2013 IL App (1st) 111467-U

FIFTH DIVISION
May 17, 2013
Modified upon denial of rehearing January 17, 2014

No. 1-11-1467

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 50429
	)	
EDDIE MYLES,	)	Honorable
	)	Colleen Ann Hyland,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

ORDER

¶ 1 *Held*: Denial of defendant's *pro se* motion alleging ineffective assistance of counsel and requesting appointment of new counsel was not manifestly erroneous; sentence was not excessive; judgment affirmed.

¶ 2 Following a jury trial, defendant Eddie Myles was convicted of robbery of a person over the age of 60 and sentenced to 20 years' imprisonment. On appeal, defendant contends that the trial court erred in failing to appoint counsel to represent him on his *pro se* post-trial motion alleging ineffective assistance of trial counsel, and also failed to conduct an adequate *Krankel* inquiry into his *pro se* allegations. He also maintains that his sentence was excessive.

¶ 3 At trial, the 67-year-old victim, Maryanne Koll, testified that on the evening of July 23, 2009, she went to the Jewel grocery store at 5545 South Brainard Avenue in Countryside to purchase some produce and withdraw money at the bank located there. After completing her withdrawal, Koll placed the money in a white envelope inside her open purse in the child-seat section of the grocery cart. As she was leaving the store, defendant bumped into her left shoulder, and she saw him remove her money envelope from her purse. She yelled out, "give me back my money," and "[h]elp. I am being robbed." Defendant fled, throwing her money envelope on the street. Koll did not notice if defendant had an art portfolio or anything else in his hand, but identified him as the offender 10 minutes after he was apprehended by police.

¶ 4 Sheila LaRoche testified that she witnessed the robbery and pursued defendant while calling police. As she did so, she asked several men along the way to stop defendant. They closed in on defendant, who went down on one knee, placed his hands up, and said, "I give." Police arrived and took defendant into custody. LaRoche did not notice a portfolio or a plastic bag in defendant's hands.

¶ 5 Countryside police officer Paul Klimek testified that when he took defendant into custody, he noticed that defendant had drawings with him, including one of Michael Jackson, but did not recall if defendant had a Jewel bag with him. The officer also did not recall if he brought medicine to defendant's wife after placing him in custody.

¶ 6 Defendant acknowledged that he had prior convictions for theft and driving under the influence, then testified that on the date of the incident, he went to the Jewel store to pick up his wife's medication. He had his art portfolio with him which contained 56 pictures that were 11 by 17 inches in size. Defendant explained that the portfolio itself was a "little bit wider" than his pictures. Defendant further testified that after he picked up and paid for his wife's medication, he

purchased some apple turnovers at the self-checkout. As he exited the store, he was not watching where he was walking and bumped into the victim. He apologized, and bent down to pick up some papers and an envelope that she had dropped, but the victim screamed that he had robbed her. Defendant denied pushing the victim, and reaching into her bag and pulling out an envelope. He stated that the whole incident was blown out of proportion, and that he was afraid he would end up in a squad car because he was a black man in a white community.

¶ 7 Defendant further stated that after his encounter with the victim, he walked away without running or walking fast and without the envelope. As he was walking, LaRoche ran past him and told three men nearby to stop him because he had robbed someone. Defendant stopped, and asked, "[w]hat are you talking about?" She told him he knew what happened, and that police were on their way. Defendant denied going down on one knee, and stating, "I give," and waited in the area because the police had been called. Defendant further testified that after Officer Klimek placed him in custody, he asked the officer to bring the medication he had purchased to his wife, and the officer brought the medication to his wife at his home.

¶ 8 In closing argument, defense counsel pointed out the circumstances of the case where defendant and the alleged victim were in the Jewel store at the same time for legitimate purposes, and where the inadvertent contact was made. Counsel then noted the inconsistences in the testimony where LaRoche testified that defendant had nothing in his hands, but the officer testified that defendant had his drawings with him, and that defendant testified that he had his art portfolio, the apple turnovers, and his wife's medication with him. Counsel also recalled defendant's innocent portrayal of the events which then got out of hand.

