FIRST DIVISION
June 17, 2013

No. 1-11-1579

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. 10 CR 20709
	)	
ERVIN BUTLER,	)	Honorable
	)	Rosemary Higgins-Grant,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's conviction affirmed where he failed to preserve review of alleged prejudicial comments by the trial court.

¶ 2 Defendant, Ervin Butler, was convicted of possession of a controlled substance after a bench trial and sentenced to two years in prison. On appeal, defendant argues: (1) he was denied a fair trial where certain pretrial comments made by the trial judge indicated she had prejudged his case and was biased; and (2) his sentence was excessive. We affirm.

¶ 3 On October 27, 2010, defendant was arrested and charged with criminal trespass. Pursuant to a custodial search, police recovered three white pills not contained in a prescription bottle from defendant's pants pocket. Defendant was subsequently charged with possession of less than 200 grams of codeine (1.2 grams) pursuant to 720 ILCS 570/402(c) (West 2010). On October 28, 2010, defendant's bond was set at $30,000. Defendant did not post bond and was kept in custody.

¶ 4 On December 7, 2010, defendant was arraigned before Judge Rosemary Higgins-Grant (the judge) and entered a plea of not guilty. During the arraignment, defendant began to contest the charges and maintained the pills were Tylenol. The judge explained to defendant that, any discussion as to the evidence, must wait until trial. Defendant asked to be released on bond so that he might see a doctor and "bring *** paperwork" as to the pills. After some discussion with the Assistant State's Attorney and defense counsel, the judge set the matter for a hearing as to reduction of bond on December 9, 2010. Near the conclusion of his court appearance, defendant again began to say his case was about Tylenol. The judge warned defendant that he should not say another word "about that," or she would find him in contempt. The judge entered orders granting defendant's motion to receive drug treatment while in jail, and directing that defendant receive medical treatment at Cermak Hospital.

¶ 5 On December 9, 2010, defendant appeared for a hearing on his request for bond reduction. Defense counsel asked that defendant be released on a lower bond so that he could see both his psychiatrist and personal physician for his "back issues." Defendant offered nothing to corroborate his medical history. The State responded by citing the factual circumstances of defendant's arrest and his criminal history.

¶ 6 During the parties' presentation as to bond reduction, the judge stated that defendant "wants every break there is" and has done "nothing to deserve it," and said to defense counsel, "you better give me something." The judge then stated that defendant "clearly thinks he is entitled." Defense counsel explained to the judge that the pills recovered from defendant were Tylenol with codeine, that defendant has medical issues, but that counsel was not aware of a prescription for the pills. The judge denied defendant's motion for reduction of bond. The judge believed defendant had been "disrespectful in [the] courtroom," and had noted defendant was shaking his head during the hearing and "rolling" his eyes at her. The judge found defendant's medical issues were insufficient grounds for a reduction in bond. The following exchange then took place:

"Judge [Higgins-Grant]: Who is the gentleman here [on defendant's] behalf?

[Defendant's Father]: It is my son.

Judge: He has not served you well, has he sir?

[Defendant's Father]: No.

***

You put your father through this?"

Defendant made a request to address the court. The judge refused, stating:

"You have nothing to say. You're still making excuses for yourself. You've not learned to take responsibility for your actions *** and I want to see you do that."

The judge stated that, while in jail, defendant should undergo addiction treatment at West Care and said:

"[N]ow you show me some progress there that you take responsibility for what you've done to your life and what you have done to your family and I'll consider putting you out [of jail]."

Defendant indicated that he wanted treatment for his addiction. The judge then responded:

"[The treatment is] in the jail. I'm going to put you there. *** I want to see you stop shaking your head *** 'poor me.' That's the addiction talking. *** Listen sir, you have a problem *** and you are in denial of that problem."

*** There is no reason for this court to give you any consideration at this time and your medical reasons are not enough."

The judge told defendant to "do something good with [his] life so [he] could take the worry from [his] father's eyes." Defendant responded: "My father is kind of sick."

¶ 7 The judge entered a written order on that date directing that defendant be evaluated by West Care and, "if appropriate," that he receive substance abuse treatment. Defense counsel demanded a trial on defendant's behalf and asked that the case be set for a bench trial. The judge set the case

for a bench trial on February 15, 2011, a date beyond the 90 days defendant might need to spend in drug treatment with West Care. The judge also set the case for December 29, 2010, as to the status of the West Care treatment.

