2014 IL App (1st) 120999-U

FOURTH DIVISION
May 15, 2014

No. 1-12-0999

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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. 84 C 9282 (02)
	)	
HENRY GRIFFIN,	)	The Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concurred in the judgment.

ORDER

HELD: Defendant did not waive consideration of his arguments regarding sentencing errors on appeal, even though he failed to object to them and to file postsentencing motion, and even though he did not argue for plain error review in his opening brief on appeal; ultimately, we chose to review his claims. However, upon this review, and considering his troubled upbringing and rehabilitation, defendant's sentence of natural life in prison was not excessive in light of the record as a whole, and he was not deprived of a fair resentencing hearing despite comments the trial court made with respect to the prior sentencing judge, certain mitigating evidence, and previous sentencing laws.

¶ 1 Following a jury trial which took place in 1985, defendant-appellant Henry Griffin (defendant) was convicted of murder, solicitation to commit murder and conspiracy to commit murder. The trial court sentenced him to death. While the cause was pending on appeal in both state and federal court, defendant's sentence was commuted and he was given a new sentencing hearing. This time, the trial court sentenced him to natural life in prison without the possibility of parole. Defendant now appeals, contending that he was deprived of a fair resentencing hearing where the presiding judge improperly speculated as to what sentence the original sentencing judge would have imposed under the circumstances, considered mitigating evidence as aggravating evidence, and demonstrated bias against the more lenient sentencing laws in effect at the time of the offense. Defendant also contends that his sentence was excessive. He asks that we vacate his natural life sentence and instead impose an appropriate term of years or, alternatively, remand his cause for a new sentencing hearing before a different judge. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 Defendant, along with codefendants Charles Ashley and James Allen, was charged with murder, solicitation to commit murder and conspiracy to commit murder in relation to the death of the victim, Carl Gibson. The underlying facts of that cause are not in dispute.[1] The victim's body was found with four close-range gun shots on June 21, 1984 near the 73rd Street exit ramp

[1]The following rendition of facts is taken from the summary of facts issued by the Illinois Supreme Court in *People v. Griffin*, 148 Ill. 2d 45 (1992). Both parties, in their briefs on appeal, agreed to and quoted the Court's statement of facts in full. Accordingly, we, too, present this restatement, albeit in brief, as there is no dispute regarding these facts.

off the Chicago Skyway. At the time of the murder, authorities were investigating a major drug operation run by codefendant Ashley, which also employed defendant, codefendant Allen, the victim and Darryl Moore. In August 1984, Moore was arrested on drug and unlawful use of weapons charges. While in jail, Moore told police that he had information regarding the victim's murder and discussed with them defendant's involvement. With police recording him, Moore then called defendant, who implicated himself in the victim's murder. Defendant was subsequently arrested along with codefendant Allen and the two were questioned by police. Upon hearing that codefendant Allen had made a statement, defendant waived his rights and confessed to killing the victim.

¶ 4 In his confession, defendant described that codefendant Ashley, in the presence of codefendant Allen, had asked him to kill the victim, whom he (codefendant Ashley) believed was secretly working with police, in exchange for $2,500 in cash and drugs. Defendant agreed and drove with codefendant Allen to Moore's apartment to retrieve a .38-caliber revolver. Defendant then went and picked up the victim. Codefendant Allen drove the car, the victim got into the front passenger's seat and defendant sat in the back seat. Codefendant Allen drove for a while and, once on the Skyway, defendant shot the victim four times in the back of the head. Codefendant Allen then exited the Skyway at 73rd Street and stopped the car on the ramp, whereupon defendant pulled the victim's body out of the car and left it on the side of the road. Defendant and codefendant Allen disposed of the car, and defendant gave the murder weapon to codefendant Ashley in exchange for cash and drugs. Defendant was tried before a jury in 1985 in the courtroom of the Honorable Earl Strayhorn. In addition to his oral and written confessions,

the taped telephone conversation between Moore and defendant was admitted into evidence, and several witnesses testified for the State and the defense. The jury found defendant guilty. See *People v. Griffin*, 148 Ill. 2d 45, 49-52 (1992).

¶ 5 Following the verdict, defendant opted to be sentenced by the trial court, and Judge Strayhorn sentenced him to death. While his cause was on direct appeal, defendant filed a postconviction petition, alleging that perjured evidence had been used to convict him, namely, Moore's testimony.[2] The trial court dismissed this postconviction petition without an evidentiary hearing, and defendant appealed. Consolidating his direct appeal and his appeal from the dismissal of his postconviction petition, the Illinois Supreme Court affirmed, thereby upholding his conviction, his death sentence and the dismissal of his postconviction petition. See *Griffin*, 148 Ill. 2d 45. Defendant filed a petition for writ of *certiorari* before the United States Supreme Court, which was denied. See *Griffin v. Illinois*, 507 U.S. 924 (1993). Later, defendant filed a second postconviction petition, this time alleging ineffective assistance of trial and appellate counsel. The trial court dismissed this petition as well without an evidential hearing, and the Illinois Supreme Court again affirmed. See *People v. Griffin*, 178 Ill. 2d 65 (1997).

¶ 6 In August 1998, defendant filed a petition for writ of *habeas corpus*, combining his claims of perjured testimony and ineffective assistance of sentencing counsel. The district court denied his petition, but granted a certificate of appealability on these claims, and defendant appealed. The Seventh Circuit granted *habeas corpus* relief and ordered a new sentencing

[2]In August 1986, Moore recanted his testimony against defendant and claimed that he had been fed the information, and was paid money, by police and the State's Attorney's office in exchange for his testimony. See *Griffin*, 148 Ill. 2d 45.

hearing. See *Griffin v. Pierce*, 622 F.3d 831 (7th Cir. 2010). The court found that, while the evidence, even without the allegedly perjured testimony, was sufficient to sustain his conviction, defendant's sentencing counsel had been ineffective due to a failure to investigate and present mitigating evidence, specifically, defendant's troubled family history, his chronic mental health problems, his drug addiction, and his "good acts" of caring for sick and dying family members, including his abusive father–all of which, it believed, the state court had not independently and objectively evaluated. See *Griffin*, 622 F.3d at 845-46.

¶ 7 The cause then proceeded to a resentencing hearing in the trial court. This took place between October 2011 and February 2012. At this time, defendant was 65 years old. Judge Strayhorn had retired, and Judge James B. Linn now sat in his stead. When given the choice, defendant opted to be sentenced under the law in effect at the time he committed the crimes for which he had been convicted. Accordingly, the parties agreed that the applicable sentencing range was a term of 20 to 80 years in prison or natural life imprisonment without parole.

¶ 8 At the hearing, the State presented several pieces of evidence in aggravation. This included the Seventh Circuit's opinion granting a resentencing hearing, the grand jury transcripts, defendant's confession, the jury verdict forms, defendant's original presentence investigation report, certified copies of his prior convictions, the 1984 criminal sentencing statute, a transcript of the original sentencing hearing before Judge Strayhorn that did not contain the judge's comments prior to sentencing, defendant's Department of Corrections (DOC) Masterfile, and his disciplinary files while in the DOC. In addition, a new presentence investigation report was prepared for defendant. This listed his criminal history, which included two misdemeanor theft

convictions in 1963; a conviction for attempted robbery in 1965; a conviction for mail theft in 1969; convictions for unlawful possession of a firearm and robbery in 1972; convictions for disorderly conduct and federal bank larceny in 1975; a conviction for unlawful use of a weapon in 1978; a conviction for possession of a controlled substance in 1982; and a conviction for possession of a controlled substance with intent to deliver in 1983.