¶ 9 The jury, however, found defendant guilty of robbery, and he then filed several *pro se* motions, including one titled, "Motion for Ineffective Assistance of Counsel." In this motion,

defendant alleged, in relevant part, that his attorneys said they had the Jewel receipt and the police inventoried drawing pad, which was 24 by 24 inches in size, and which they were going to show to the jury during closing arguments. Defendant also claimed that when he confronted counsel during a break in the trial, and asked to see his drawings and receipt, his counsel informed him that he had subpoenaed the Jewel grocery store, but they did not have a receipt for July 23, 2009. Because counsel did not have these items in court, defendant maintained that they lied to him. Defendant further maintained that if the jury had been shown the drawing pad and receipt, they would know that the victim and LaRoche were lying because they testified that he did not have anything in his hands. He also claimed that if he knew that the drawing pad and receipt were not in court, he would have asked for a continuance rather than going to trial.

¶ 10 At the proceeding on his *pro se* motion alleging ineffective assistance of counsel, the court asked defendant if he had anything to add to his motion. Defendant responded that his attorneys misled him into believing that they had his art portfolio and the Jewel receipt in court with them, but if he knew that they did not, he would not have proceeded to a jury trial. The court noted that the jury heard evidence from defendant and the officer that he had his drawing portfolio with him. The court also noted that defendant indicated in his motion that he had confronted his counsel regarding the receipt and was told that counsel subpoenaed the Jewel, but the grocery store was unable to produce the receipt in question. The court further noted defendant's testimony that he had purchased medication at the Jewel and the officer's testimony that he may have delivered the medication to defendant's wife. Defendant responded, however, that, "[w]hen we are talking about evidence to show a jury evidence is one thing; to talk about it is something else."

¶ 11 Defendant then stated that a security guard was present at Jewel, but that his attorneys failed to present him. The court noted that defendant had not included this argument in his petition, but allowed him to argue it. Defendant maintained that the security guard should have been presented to explain why there was no videotape when the incident was allegedly caught on tape. The court responded that no one testified that the incident was caught on tape.

¶ 12 Defendant then argued at length his attorneys' failure to impeach the State's eyewitnesses, but the court responded that defense counsel had thoroughly questioned the witnesses. Defendant further complained that he had an inventory receipt for his drawing portfolio, and that his counsel should have used it to obtain the portfolio from the Countryside police station. He maintained that his art portfolio is too big for someone to claim they did not see anything in his hands, and that what LaRoche said on the stand was completely different from what she told police.

¶ 13 Defense counsel responded that LaRoche's statements were consistent, and there was nothing generated from her testimony to contradict. Counsel explained that since the medication was paid for in cash, he could not retrieve a receipt for it from Jewel. Counsel also stated that he sent a subpoena to the Jewel for prescriptions filled on July 23, 2009, but there was no record of the prescription in question. Counsel further stated that his investigator went to the Jewel and learned that there was no tape of the incident and that no security guard witnessed it.

¶ 14 The court subsequently denied defendant's motion finding that he failed to raise any meritorious claims, and that the issues he raised were related directly to his attorneys' trial strategy. The court noted that it had the opportunity to observe the attorneys at trial, and found that they were well prepared, diligent, and possessed excellent trial skills. The court further noted that the evidence of the art portfolio was introduced through the testimony of the officer

and defendant, that the jury had an opportunity to hear that evidence, and counsel presented argument on it during closing argument.

¶ 15 At the sentencing hearing, the State presented evidence in aggravation. The State noted that defendant had prior convictions for armed robbery of two senior citizens for which he was sentenced to 13 years' imprisonment, and a second degree murder conviction for which he was sentenced to 25 years' imprisonment. The State asserted that every time defendant leaves prison, he commits another violent act, and thus a substantial sentence was necessary to protect society from defendant who has repeatedly shown disrespect for the law and private citizens.