¶ 8 At the December 29, 2010, status hearing, the judge asked defendant whether he was in treatment at West Care. Defendant answered "No" and requested permission to speak, which the judge granted. Defendant stated that he wanted to see a doctor for his bad back. The judge told defendant to "forget about it," that he had "always been interested in getting out," and that he no longer had permission to speak. The judge further informed defendant that he was going into treatment. Defendant then responded: "No Judge. My back is killing me, I need to see a doctor." The judge then suggested defendant be sent to Cermak Hospital, but defendant responded that Cermak Hospital had refused him medical care. The judge again told defendant to not speak or he would be held in direct contempt of court. The judge entered an order on that date indicating defendant should be sent to Cermak Hospital.

¶ 9 On February 15, 2011, defendant, in open court, waived his right to a jury and elected to proceed to a bench trial before the judge. Chicago police officer, Kevin Quinn, testified that on October 27, 2010, at approximately 3 p.m., he had received a radio dispatch regarding a disturbance at 5318 West Madison Street in Chicago. When Officer Quinn arrived at that location, he observed defendant standing on the sidewalk outside of a grocery/liquor store. After speaking with an employee of the store, Officer Quinn arrested defendant for criminal trespass. At the police station, a custodial search was conducted, and three white pills were found loose in defendant's pants pocket. Officer Quinn did not find a prescription for those pills during the custodial search. The parties stipulated to a proper chain of custody and that the pills recovered tested positive for 1.2 grams of codeine.

¶ 10 Defendant acknowledged that, when he was arrested, he had three Tylenol with codeine pills on his person. Defendant admitted he did not have a prescription on him when arrested. Defendant

testified he had received a prescription for the pills two years ago while under a doctor's care for chronic backaches. However, he could not recall the doctor's name. During cross-examination, defendant named some of the doctors who may have prescribed him the Tylenol with codeine, and testified to using the remaining pills whenever he experienced pain. Defendant testified that at the time of his arrest he was in pain, which is why he had the pills on him. The defense presented no other evidence.

¶ 11 The judge found defendant guilty of possession of a controlled substance after noting defendant was not credible. However, the judge informed defense counsel that, if defendant located a prescription for the pills, counsel should file a motion to reconsider the guilty finding. The judge ordered that defendant be placed on day reporting to the sheriff of Cook County so he would have an opportunity to get proof of his prescription and receive medical treatment. However, the sheriff terminated defendant's day reporting after defendant went "AWOL" on the first day. Although defense counsel filed a motion for a new trial, defendant had not obtained proof of any prescription. The judge denied the motion, and sentenced defendant to two years in prison.

¶ 12 On appeal, defendant first argues that he was denied a fair trial because the judge had predetermined his guilt by concluding he needed drug treatment and had exhibited bias by her comments, and by refusing to allow him to speak during the pretrial proceedings. The State responds that defendant has forfeited review of these issues by failing to object during trial, and by failing to raise these claims in his posttrial motion. See *People v. Enoch,* 122 Ill. 2d 176, 186 (1988). The State further argues that the judge was impartial.

¶ 13 Defendant argues that under *People v. Sprinkle,* 27 Ill. 2d 398 (1963), the forfeiture rule does not preclude review here, where he is raising for the first time on appeal a claim of judicial impartiality.

¶ 14 In *Sprinkle,* our supreme court held that the forfeiture rule may be relaxed when the basis for the objection is the conduct of the trial judge. See *Sprinkle,* 27 Ill. 2d at 401. However, the failure

to preserve a claim should be excused only under extraordinary circumstances. *People v. McLaurin,* 235 Ill. 2d 478, 488 (2009). That our supreme court has seldom applied the *Sprinkle* doctrine to noncapital cases, "further underscores the importance of uniform application of the forfeiture rule except in the most compelling of situations." *Id*. In this case, however, we need not reach the question of whether the forfeiture rule should be applied less rigidly under *Sprinkle*, as there was no showing of judicial bias.

¶ 15 "A trial judge is presumed to be impartial, and the burden of overcoming this presumption rests on the party making the charge of prejudice." *People v. Faria,* 402 Ill. App. 3d 475, 482 (2010). Allegations of judicial bias or prejudice must be viewed in context and should be analyzed in terms of the trial court's reaction to the events taking place. See *People v. Urdiales,* 225 Ill. 2d 354, 426 (2007). A defendant has the burden of establishing the trial court's bias or prejudice by showing the existence of active personal animosity, hostility, ill-will or distrust toward him (*People v. Shelton,* 401 Ill. App. 3d 564, 583 (2010)) and, in the absence of such a showing, the "proof falls short of establishing actual prejudice which would interfere with a fair trial." *People v. Neumann,* 148 Ill. App. 3d 362, 370 (1986).