¶ 9 In mitigation, defendant presented the testimony of four witnesses. First, his sister Eyvonne testified at length about defendant's youth and home life as one of six siblings. She recounted that their father got drunk on whisky daily, whereupon he became verbally abusive toward his children, in particular, calling defendant "a rotten MF" and telling him he "wasn't good for anything and never would be." By age 11, defendant would leave the house when the abuse started. Their mother tried to protect the children by barricading them in a room but, after she died, there was no one to protect them. Defendant's father also became physically abusive against his sisters. Yet, despite the abuse, defendant tried to establish a relationship with him whenever he was sober, but he ignored defendant. Much later, when defendant's father moved into a senior center for about two years, defendant visited him there several times a week and brought him food. With respect to their mother, Eyvonne testified that defendant was incarcerated in a juvenile detention facility when she died; he took it very hard that he was not home when it happened. He cried a lot and felt guilty. Eyvonne further testified that she suffered a mental breakdown after being molested by a neighbor and was hospitalized when she was 17 years old. When she was released, defendant told her that he understood how she felt and revealed to her that he, too, had been molested when he was a child by a minister who visited

their mother at their home. Eyvonne stated that she then began to use drugs in the early 1980s and knew that defendant was doing the same. Defendant received drugs from his then-girlfriend, an older woman who became defendant and Eyvonne's supplier for heroin and cocaine. Lastly, Eyvonne testified that during defendant's time in prison, she has visited and corresponded with him on a regular basis. In her opinion, defendant's outlook on life has changed; he is older and wiser now and he has expressed to her that, if given the chance, he would do things differently and make the best of what life he has left.

¶ 10 Next, defendant's wife Cheryl testified that they met in the late 1970s while he was being treated for heroin addiction at a treatment facility where she worked. They began a personal relationship after defendant was incarcerated in the underlying cause, following a chance phone call, an exchange of letters and visits in prison. They married in 1990 and have been married for 20 years. After they married, Cheryl and her son went to live with her grandmother in Georgia; Cheryl later moved back to Illinois to be close to defendant but in 2011 returned to Georgia where she currently lives. Cheryl stated that over the last 30 years, she had noticed significant changes in defendant's demeanor; he has let his guard down, he is able to trust people, he is sober and he is able "to be the person that he really is inside." He also has a love for young people and wants to help others. Cheryl corroborated Eyvonne's testimony regarding defendant's childhood molestation and described that, as a result, defendant adopted a persona and lifestyle involving drugs and crime in an effort to cope but that now, he has come to terms with what happened to him and knows it was not his fault. Cheryl further testified that defendant often expressed to her his regret over the lifestyle he chose in his youth and that he once broke

down, cried and told her "how dirty he felt" about all he had done. Cheryl opined that, if defendant were released from prison, he would come and live with her in Georgia where she had already looked into programs for ex-offenders, and that he would be away from any exposition to his old friends or former lifestyle.

¶ 11 Defendant's third witness was business writer John Kador, who had become defendant's prison pen pal in 1996. He has written more than 150 letters to defendant and has visited him some 26 times in prison. According to Kador, during their visits, defendant would become very emotional when describing taking a life; he was full of remorse and self-incrimination. Kador and defendant talked about defendant's past drug use and addiction and how these completely destroyed his life. In addition, they spoke about defendant's father; Kador saw abandonment and confusion in defendant and noted that he felt at fault for the abuse he suffered. Kador described that defendant has become more spiritual and self-reflective, and less angry, over the years; he understood that he did terrible things and he regrets them. Kador opined that, if defendant were released, he would be a law-abiding citizen, a respectful husband and a decent father since he was now older, drug-free and has experienced positive influences that have changed his life.

¶ 12 Finally, Dr. Tiffany Masson, a clinical and forensic psychologist, testified at length at defendant's resentencing hearing regarding an assessment she conducted of his mental health and cognitive functions based upon her interviews with him, tests she administered and his DOC records.[3] She found that defendant had a low average range of intellectual functioning. She divided her review of his DOC mental health records into three periods. From 1985 to 1987,

[3]Dr. Masson's report was admitted into evidence.

defendant had an extensive history of heroin and cocaine addiction; he also received psychiatric treatment for the first time. From 1993 to 1997, he again came under prison psychiatric care and was diagnosed with major depressive disorder, antisocial personality disorder (with which Dr. Masson disagreed) and malingering. He was treated with medication and then discharged from care. From 2005 to 2010, defendant was again treated at the prison psychiatric clinic and was diagnosed with depressive disorder, antisocial personality disorder, post-traumatic stress disorder and schizoaffective disorder. Also during this period, defendant was experiencing auditory hallucinations and he finally reported that he had been a victim of sexual abuse as a child. He later began experiencing flashbacks consistent with the recollection of this sexual abuse and was placed on "crisis watch."

¶ 13 With respect to their interviews, Dr. Masson described that defendant's demeanor was usually calm, except for two instances: when he described the sexual abuse he suffered whereupon he became disconnected and began to vomit, and when he described the instant murder whereupon he cried and expressed remorse. Defendant told Dr. Masson that he would have rather faced physical abuse from his father than constantly being told he was worthless. He discussed the sense of guilt he felt when his mother died and that he was not able to go to her funeral because he was in a juvenile detention facility for truancy, which he attributed to his inability to read or write at that time. Following her death, he engaged in problem behavior and used drugs to cope, and his mental problems began shortly thereafter. He was placed in a psychiatric hospital at the age of 14, where he was diagnosed with depression, self mutilation and made multiple suicide attempts.

¶ 14 Dr. Masson also testified regarding defendant's time in prison. Although he used drugs when he was first incarcerated, he has been clean and sober for the last 22 years; while he still had/has access to drugs, he no longer uses them. He has been tested for drugs four times since 2000, all with negative results. Dr. Masson noted that from 1985 to 2006, defendant was charged with 62 DOC violations, but that the majority of them occurred more than 12 years ago. She pointed out that beginning in 1996, his DOC records show a shift from engaging in aggressive behavior and verbal threats, including assaulting DOC staff, to mostly violations for insolence. For example, his disciplinary records show that in January 1986, he was found in possession of a .38 caliber bullet; in July and August 1989, he fought with other inmates; in January 1990, he threatened to skin a nurse alive; in February 1990, he was found in possession of an iron rod, a wire extension cord and a radio antenna; in August 1993, he threatened a guard; and in April 1996, he screamed obscenities at a female guard. Based on her review, however, Dr. Masson believed defendant had not exhibited any aggressive behavior for the past 18 years and had not engaged in any verbal threats in the last 15 years; she stated he had no disciplinary sanctions since 1993 and had received no disciplinary tickets since 2006.

¶ 15 Dr. Masson further testified that she acknowledged defendant's history of criminal behavior and his prior convictions, as well as that he personally shot the victim in the back of the head. She concluded, however, that he presented a reduced risk for engaging in future violent behavior. She noted he had a strong support system of family and friends which would allow him to transition smoothly to life outside prison if he were released. She further noted that he had a long history of sobriety, had demonstrated the ability to control his behavior and had

engaged in nurturing relationships. Thus, she opined that there was a distinct difference between his past and present behavior, his insight and his recognition of what he needed to accomplish if released.

