ill. 2d at 301-02. Indeed, this court reasoned in *People v. Childress*, 306 Ill. App. 3d 755, 757 (1999), that if the presentence report requirement cannot be knowingly waived by the defendant, "then certainly a defendant cannot forfeit it through some sort of procedural default."

¶ 17 Accordingly, the defendant's sentence is vacated. This case is remanded for a new sentencing hearing and the trial court is to receive a written presentence investigation report in compliance with sections 5-3-1 and 5-3-2 of the Code prior to or at the new sentencing hearing. The judgment of the circuit court of Cook County is affirmed in all other respects.

¶ 18 Sentence vacated; cause remanded.