¶ 16 Defendant presented evidence in mitigation, including the live testimony of Ruth Adair, a staff chaplain at the Cook County Department of Corrections, who testified that defendant is now peaceful and humble, has taught Bible class and helped direct a prison choir. Counsel then noted that the second degree murder conviction was a reduced conviction from first degree murder, and since that incident, defendant has "done things to better himself." Counsel further noted that defendant did not attempt to flee from police, and did not hurt the victim in the instant case.

¶ 17 Defendant exercised his right to allocution. He apologized for disrupting the victim's life, then stated that his decision to use alcohol and drugs led to his criminal history. He also stated his belief that prison does not rehabilitate one, and that the system itself made him a victim. Defendant asked the court to consider that he was 59 years old, the life he had to live, his drug and alcohol use, and the changes he has made since the incident. Defendant finally stated that he felt that his attorneys helped convict him, and that the victim said he took an envelope from her, but that the envelope was returned to her and he never left with it.

¶ 18 In announcing its sentencing determination, the court stated that it had considered defendant's statement, the State's evidence, and the mitigation evidence presented by counsel, as

well as the live witness testimony, and the arguments of the parties. The court noted that it considered the presentence investigation (PSI) report, which sets out the mitigation evidence, but also shows that defendant is a career criminal who continues to "prey on people who are an easy target." The court noted that, in addition to his second degree murder and armed robbery convictions, defendant had convictions for driving under the influence and theft, that he was a gang leader for a period of time, and that it kept hearing excuses from defendant and reasons to blame everyone, but himself, for his actions. Based on these factors, the court sentenced him as a Class X offender to a term of 20 years' imprisonment. Defendant filed a motion to reconsider that sentence alleging that his sentence was excessive, but the court denied the motion.

¶ 19 On appeal, defendant contends that the trial court erred in failing to appoint counsel to represent him on his *pro se* post-trial motion alleging ineffective assistance of trial counsel. Defendant requests this court to vacate his sentence and remand his cause for the appointment of counsel to represent him on this motion. He argues, "alternatively," that the matter should be remanded for a more thorough *Krankel* hearing because the inquiry conducted by the court was inadequate.

¶ 20 New counsel is not automatically required in every case where defendant brings a *pro se* motion alleging ineffective assistance of trial counsel. *People v. Taylor*, 237 Ill. 2d 68, 75 (2010). When a defendant presents a *pro se* post-trial claim of ineffective assistance of counsel, the trial court should first examine the factual basis for defendant's claim, *i.e.*, conduct a *Krankel* hearing. *Taylor*, 237 Ill. 2d at 75. If the court determines that the claim lacks merit or pertains only to matters of trial strategy, new counsel need not be appointed and the court may deny the *pro se* motion. *People v. Chapman*, 194 Ill. 2d 186, 230 (2000). If, however, the *pro se* allegations show possible neglect of the case, new counsel should be appointed. *Taylor*, 237 Ill.

2d at 75. The operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into the *pro se* allegations of ineffective assistance of counsel (*People v. Moore*, 207 Ill. 2d 68, 78 (2003)); and, in this case, where the trial court made a determination on the merits of defendant's claim, we review the conduct of the trial court under the manifestly erroneous standard (*People v. Walker*, 2011 IL App (1st) 072889-B, ¶33; *People v. Dixon*, 366 Ill. App. 3d 848, 852 (2006); *People v. Young*, 341 Ill. App. 3d 379, 382 (2003)).

¶ 21 As set forth above, defendant filed a *pro se* motion alleging that his trial counsel was ineffective for misleading him to believe that his Jewel receipt and art portfolio would be presented to the jury, and that if he knew counsel had lied about having the portfolio and did not intend to present it, he would have requested a continuance and not proceeded to the jury trial. The trial court conducted a *Krankel* hearing into defendant's claims and explored matters alleged by defendant in his motion, and over another issue that was not raised in his petition, *i.e.*, the security guard and video recording issue. Defendant argued that the art portfolio and Jewel receipt were important to his defense, and that his attorneys failed to impeach the State's witnesses. The court noted that evidence regarding the art portfolio and the purchase of the medication at Jewel was produced in court through testimonial evidence, and that defense counsel thoroughly cross-examined the witnesses. Defense counsel also explained that he subpoenaed the Jewel for the receipt for the prescription allegedly filled on July 23, 2009, but Jewel was unable to produce any such evidence. The court also noted that defendant acknowledged in his motion that his counsel had subpoenaed the Jewel for this receipt. The record thus shows that the trial court conducted a significant inquiry into the matters raised by defendant in his petition, found that they were not meritorious, and that they were related to trial strategy, then denied defendant's motion. We cannot say that this decision was manifestly