¶ 16 Following the State's rebuttal to defendant's mitigation evidence,[4] defendant allocuted. He expressed remorse for the crime and stated that he sees the face of the victim every day and begs his forgiveness. He told the court that he was "deeply sorry" and knew that his remorse would be with him forever. He further stated that he is not the same person he was when he was first incarcerated, noting that he is drug free, has accepted responsibility and realizes that what he does "effects everybody." At the close of the hearing, the State argued that because defendant had been convicted of a contract killing, and based on his prior criminal behavior, a sentence of natural life should be imposed. Defendant argued that the trial court should consider not only his criminal background and the nature of the underlying crime, but also his remorse and all the mitigating factors presented, including his troubled upbringing, his mental health problems, and the evidence demonstrating that over the past decades he has transformed from someone with violent tendencies to a person who could be productive and law-abiding. Based on this, defendant suggested a term sentence of 60 years in prison.

¶ 17 After reviewing all that was presented, the trial court sentenced defendant to natural life

[4]The State presented the testimony of DOC correctional officer Lynn Hethmon, who stated that during a shakedown in November 1990, defendant attempted to stick him with a syringe in the arm. However, while Hethmon testified he wrote a report on the incident, he admitted that he never submitted it and that reports from other officers regarding what happened did not include this incident.

in prison. In his colloquy, Judge Linn stated:[5]

"This case has a lengthy history. It was involving an offense that occurred back June 21, 1984. [Defendant] was arrested several months later in August of 1984. He was accused and indicted originally for first degree murder. That's with a firearm. It was a contract murder, where he shot a person in the back of the head. He and the people with him dumped the body out on the Chicago Skyway. For anybody passing the Skyway to see.

He gave a court reported confession to [the] Assistant State's Attorney Neil Cohen, now Judge Cohen, the Chancery Division. That is all back in the eighties.

[Defendant] was represented at trial by George Howard, a very highly regarded lawyer in this building. Since got disbarred for other reasons, not about things about his competence or lack thereof, but about taking on quite a few cases and not keeping all of his court dates straight and his commitments.

In any event, George Howard represented [defendant] back in the eighties. The case went to trial before Judge Strayhorn. He sat in this building for many many years. I will note that under the criminal code today for the offense [defendant] was found guilty of, the minimum, absolute minimum sentence would be forty-five years in the penitentiary. One hundred percent of the sentence.

Things changed. The Legislature, in their wisdom, sought to take a totally

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[5]We include here the entirety of the trial court's colloquy in imposing the sentence since this is the whole crux of defendant's appeal and his arguments center directly on its contents.

different line on matters like this, crimes of this magnitude, than they had back in the eighties when this crime occurred, and when all the litigation involved in this case took place.

This case, nonetheless is going to be decided under the old code and how we got here, in fact, after [defendant] was found guilty by the jury of first degree murder, George Howard waved [*sic*] jury for sentencing purposes before Judge Strayhorn.

He urged Judge Strayhorn, he put some mitigation. [Defendant] testified. Someone else testified in his behalf. He tried to urge Judge Strayhorn that in his massive experience, the facts of this case are such and the quantity of evidence just wasn't right for death penalty consideration.

Earl Strayhorn denied that application, looked at everything, including [defendant's] very lengthy criminal history, and sentenced [defendant] to death.

That is affirmed by the Illinois Supreme Court. Proceedings took place later. Proceedings brought in Federal Court. Sometime in the interim Governor Ryan, prior to his own incarceration, chose to take all people off death row, including [defendant]. He let some of them go. As to the majority of them, including [defendant], commuted their sentences to life in the penitentiary without the possibility of parole.

Judge Zagle took this matter under consideration in habeas proceedings, denied further relief. There was an appeal made to the 7th Circuit Court of Appeals. Finally, Justice Bower, Justice Pinder and I believe Justice Wood, if I'm not mistaken, indicated that looking at the record in its entirety, that [defendant] never really had a chance to put

on mitigation evidence the way it should have been put on in what was at that time a death penalty proceeding. And the Court never really had the opportunity to talk about things, or to discuss. And have an airing of things like his addictions and his family history. Dysfunctional family history, as it was, and the things that had been in [defendant's] life that may have put some context in what had taken place. That never took place on a trial court level.

This many years later, that hearing was ordered. We've been here a past number of days. I have had the chance to hear things that the 7th Circuit Court said ought to be considered by this Court for sentencing purposes.

[Defendant] is an older man now. He's in his sixties. He's 64 years old. He's been in jail for the past 27 years on this case. He is neither the oldest person in jail nor the person incarcerated the longer period of time in our state [*sic*]. But he has clearly served a substantial period of time. And nobody is minimizing that.

Prior to his incarceration on this matter, I think what Judge Strayhorn was strongly considering at the time was his extremely lengthy violence, criminal history. He was in and out of this court system numerous times. He'd be [*sic*] through the Probation Department, federal convictions for bank robbery, more than one robbery conviction, attempted robbery conviction. He went to the Illinois Department of Corrections. A drug offense, a gun offense.

Each and every time he went into the system, he got out of the system and immediately got back in more criminal activity.

While in the penitentiary, there has been information that's been presented at this hearing that he's been not a particularly stellar inmate. He's been involved in numerous disciplinary proceedings, threatened guards, throwing bottles of cans of soda pop at guards. Threatening, causing disruptions, using drugs. And doing a lot of things consistent with the way he led his life throughout his life since he was born, since he dropped out of alternative school back in the sixth grade.

I am now seeing the fact that most of the abhorrent behavior in the penitentiary seems to have been still, to have been quieted over the past several years. He does not appear that he's acting the way he had before.

I also am considering everything that's been brought to this Court for the sentencing hearing, including the associations that [defendant] has chosen to make, both in and out of jail, whether it be with gang leaders, like Larry Hoover, or people like Charles Ashley, or people like – like the women that he's been involved with, with lengthy histories of drug abuse.

He always seemed to find the wrong people to associate with. I am not sure I have confidence he's ever going to make good decisions about that.

I will note that in sentencing hearings like this, going back to the case of People vs. Demetrius Henderson, the Illinois Supreme Court, there are matters that can be brought to the Court's attention in mitigation which also can be aggravating at the same time. Even though somebody may have had a difficult upbringing and had problems and drug abuse and been in a traumatic event taking place in their life, as much as that may

mitigate and explain how they may have committed some violent acts, it can also aggravate, because given the case that because of that certain people have been damaged and there is no hope they can ever overcome those traumas and lead any kind of normal life.

I'm looking at all these in totality. I'm not sure that it is in the interest of the rest of our society to have [defendant] walking around as a free man again. I have an obligation both to [defendant] and to the public at large.

He's led a criminal life. He's been involved in all kinds of violent criminal activity. He's had his day in court.

I believe that had Earl Strayhorn heard all of the things that I heard, he still would have sentenced him to death back then. As it is now, that is obviously, of course, not on the table.

I do find the appropriate sentence on resentencing to be natural life without the possibility of parole. That will be the order."