¶ 16 Here, defendant contends that judicial bias was established during the court proceedings relating to defendant's bond reduction request. We must consider this particular setting in determining whether there has been a showing of bias or impartiality.

¶ 17 A court has the authority to reduce a defendant's bail. 725 ILCS 5/110-5.1(a) (West 2005). In setting the amount and conditions of bail, a court must consider such factors as the nature and circumstances of the offense and defendant's family ties, character, mental condition, and past conduct. 725 ILCS 5/110-4 (West 2008). During the proceedings here, defendant asked the judge to consider reducing bond so that he could receive medical care. Defendant provided no evidentiary or documentary proof of any ongoing medical treatment that would require his release from custody. The judge concluded that it was possible for defendant to receive treatment, both for any medical

conditions and drug addiction, while in custody. It was within her authority to determine that defendant had not offered a sufficient basis to reduce the bond. She entered orders to accomplish the provision of medical care and drug treatment to defendant. The judge left open the door to a possible reduction in bond should defendant show progress in addressing any drug addiction.

¶ 18 In making this decision as to the amount of and the conditions of the bond, it was not improper for the judge to consider defendant's prior drug use, attitude, demeanor, and history, and any concerns of defendant's father. When the record is reviewed as a whole, the judge's comments reflect her attempt to assess the appropriateness of defendant's bond under the relevant circumstances and factors. In other words, defendant has failed to prove the judge, when commenting on defendant's background in considering bond, was motivated by hostility or ill-will toward him. *Shelton*, 407 Ill. App. 3d at 583.

¶ 19 Similarly, we do not find judicial bias as to the times the judge did not permit defendant to speak. Defendant had been warned that it would be inappropriate to speak without permission, yet he continued to do so. A court's displeasure or frustration with certain behavior is not necessarily evidence of judicial bias against a defendant. *Faria,* 402 Ill. App. 3d at 482. By requiring defendant to speak through counsel or when given permission, the judge was attempting to ensure the proceedings were conducted in an orderly fashion, and prevent defendant from presenting statement's about the charges prematurely. See *People v. Griffin*, 194 Ill. App. 3d 286, 294 (1990) (the trial court has an inherent power to preserve its own dignity by making sure that the proceedings before it are conducted in a dignified and orderly fashion).

¶ 20 Finally, defendant argues the evidence at trial was close, and if the judge had not believed he was a drug addict, she would have found his testimony credible and entered a finding of not guilty. We disagree.

¶ 21 Defendant has never challenged the evidence that at the time of his arrest he possessed loose pills containing codeine, but had no prescription. Defendant did testify that a doctor had prescribed

the Tylenol with codeine. Defendant, however, also testified he could not remember the name of the prescribing physician. Taking the evidence as a whole, in the light most favorable to the State, this court cannot say that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *People v. Ross*, 229 Ill. 2d 255, 272 (2008).

¶ 22 Although the judge determined defendant was not a credible witness, she instructed defense counsel to file a motion for a new trial if defendant could prove he had a prescription for the pills. The judge placed defendant on day reporting pending sentencing so he could get the necessary proof. The fact that the judge was willing to reconsider its finding if defendant located a prescription leads to the conclusion that the judge's finding of guilt was not, in fact, motivated by hostility or animosity toward defendant. Rather, it was based on the evidence.

¶ 23 Defendant also requests that this court review his unpreserved objections of judicial bias for plain error. See *People v. Herron*, 215 Ill. 2d 167. 186-87 (2005) (a reviewing court may address forfeited errors "when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence."). In considering defendant's plain-error argument, a court must first determine whether an error occurred. *Urdiales*, 225 Ill. 2d at 415. Defendant fell short of establishing judicial bias and prejudice. Thus, his procedural default as to a claim of judicial bias must be honored.

¶ 24 Finally, defendant initially argued his sentence was excessive. In his reply brief, defendant concedes the issue is moot as he has completed his sentence and term of mandatory supervised release. See *People v. Metlon*, 2013 IL App (1st) 060039, ¶ 28 ("a challenge to the validity of an imposed sentence becomes moot once the entire sentence has been served").

¶ 25 For these reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 26 Affirmed.