erroneous where the court conducted more than an adequate inquiry into defendant's allegations, reviewed them in light of the record, gave him an opportunity to argue, explain and support his allegations, and also gave counsel an opportunity to respond. *Walker*, ¶33; *People v. McKinney*, 2011 IL App (1st) 100317, ¶47; see also *Moore*, 207 Ill. 2d at 78 (a brief discussion with defendant may be sufficient).

¶ 22 Defendant nonetheless claims that his allegation of ineffective assistance of counsel showed the possibility of neglect because if the art portfolio was shown in court along with the inventory record of it, this evidence would have impeached and undermined the credibility of the State's eyewitnesses. We disagree.

¶ 23 Defendant and the arresting officer presented testimonial evidence that he was carrying such an item, and counsel focused on this evidence during closing argument to contradict the eyewitness testimony otherwise, and to challenge their credibility. Under these circumstances, production of the art portfolio would merely have been cumulative to the testimonial evidence presented to the jury, and thus, defendant's claim that counsel was ineffective for failing to produce it fails for lack of prejudice. *People v. Hayes*, 2011 IL App (1st) 100127, ¶42. Moreover, the decision to present certain evidence to the jury is a matter of trial strategy, and thus, defendant's claim regarding the portfolio could have been dismissed without any further inquiry. *People v. Ward*, 371 Ill. App. 3d 382, 433 (2007).

¶ 24 Finally, whether or not defendant was carrying the portfolio at the time of the robbery does not negate his guilt of the robbery, and the photographs of various art portfolios included in his reply brief, which were not filed as part of the record on appeal, may not be considered. *People v. Gacho*, 122 Ill. 2d 221, 254 (1988).

¶ 25 Defendant next contends that his sentence was excessive in light of the nature of the offense, his age and social history, his post-arrest progress and remorse, and the current overcrowding problem in Illinois prisons. He further maintains that the court failed to acknowledge and overlooked a number of mitigating factors in imposing the 20-year sentence against him. The State responds that defendant waived this issue because he did not object at the time of sentencing.

¶ 26 Generally, in order to preserve a claim of sentencing error for review, a defendant must make a contemporaneous objection and raise the issue in a written post sentencing motion. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Here, defendant raised this issue in his motion to reconsider sentence, but failed to make a contemporaneous objection at the sentencing hearing. However, in a petition for rehearing, defendant contends a contemporaneous objection is not required to preserve his excessive sentencing claim. Specifically, defendant relies on *People v. Sims*, 233 Ill. App. 3d 471 (1992), in which the court stated that where a defendant alleges "merely that a sentence is excessive, and not that evidence was improperly considered at the sentencing hearing, a contemporaneous objection at the sentencing hearing is not required for appeal." *Sims*, 233 Ill. App. 3d at 473. In order to better understand this apparent conflict in Illinois law, we will trace the reasoning of the supreme court, beginning with *Hillier*.

¶ 27 In *Hillier*, the defendant's claim on appeal was that the trial court erred in ordering him to submit to a sex offender evaluation before sentencing, because the evaluation is only required of defendants who are eligible for probation, which the defendant in Hillier was not. Hillier, 237 Ill. 2d at 544. However, the defendant failed to object to the evaluation on the basis of probation eligibility and failed to raise the issue in a postsentencing motion. *Id*. at 545. In finding the issue forfeited, our supreme court observed that "[i]t 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." *Hillier*, 237 Ill. 2d at 544. The *Hillier* court cited another supreme court case in support of that statement, *People v. Bannister*, 232 Ill. 2d 52 (2008).