Judge Linn then ended the resentencing hearing by stating:

"[Defendant], you have a right to appeal these proceedings and to ask that this sentence be modified. You would have to file an application in writing within thirty days. Anything not stated in that application will be waived for appellate purposes.

If you could not afford lawyers or transcripts, they will be provided free of charge."

¶ 18 ANALYSIS

¶ 19 As noted, defendant raises two principle issues on appeal. First, he contends that he was deprived of a fair resentencing hearing because the judge improperly: speculated that the original sentencing judge would have still imposed the death penalty had he heard the newly-presented mitigating evidence, considered this mitigating evidence as aggravating, and exhibited bias against the more lenient sentencing laws in effect at the time of the offense pursuant to which defendant chose to be sentenced. Second, he contends that his sentence of natural life without parole is excessive in light of the circumstances presented. We disagree with both contentions.

¶ 20 As a threshold matter, both parties raise and address an issue of waiver in this cause. That is, the State points out, and defendant readily acknowledges, that he never posed contemporaneous objections to the sentencing judge's comments which he now claims were erroneous and that he never filed a motion to reconsider his sentence before filing his notice of appeal. As both parties note, the failure to object during a sentencing hearing and to file a motion to reconsider sentence citing the objections results in the waiver of a claim of sentencing error. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010); accord *People v. Pryor*, 2013 IL App (1st) 121792, ¶ 24. However, sentencing errors that are raised for the first time on appeal are reviewable under plain error. See *People v. Ahlers*, 402 Ill. App. 3d 726, 734 (2010); *People v. McCain*, 248 Ill. App. 3d 844, 850 (1993) (challenges to the propriety of a defendant's sentence involve his fundamental right to liberty, thereby meriting plain error review if otherwise waived). As such, the burden is on the defendant to specifically assert that the evidence at his sentencing hearing was closely balanced or that any of the alleged errors deprived him of a fair sentencing

hearing. See *Ahlers*, 402 Ill. App. 3d at 734 (to succeed under plain error in sentencing context, the evidence at that hearing must have been closely balanced or the error "was sufficiently grave" that it rendered the hearing fundamentally unfair).

¶ 21 A complexity arises in the instant cause because defendant does not argue for plain error review in his opening brief on appeal. Rather, he argues for full review of his cause, citing first *People v. Dameron*, 196 Ill. 2d 156 (2001), for the proposition that waiver rules are relaxed when a judge's conduct is at issue, and also arguing that his failure to properly preserve his sentencing issues for review should be excused since the trial court here failed to comply with Illinois Supreme Court Rule (Rule) 605 (Ill. Sup. Ct. R. 605(a)(3)) regarding admonishments given at the end of his resentencing hearing and, alternatively, because his counsel was ineffective for failing to file a motion to reconsider his sentence before filing a notice of appeal in his cause. For its part, the State addresses and dismisses defendant's admonishments and ineffective counsel arguments, then counters by noting that a defendant who fails to argue under plain error forfeits plain error review (see *People v. Nieves*, 192 Ill. 2d 487, 502-03 (2000)), and ends its discussion by stating that, even under such review, defendant here could not meet his burden.

¶ 22 Turning to defendant's arguments, we note that he is correct that *Dameron* mentions it is not always necessary for a defendant to interrupt a sentencing judge with a contemporaneous objection to preserve an alleged error for review. See *Dameron*, 196 Ill. 2d at 171; see also *People v. Woolley*, 205 Ill. 2d 296, 301-02 (2002). However, while the waiver rule may be relaxed in that sense, neither *Dameron* nor its progeny have specifically absolved defendants from the requirement of filing a motion to reconsider sentence outlining the sentencing errors

alleged in order to preserve them for appeal, which, admittedly, defendant here failed to do. See *Dameron*, 196 Ill. 2d at 171; accord *Woolley*, 205 Ill. 2d 301-02. It is one thing to find it futile to contemporaneously challenge a sentencing judge who may be relying on factors perceived to be improper at the time of sentencing, but it is another to then further choose not to list these alleged errors–the crux of one's appeal–in writing in a postsentencing motion, as the law requires. See 730 ILCS 5/5-8-1(c) (recodified at the time of defendant's resentencing hearing at 730 ILCS 5/5-4.5-50(d)) (West 2009).

¶ 23 In this vein, defendant next asserts that his failure to file a motion to reconsider sentence should be excused because the trial court's admonishments to him about the necessity of filing such a motion failed to strictly comply with the requirements of Rule 605(a)(3), which governs the advice a trial court is to give a defendant regarding the preservation of sentencing issues for appeal. However, our courts have recognized that, while trial courts must strictly comply with the admonishment requirements of Rule 605, they are not required to use the exact language of the rule; instead, their admonishments are sufficient as long as they convey the substance of the rule. See, *e.g.*, *People v. Tlatenchi*, 391 Ill. App. 3d 705, 721 (2009), and *People v. Dominguez*, 2012 IL 111336, ¶ 11. Indeed, even when incomplete Rule 605 admonishments are given by a trial court, remand is required only where there has been prejudice or a denial of real justice. See *People v. Henderson*, 217 Ill. 2d 449, 466 (2005) (purpose of Rule 605(a) is to inform defendants as to what they must do to perfect appeal from sentence, and was never intended to advise them of every step necessary to preserve sentencing errors for review).

¶ 24 Rule 605(a)(3), upon which defendant focuses here, admonishes a defendant that he has

the right to appeal his conviction, excluding his sentence, as long as he files a notice of appeal within 30 days from the date on which the sentence is imposed; that, if he wants to challenge the correctness of his sentence, he must file in the trial court a written motion to reconsider the sentence within 30 days from the date of its imposition setting forth all issues or claims of error; that any issue or claim of error regarding the sentence not raised in a written motion is waived; and that to preserve the right to appeal following the disposition of such motion, he must file a notice of appeal within 30 days from the entry of the order disposing of his motion to reconsider sentence. See Ill. Sup. Ct. R. 605(a)(3).

¶ 25 As we noted earlier, in the instant cause, at the end of his resentencing hearing, the sentencing judge admonished defendant that he had the "right to appeal these proceedings and to ask that this sentence be modified," and explained to him that, to exercise this right, he would have to "file an application in writing within thirty days." He also cautioned defendant that "[a]nything not stated in that application will be waived for appellate purposes." Contrary to defendant's insistence that these admonishments were "woefully inadequate" because they did not more closely track the language of Rule 605(a)(3), we find that they were sufficient. From what the sentencing judge told him, defendant knew that he had the right to appeal his sentence, that he had to do so in writing, that this writing had to be submitted within 30 days from the date his sentence was imposed and that anything not raised therein would be waived on appeal. What happened here had nothing to do with the timing of a motion to reconsider or a notice of appeal filed by defendant, nor with the legal sufficiency with respect to allegations he made therein, which comprise defendant's claim of improper admonishments. Instead, what happened here is

simply that defendant chose not to file any written motion to reconsider his sentence at all–which the sentencing judge clearly and most essentially explained was required to preserve any sentencing issue for appeal. Accordingly, we fail to find merit in his claim that the trial court did not comply with the rule and that its noncompliance prejudiced him or denied him justice.

¶ 26 Moreover, we further fail to find any support for defendant's alternative argument that waiver should be excused, and full review is merited, because his counsel was ineffective for failing to file a motion to reconsider his sentence before filing his notice of appeal. Briefly, just as with any ineffective assistance claim, to analyze whether sentencing counsel was ineffective for failing to file a motion to reconsider sentence, the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), applies. See *People v. Price*, 2011 IL App (4th) 100311, ¶ 34. Thus, the defendant must show both that his counsel's performance failed to meet an objective standard of competence and that this deficient performance resulted in prejudice such that, but for counsel's error, the result of the proceeding would have been different. See *Strickland*, 466 U.S. at 687-88; *People v. Evans*, 186 Ill. 2d 83, 93 (1999). The defendant's failure to prove either prong renders his ineffective assistance claim untenable (see *People v. Sanchez*, 169 Ill. 2d 472, 487 (1996)), and, where the defendant has not suffered prejudice, an examination of the performance prong is not even warranted (see *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011)). In the instant cause, defendant cannot establish the requisite prejudice because, for the reasons set forth at length herein, there is no reasonable probability that, had his sentencing counsel objected to and filed a motion to reconsider citing the alleged errors he asserts now on appeal, there would have been a different outcome. See, *e.g.*, *People v. Kelley*, 2013 IL App (4th) 110874, ¶ 48;

Price, 2011 IL App (4th) 100311, ¶ 38. There is simply nothing in the record to indicate that the trial judge, upon the presentation of a motion to reconsider defendant's sentence, would have reduced that sentence to any term of years rather than natural life without parole. See, *e.g.*, *Kelley*, 2013 IL App (4th) 110874, ¶¶ 45-47; *Price*, 2011 IL App (4th) 100311, ¶¶ 37-38.

¶ 27 With all this said, however, we cannot agree with the State's initial proposition that, because defendant relied on the admonishments and ineffective assistance of counsel claims for full review and did not argue plain error review in his opening brief on appeal, his entire cause here is forfeited. See, *e.g.*, *Nieves*, 192 Ill. 2d at 502-03. First, while it is true that defendant did not argue for plain error review in his opening brief, he did argue for it in his reply brief on appeal. Our state supreme court has declared that this "is sufficient to allow us to review" an issue for plain error, particularly in the context of challenges to the propriety of a sentence following a sentencing hearing. See *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010), citing *People v. Williams*, 193 Ill. 2d 306, 348 (2000). In addition, our research shows that even when a defendant never specifically argues the plain error prongs of review regarding alleged sentencing errors, we have still taken it upon ourselves to consider such a review. See *Ahlers*, 402 Ill. App. 3d at 734. And, ultimately, apart from forfeiture and waiver and whether sufficient admonishments were given or counsel was ineffective, we note that this cause presents us with something bigger than the technical requirements of the law. To call the facts of this cause and its procedural posture atypical would be an understatement. What occurs in court at a sentencing hearing affects a defendant's fundamental right to liberty meriting, at the very least, plain error review. See, *e.g.*, *People v. Cotton*, 393 Ill. App. 3d 237, 265 (2009); *People v. Ryan*, 336 Ill.

App. 3d 268, 274 (2003).

¶ 28 Thus, while we acknowledge and appreciate the parties' devotion in their briefs to the threshold matter of waiver, we note, as we have infinite times in our state's jurisprudence, that waiver limits the parties' ability to raise arguments, but not our right to entertain them. See *People v. Kliner*, 185 Ill. 2d 81, 127 (1998). Accordingly, just as defendant and the State have both chosen to address the merits of this appeal, and because of the weightiness of the issues at hand and the facts presented, we, too, choose to do so now under a plain error analysis.

¶ 29 Yet, having agreed with defendant that plain error review is permissible in the instant cause, this is where our agreement with him ends.

¶ 30 To succeed under a plain error analysis in the context of sentencing error, defendant is required to show that the evidence at his sentencing hearing was closely balanced or that any of the errors he alleges deprived him of a fair sentencing hearing. See *Ahlers*, 402 Ill. App. 3d at 734; *Ryan*, 336 Ill. App. 3d at 274; see also *People v. Herron*, 215 Ill. 2d 167, 187 (2005) (under first prong, the defendant must prove prejudicial error and that the evidence was so closely balanced that this error alone severely threatened to tip the scales of justice against him; under the second prong, he must prove prejudicial error and that this was so serious that it affected the hearing's fairness and challenged the integrity of the judicial process). This plain error rule does not apply if a clear and obvious error did not occur. See *People v. Walker*, 232 Ill. 2d 113, 124 (2009). Based on the circumstances presented in the instant cause, defendant cannot meet his burden under either prong.

¶ 31 The law regarding sentencing is well established. The trial court has broad discretionary

powers to determine a defendant's sentence. See *People v. Stacey*, 193 Ill. 2d 203, 209 (2000); *People v. Fern*, 189 Ill. 2d 48, 53 (1999). Its decision merits great deference because the trial judge is in the best position to make a reasoned judgment, weighing factors such as his direct observations of the defendant and his character. See *Fern*, 189 Ill. 2d at 53; see also *Kelley*, 2013 IL App (4th) 110874, ¶ 46, quoting *Price*, 2011 IL App (4th) 100311, ¶ 36 (trial court's sentence must be based on particular circumstances of each case, including the defendant's credibility, age, demeanor, moral character, mentality, social environment and habits). A reviewing court must not substitute its judgment with respect to sentencing for that of the trial court merely because it would have weighed factors differently or because it desires to invoke clemency. See *Fern*, 189 Ill. 2d at 53 (reviewing court "must proceed with great caution" in deciding whether to modify sentence); *People v. Hayes*, 159 Ill. App. 3d 1048, 1052 (1987); accord *People v. Coleman*, 166 Ill. 2d 247, 258 (1995) (trial court's decision with respect to sentencing "is entitled to great deference"). Therefore, a sentence imposed by the trial court will not be altered absent an abuse of discretion. See *Stacey*, 193 Ill. 2d at 209-10; accord *Kelley*, 2013 IL App (4th) 110874, ¶ 46, quoting *Price*, 2011 IL App (4th) 100311, ¶ 36.

¶ 32 In determining an appropriate sentence for a defendant, the sentencing court must weigh both aggravating and mitigating factors. See 730 ILCS 5/5-5-3.1, 3.2 (West 2008). When such factors have been presented to the court, it is presumed that they have been considered, absent some contrary indication. See *People v. Sutherland*, 317 Ill. App. 3d 1117, 1131 (2000); see also *People v. Cord*, 239 Ill. App. 3d 960, 969 (1993) (when mitigating factors have been presented, it is presumed court considered them in fashioning sentence and burden rests with the defendant to

prove that court failed to do so). "The weight that the trial judge accords each factor in aggravation and mitigation, and the resulting balance that is struck among them, depends on the circumstances of the case." *Sutherland*, 317 Ill. App. 3d at 1131.

¶ 33 With these principles in mind, we turn first to defendant's second contention on appeal, *i.e.*, that his natural life sentence without parole was excessive, as it is more generic in nature. Pointing out incarceration's dual nature of retributive and rehabilitative ends, defendant asserts that a sentencing reduction is warranted here because of his poor social upbringing and the great rehabilitative potential he has manifested in the last many years, as evidenced by the several witnesses who testified at his resentencing hearing. See, *e.g.*, *People v. Moldonado*, 240 Ill. App. 3d 470, 485-86 (1992); *People v. Cooper*, 283 Ill. App. 3d 86, 95 (1996).