¶ 28 In *Bannister*, the defendant was convicted of first degree murder, attempt murder, and home invasion, the defendant was found eligible for the death penalty, and was ultimately sentenced to death. *Bannister*, 232 Ill. 2d at 60, 64. On appeal, the defendant claimed that he was denied a fair death sentencing hearing because the trial court gave the death sentencing hearing jury misinformation through comments during *voir dire* and through the written jury instructions. *Id*. at 76. However, the defendant failed to object during *voir dire*, did not offer an alternative jury instruction, and did not include the issue in his posttrial motion. *Id*. Relying on *People v. Hall*,194 Ill. 2d 305 (2000), the supreme court stated, "[t]o preserve this issue for appeal, defendant was required to make a contemporaneous objection at the sentencing hearing and to raise the issue in a postsentencing motion." *Bannister*, 232 Ill. 2d at 76. The court concluded the issue was procedurally forfeited. *Id*. at 77.

¶ 29 Similar to *Bannister*, the defendant in *Hall* was also sentenced to death, after being found guilty of two counts of first degree murder. *Hall*, 194 Ill. 2d at 315-16. On appeal, the defendant contended he was denied a fair sentencing hearing because the State improperly introduced unreliable hearsay evidence at the hearing. Id. at 351. However, the supreme court observed that "[i]n order to preserve this issue for appeal, defendant was required to make a contemporaneous objection and to raise the issue in a post-sentencing motion. [Citation omitted.] Defendant did neither," citing *People v. Mahaffey*, 166 Ill. 2d 1 (1995). *Hall*, 194 Ill. 2d at 352. Accordingly, after further determining there was no plain error, the court found the issue was waived. *Id*. at 352-53.

¶ 30 *Mahaffey* also involved a defendant convicted of murder and sentenced to death. *Mahaffey*, 166 Ill. 2d at 4. On appeal, the defendant argued that the State improperly introduced at the second stage of his sentencing hearing evidence from a psychiatric interview before which the defendant had not received *Miranda* warnings. *Id*. at 26. Citing *People v. Hampton*, 149 Ill. 2d 71 (1992), among other cases, the supreme court held that the issue was "waived, for the defendant raised this issue only in his post-sentencing motion and did not make a contemporaneous objection to the expert's testimony at the sentencing hearing." *Mahaffey*, 166 Ill. 2d at 27. The *Mahaffey* court went on to conclude the issue did not rise to the level of plain error, and affirmed the judgment of the circuit court. *Id*. at 27, 34.

¶ 31 The defendant in *Hampton* was convicted of three counts of first degree murder, pursuant to a guilty plea, and sentenced to death. *Hampton*, 149 Ill. 2d at 78. On appeal, the defendant challenged the admission of "irrelevant and prejudicial" evidence at his sentencing hearing. *Id*. at 93. The supreme court determined that defendant had waived the issue on appeal because the defendant "failed to object to the complained-of comments at the sentencing hearing and failed to raise the issue in his post-sentencing motion. Such failure results in a waiver of the issue on review." *Id*. at 93-94. The court went on to find that the comments were not admitted in error and therefore did not rise to the level of plain error. *Id*. at 94.

¶ 32 Although the supreme court made a statement in *Hillier*, which would suggest an excessive sentence argument requires both a contemporaneous objection and inclusion in a postsentencing motion to be preserved on appeal, we observe that the cases on which *Hillier* relies are distinguishable from the instant case. *Bannister*, *Hall*, *Mahaffey*, and *Hampton* all involved cases where the defendant was sentenced to death after a two-stage death sentencing hearing. We also note that the defendants in *Hillier*, *Bannister*, *Hall*, *Mahaffey*, and *Hampton*

failed to both make a contemporaneous objection and address the issue in a post-sentencing motion. Most importantly, in all of the above cases the issue on appeal was not the excessive nature of the sentence, but rather involved the nature of the evidence introduced at the sentencing hearing or misinformation presented to the jury. We can reconcile the apparent conflict because here defendant only presents a challenge to the allegedly excessive nature of his sentence and the circuit court had an opportunity to address the claim, as defendant raised it in his postsentencing motion. Accordingly, under these circumstances, we will consider defendant's excessive sentence claim as preserved, and review it.