¶ 34 Defendant is correct that poor social upbringing and rehabilitative potential are certainly factors to be considered in imposing a sentence. However, so, too, is the seriousness of the offense; critically, this has often been referred to as the most important factor to consider. See *People v. Jones*, 376 Ill. App. 3d 372, 394 (2007). As we have discussed above, there are infinite factors, both aggravating and mitigating, statutory and nonstatutory, that a trial court may examine. Ultimately, and in addition to the legal principles we announced earlier, a sentence within the prescribed statutory range is presumed to be appropriate and will not be deemed excessive unless the defendant affirmatively shows that his sentence varies greatly from the purpose and spirit of the law or is manifestly disproportionate to the nature of the offense. See *Fern*, 189 Ill. 2d at 54; accord *Stacey*, 193 Ill. 2d at 210; see also *Kelley*, 2013 IL App (4th) 110874, ¶ 46, quoting *Price*, 2011 IL App (4th) 100311, ¶ 36.

¶ 35 Under the law in effect at the time of the instant crime, pursuant to which defendant chose to be sentenced, the punishment for murder for hire ranged from a term of 20 to 80 years or natural life in prison without parole. See Ill. Rev. Stat., Ch. 38, para. 1005-8-1(a)(1); Ill. Rev. Stat., Ch. 38, para. 1005-8-1(a)(1)(b); Ill. Rev. Stat., Ch. 38, para. 1005-8-2(a)(1); Ill. Rev. Stat., Ch. 38, para. 1005-9-1(b)(5). Thus, based on his own choice, defendant here knew that, though it was the maximum available, natural life without parole was a viable sentencing option based on his crime. That is the sentence he received and, undeniably, it was one that was within the prescribed statutory range. Thus, it is presumed valid.

¶ 36 In no way do we minimize what defendant experienced in his childhood nor the changes he has made in his life in the past 27 years he has been incarcerated. We acknowledge and openly receive the Seventh Circuit's concerns regarding defendant's past, and we have detailed at length herein the testimony of the four witnesses defendant presented to reflect his rehabilitation. Like defendant himself stated during his allocution, we believe he is not the same man who walked into prison all those years ago.

¶ 37 However, based upon our review of the record here, we find that the trial court on resentencing undeniably took into consideration all of these factors. As is more than apparent in its colloquy, it explicitly and repeatedly stated as much. That is, it was cautious to note that there was never an "airing" of defendant's family history and addictions that "may have put some context in what had taken place," and that it was doing so now, having the "chance to hear things that the 7th Circuit Court said ought to be considered." It examined defendant's age, the length of time he has been in prison, and how much time he has served; it commented on the fact that

his behavior since being imprisoned has "been quieted;" and it acknowledged that he no longer acts "the way he had before." All this was in addition to the testimony of defendant's witnesses, whom the trial court was in the best position to view, as they testified before it: his sister who detailed the mental, physical and emotional abuse they suffered as youngsters, revealed the drug use they shared, and reiterated that defendant's outlook on life has changed; his wife who described defendant's remorse, his newfound passion to help others and his desire to reenter civilian life somewhere away from his past; his friend who noted that defendant has become more spiritual and self-reflective, and less angry, over the years; and psychologist Dr. Masson who testified about all the medical aspects surrounding defendant and concluded that he presented a reduced risk for engaging in future violent behavior.

¶ 38 However, at the same time, and as was well within its discretion to do, the trial court reflected on the contrary side of the situation. As much credence as it could give to the considerations that supported a reduction in defendant's sentence, it could not ignore those in opposition that, it eventually concluded, weighed more heavily. According to the trial court, these included his lengthy history of criminal violence that showed chance after chance for reform rejected; a record of disciplinary problems while incarcerated that spanned many years; and his associations, past and present, with the "wrong people," including gang members and drug abusers. As the trial court noted, it had an obligation not only to defendant, but also to the public to maintain its protection. See, *e.g.*, *People v. Kolzow*, 301 Ill. App. 3d 1, 8 (1998). Ultimately, having weighed everything "in totality," the trial court concluded that it believed,

based on his "violent criminal activity" and his "criminal life," that imprisonment for natural life without parole was the appropriate sentence to impose here.

¶ 39 In light of the record, we do not find that the trial court abused its discretion in sentencing defendant as it did. There is no doubt as to defendant's guilt; he confessed to the crime and has maintained his guilt since his conviction. With respect to the crime itself, it was, under the circumstances, brutal. For $2,500 in cash and drugs, defendant agreed to an offer to kill the victim, against whom he otherwise had no animosity, all in an effort to benefit one of the wealthiest and most powerful drug kingpins of the time. With this premeditation in tact, defendant teamed up with a fellow gang member, lured the victim into a car, sat behind him and, after driving a bit, shot him at close range in the back of the head four times. He then dumped the victim's body on the exit ramp of one of the city's busiest expressways for all to see, retrieved his reward upon handing over the murder weapon to his contractor, and had the presence of mind to dispose of the vehicle.

¶ 40 In addition, defendant's criminal history cannot be ignored. Excluding the instant crime, this is comprised of some nine felony convictions spanning several decades and including federal and state convictions for robbery, theft, and weapons charges, all of which were detailed during his sentencing hearing. Nor can his disciplinary DOC record be forgotten: over five dozen separate infractions since being taken into custody on the instant cause, demonstrating threats and violence against guards and inmates.

¶ 41 Based on the record in its entirety, we conclude that defendant has failed to show that his sentence violates the purpose and spirit of the law or is manifestly disproportionate to the nature

of the offense. Rather, at the time of resentencing, he clearly knew and understood that natural life without parole was within the appropriate statutory range for the crime he committed. While it is true that his poor upbringing may have provided a context for his crime and that he has shown rehabilitative potential, and perhaps accomplishment, after 27 years of incarceration, these are only two of several factors at play here, which the trial court thoroughly discussed and repeatedly considered as a whole. Accordingly, and based on all the particular circumstances of this cause, we hold that defendant's sentence was not excessive.

¶ 42 We now turn to defendant's three specific arguments focusing on particular comments made by the trial court during resentencing which he contends deprived him of a fair resentencing hearing. Defendant's first claim is that the trial court improperly speculated that, had Judge Strayhorn, the original sentencing judge, heard the newly-presented mitigating evidence, he would have still imposed the death penalty. Defendant cites the following comments made by Judge Linn upon resentencing in support of his claim: that Judge Strayhorn had "sat in this building for many many years;" that he thought "what Judge Strayhorn was strongly considering" at the time of the original sentencing hearing was defendant's "extremely lengthy violence, criminal history;" and that "had [Judge] Strayhorn heard all of the things that I heard, he still would have sentenced him to death back then" but that the death penalty was now "not on the table." Based on these, defendant asserts that Judge Linn abdicated his duty to independently determine an appropriate sentence and "consciously sought to impose a sentence that most closely approximated the sentence Judge Strayhorn had imposed decades earlier." We disagree.

¶ 43 Defendant is correct that when an original sentence is vacated, the case is to be remanded to the trial court for resentencing, which is to include a hearing to reconsider various factors during the time since the original sentence was imposed, along with evidence from the trial, presentence investigation reports, the financial impact of incarceration, aggravating and mitigating factors, substance abuse treatment, sentencing alternatives, and allocution by the defendant. See *People v. Mitchell*, 2014 IL App (1st) 120080, ¶¶ 11-12. Defendant is also correct that, upon sentencing, a trial court should search only "within reasonable bounds for facts in an inquiry relative to aggravation and mitigation." *Dameron*, 196 Ill. 2d at 179. However, where a sentencing hearing is conducted before a judge and not a jury, it is presumed that the judge considered only competent and relevant evidence in determining the sentence. See *People v. Ashford*, 168 Ill. 2d 494, 508 (1995). It is further presumed that the judge based his sentence on only proper legal reasoning. See *People v. McFadden*, 2014 IL App (1st) 102939, ¶ 47; *People v. Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 22. Critically, a reviewing court must "consider the record as a whole, rather than focusing on a few words or statements by the trial court." *Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 22.

¶ 44 In the instant cause, when Judge Linn's colloquy is viewed in its entirety, and when the specific comments cited by defendant here are considered in context, they in no way indicate that Judge Linn failed to independently determine a proper sentence for defendant or that he was somehow aligned with Judge Strayhorn in an effort to sentence him inappropriately. Principally, it is clear from the record that the complained-of comments here were made while the trial judge was reciting the procedural posture of the instant cause. As we have noted herein, that

procedural posture was somewhat atypical of general criminal cases. Defendant's original sentencing hearing occurred over 25 years ago. His cause has been heard in our state supreme court as well as our federal courts, where his *habeas corpus* petition was partially granted. When his cause returned to the trial court for resentencing, Judge Strayhorn was no longer presiding and the cause came before Judge Linn.

¶ 45 None of this was lost on Judge Linn. From our recitation of his colloquy herein, it is obvious that he intended to be very thorough in his description of what occurred in this cause. This is understandable, as he was not the original trial or sentencing judge. Consequently, to single out the comments defendant has cited here does nothing to lend credence to his claim of unfairness, as they all occurred while Judge Linn was outlining what occurred in the underlying cause. That is, regarding the first comment, Judge Linn began his colloquy with a recitation of the facts of the underlying murder, as committed by defendant. He detailed the name of the assistant state's attorney to whom defendant gave his confession, he named the attorney who represented him, and he even described what eventually happened to that attorney. Though not relevant to the determination of defendant's sentence, it was clear from the outset that Judge Linn would be detailing every fact of this cause. He then discussed that defendant's cause went to trial before Judge Strayhorn. It was at this point that Judge Linn mentioned Judge Strayhorn "had sat in this building for many many years." Contrary to any inference by defendant of bias, this comment was part and parcel of his recitation of the history of defendant's cause and merely indicated that Judge Strayhorn was an experienced and long-time member of the judiciary. It was an objective fact.

¶ 46 Next, with respect to the second cited comment, Judge Linn continued his colloquy by noting the differences in the criminal code for the underlying offense from the time when defendant was convicted to the present, and confirmed that defendant had chosen to be sentence under the old code. He also discussed that, during defendant's original sentencing hearing, his attorney "put on some mitigation" but essentially "tried to urge" Judge Strayhorn that the death penalty was not proper. Judge Strayhorn disagreed. Defendant's cause proceeded to the supreme court and the federal court, his sentence was commuted, and it was remanded to the trial court by the Seventh Circuit. Judge Linn examined that court's decision, noting that it cautioned there had been several factors that had not been considered on defendant's behalf. Judge Linn then stated that it was now considering those factors, which should not be minimized. Here, Judge Linn commented that what he thought Judge Strayhorn was "strongly considering" at the time of sentencing was defendant's "extremely lengthy violence, criminal history." That defendant had such a history is objectively true and, undeniably, it was a factor to be considered. This comment by Judge Linn merely outlined what, quite presumably, Judge Strayhorn relied upon when originally sentencing defendant. Again, in line with Judge Linn's recitation of the facts, there is simply no bias evident in this statement.

¶ 47 The final comments defendant cites here came at the end of Judge Linn's colloquy. As defendant notes, Judge Linn stated that he believed, had Judge Strayhorn "heard all of the things that I heard, he still would have sentenced him to death back then," but such a sentence was, "of course, not on the table." Judge Linn simply stated what he believed Judge Strayhorn may have done. Since he had been tracing the case's history from the beginning, such a comment was only

natural and in line with a closure of that history. Moreover, there is entirely no indication, just because he hypothesized that Judge Strayhorn may have imposed the death penalty again, that Judge Linn was aligned with Judge Strayhorn in that opinion. To the contrary, Judge Linn never stated that he leaned the same way as Judge Strayhorn with regard to defendant's sentence. As Judge Linn noted, the death penalty was, by the agreement of everyone, not a sentencing option. Accordingly, Judge Linn was being called upon to fashion an entirely new, and different, sentence for defendant. This is why his colloquy was so lengthy and thorough. Indeed, immediately before these cited comments, Judge Linn repeatedly stated that he was "considering everything that's been brought to this Court for the sentencing hearing" and that he was "looking at all these in totality." He also consistently acknowledged all the factors the Seventh Circuit had cautioned needed to be considered with respect to defendant's sentence. In light of this, we fail to see how these comments inferred that Judge Linn was somehow trying to revive or align himself with a perceived position Judge Strayhorn may have had that was, by all accounts, irrelevant at this point. Therefore, we find no merit in defendant's assertion that the cited comments about Judge Strayhorn amounted to any improper speculation on the part of Judge Linn so as to cause defendant prejudice resulting in an unfair hearing.

¶ 48 Defendant's second specified claim is the trial court improperly considered the newly-presented mitigating evidence of his traumatic and abusive family history as aggravating evidence. He points to that portion of the trial court's colloquy where Judge Linn cited to *People v. Henderson*, 142 Ill. 2d 258 (1990), and stated that "there are matters that can be brought to the Court's attention in mitigation which also can be aggravating at the same time." From this,

defendant asserts that the trial court failed to weigh within the balance of factors not only his rehabilitative potential, but also his actual rehabilitation which, he certifies, was "established" at his resentencing hearing by "undisputed evidence." Again, we disagree.

¶ 49 As always, it is necessary to view the cited comments in full. At the end of his lengthy colloquy, after he had acknowledged the Seventh Circuit's precautions about considering factors that were not considered before, and after detailing all of these factors (including defendant's father's alcoholism and abuse, his mother's death, his mental issues and diagnoses, his drug addiction, his suicide attempts and his good acts), as well as after balancing these with other factors presented (including his age, his time in jail, his criminal history, his behavior in prison, his positive and negative affiliations and his rehabilitation), Judge Linn stated:

> "I will note that in sentencing hearings like this, going back to the case of People vs. Demetrius Henderson, the Illinois Supreme Court, there are matters that can be brought to the Court's attention in mitigation which also can be aggravating at the same time. Even though somebody may have had a difficult upbringing and had problems and drug abuse and been in a traumatic event taking place in their life, as much as that may mitigate and explain how they may have committed some violent acts, it can also aggravate, because given the case that because of that certain people have been damaged and there is no hope they can ever overcome those traumas and lead any kind of normal life."

Judge Linn then concluded by stating that he was "looking at all these [factors] in totality" and that, while he had an obligation to defendant, he also had one to society and he believed it was not in the public's interest to allow defendant to ever be released from prison.