¶ 33 In regards to sentencing, the trial court is in a superior position to fashion an appropriate sentence based on firsthand consideration of relevant sentencing factors, including the defendant's credibility, demeanor, moral character, mentality, social environment, habits, and age. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). Therefore, a sentencing decision may not be altered by a reviewing court absent an abuse of discretion. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). If a sentence is within the permitted statutory range, it will only be considered an abuse of discretion if it is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 210 (2000). It is not the function of a reviewing court to re-weigh the sentencing factors or substitute our judgment for that of the circuit court. *Alexander*, 239 Ill. 2d at 213.

¶ 34 Here, the record shows that the court was familiar with the mitigating facts of the case, including that the victim was not injured as a result of the robbery and that defendant did not attempt to flee from police. In addition, at the sentencing hearing, the court heard testimony from Ruth Adair, who testified to defendant being humble and peaceful, teaching a Bible class, and helping direct a prison choir and that defendant had "done things to better himself." The

court listened to counsel's arguments in mitigation. The court also listened to defendant's statement in allocution, in which defendant apologized, asked the court to consider his age and the changes he made since the robbery. Where mitigating evidence has been presented, it is presumed that the trial court considered it. *People v. Sven*, 365 Ill. App. 3d 226, 242 (2006).

¶ 35 In contrast, in aggravation the court noted defendant's five prior felony convictions, including an armed robbery conviction, for which he had received a sentence of 13 years in prison, and a second degree murder conviction, for which he had received a sentence of 25 years in prison. The court also noted that defendant had been involved in a gang. Although the court stated the incorrect dates of defendant's gang involvement, defendant does not deny that he was affiliated with a gang. In determining whether the trial court improperly imposed a sentence, a reviewing court will consider the record as a whole and not focus on isolated statements. *People v. Walker*, 2012 IL App (1st) 083655, ¶ 30 (citing *People v. Ward*, 113 Ill. 2d 516, 526-27 (1986)). In this case, it is clear that defendant's gang affiliation was just one factor considered among several.

¶ 36 The sentencing range for a Class X felony is 6 to 30 years. 730 ILCS 5/5-4.5-25(a) (West 2010). Before sentencing defendant to 20 years in prison, the court stated that it had heard arguments from both sides, and had considered defendant's statement, the State's evidence, the mitigating factors, the live witness testimony, and the PSI. Although defendant argues that the court "overlooked a good deal of mitigating information contained in [the] PSI," a circuit court's examination of a PSI which recites several mitigating factors is " 'in itself, a basis for finding that defendant's [rehabilitative potential] was considered' " even if the court does not expressly indicate its consideration. *People v. Parker*, 192 Ill. App. 3d 779, 789 (1989) (quoting *People v. Shumate*, 94 Ill. App. 3d 478, 485 (1981)). Moreover, the court is not required to give greater

weight to a defendant's potential for rehabilitation than the seriousness of the offense. *People v. Anderson*, 325 Ill. App. 3d 624, 637 (2001). The circuit court clearly considered all the factors and sentenced defendant within the appropriate range. Accordingly, we find no abuse of discretion.

¶ 37 To the extent defendant argues that his sentence is excessive due to the "current state of the Illinois prison system," we note that defendant has cited no relevant legal authority in support of his argument and therefore we decline to consider it. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (the argument section of appellant's brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and pages of the record relied on"). Moreover, defendant did not raise this particular argument in the circuit court, thereby waiving the argument on appeal. See *People v. Steidl*, 142 Ill. 2d 204, 235 (1991) (issues raised for the first time on appeal are waived).

¶ 38 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 39 Affirmed.