¶ 50 Defendant here focuses on *Henderson* which, he acknowledges, indicates that evidence of a defendant's traumatic childhood can be "a two-edged sword," with one edge being mitigating in that it looks back in time to consider how such an upbringing may lessen a defendant's culpability for the crime, and the other edge being aggravating in that it looks forward toward predicting whether that upbringing has rendered a defendant incapable of being rehabilitated. Yet, defendant here asserts that viewing his traumatic upbringing as aggravating in any sense was inappropriate since the "undisputed evidence established" he was already rehabilitated. Thus, as he claims, there was no reason for Judge Linn to consider this evidence as anything other than mitigating.

¶ 51 Based on the context of the comments in relation to his colloquy as a whole, we do not find that Judge Linn considered the evidence of defendant's upbringing as aggravating in any way. First, defendant's characterization of the holding in *Henderson* is somewhat myopic. In that case, the defendant was convicted of aggravated criminal sexual assault, aggravated kidnaping and murder and was sentenced to death. On appeal, with respect to his sentence, evidence was presented reflecting he had a traumatic childhood, which included that his uncle had killed his father, his grandfather had committed suicide, his mother was extremely promiscuous, he had been abused and molested, and he had been involved in gangs. The defendant argued that the trial court was required to considered this as mitigating evidence.

However, the *Henderson* court clarified that this was not exactly the case. Rather, it noted that evidence of such an upbringing could be consider mitigating or aggravating, as the court was required to predict a defendant's future behavior based on his past behavior; thus, such evidence, while perhaps diminishing a defendant's blameworthiness for the crime, could also indicate the probability of future dangerousness. See *Henderson*, 142 Ill. 2d at 339-40, *affirmed in part and reversed in part*, see *Henderson v. Briley*, 354 F.3d 907 (7th Cir. 2004). Clearly, *Henderson*'s holding was merely that a single piece of evidence can be viewed multiple ways. Indeed, the *Henderson* court concluded that the trial court there had acted within its discretion in sentencing that defendant as it did and, specifically, in considering his upbringing as it had, *i.e.*, that it was not such as to mitigate his conduct in committing the crimes for which he had been convicted. See *Henderson*, 142 Ill. 2d at 340-41, *affirmed in part and reversed in part*, see *Henderson v. Briley*, 354 F.3d 907 (7th Cir. 2004).

¶ 52 Examining Judge Linn's comments on that case, it is significant to note that he never said defendant's situation was akin to that in *Henderson*. Rather, Judge Linn was clearly responding to the Seventh Circuit's concerns regarding the airing of the facts concerning defendant's upbringing, which it believed had not been done properly in the procedural past of his cause. Having noted Judge Linn's penchant for detail in his colloquy here, it is not surprising that he would cite and discuss *Henderson* in response to the Seventh Circuit's concerns. Again, he never stated he was specifically considering defendant's traumatic upbringing and abusive family history as aggravating, but only that our state supreme court has in the past noted that such evidence, though presented as mitigating, could also be viewed as aggravating.

¶ 53 Even had Judge Linn considered the evidence as aggravating, as defendant insists, we would find that there was no abuse of discretion. A court is not required to detail for the record the process by which it arrives at a defendant's sentence, nor to articulate the factors it considers and the mitigating or aggravating weight it affords them. See *People v. Martin*, 2012 IL App (1st) 093506, ¶ 48; accord *People v. Perkins*, 408 Ill. App. 3d 752, 763 (2011). As we noted earlier, when mitigating evidence is presented, it is presumed that the court considered it, absent some contrary indication. See *Sutherland*, 317 Ill. App. 3d at 1131; *Cord*, 239 Ill. App. 3d at 969. Here, defendant's upbringing, as well as his rehabilitation and his remorse, were repeatedly presented to the trial court at sentencing. Additionally, Judge Linn allowed defendant to present four witnesses and allowed him to allocute. Moreover, defendant's insistence that his rehabilitative potential, and his actual rehabilitation, had been established by "undisputed evidence" so as to remove it as a concern for the trial court is far from accurate. It is true that the witnesses all commented that they believed defendant was older, wiser and reformed and that he would make a good citizen now if released. However, these were the opinions of defendant's sister, wife and friend. With respect to Dr. Masson, she admitted on cross-examination that, in her analysis and report of defendant, she failed to consider that several of his prior convictions involved his possession of firearms, she had not consulted his rap sheet and thus did not know of all of his past crimes, and she acknowledged that he had physically assaulted guards and inmates in the DOC.

¶ 54 As we have repeatedly noted, Judge Linn examined all of the factors presented to him in their totality. This included defendant's traumatic upbringing and his rehabilitation which, we

find, he properly considered. In his view, these simply did not comprise enough evidence in mitigation to combat the evidence presented in aggravation. Ultimately, a trial court is not required to give greater weight to any single factor, such as a defendant's upbringing or rehabilitation, over any other factor in consideration, such as the seriousness of the crime. See *People v. Tujud*, 2014 IL App (1st) 092536, ¶ 113. Thus, we find no error in the cited comments.

¶ 55 Defendant's final specified claim of error in Judge Linn's colloquy centers on his comments regarding the differences in the sentencing laws in effect at the time the crime was committed, pursuant to which defendant chose to be sentenced, and those in effect at the time of the resentencing hearing. At the outset of his colloquy, Judge Linn commented that "under the criminal code today for the offense [defendant] was found guilty of, the minimum, absolute minimum sentence would be forty-five years in the penitentiary," and that defendant would have to serve all of it. He then noted that, since 1984, things had "changed" and that the legislature "in their wisdom, sought to take a totally different line on matters like this, crimes of this magnitude, than they had back in the eighties when this crime occurred, and when all the litigation involved in this case took place." He concluded, however, that this cause "nonetheless is going to be decided under the old code and how we got here."

¶ 56 Upon citing these comments, defendant argues that Judge Linn "clearly evinced his bias *against* the more lenient sentencing laws in effect at the time of the offense, and *in favor of* the far harsher laws in effect at the time of re-sentencing." (Emphasis in original.) He calculates that, under the old code, he would have been eligible for a term of between 10 and 40 years, while under the current code, he would be eligible for a term of between 45 and 145 years; thus,

the maximum under the old code was less than the minimum under the new code and, even imposing the old code's maximum, he would be out of prison by 2024. He then insists that, from this, Judge Linn purposefully sentenced him to natural life–the only sentencing option that remained unchanged–and "essentially nullified" his choice to be sentenced under the old code, thereby demonstrating "his expressly acknowledged bias against the leniency of the old laws" and resulting in an abuse of discretion. For the final time, we disagree.

¶ 57 Defendant is correct that he had the right, pursuant to due process, to choose to be sentenced under the law in effect at the time the offense was committed or under the law in effect at the time of sentencing. See *People v. Gancarz*, 228 Ill. 2d 312, 319 (2008) (this is true as long as there has only been a change in the applicable punishment and not in the substance of the offense). He is also correct that a trial judge is to remain objective in applying a sentencing range and must not express any personal opinion or bias with respect to categories of crimes, the offenders, or its views with respect to the prison system. See, *e.g.*, *People v. Henry*, 254 Ill. App. 3d 899, 905 (1993) (improper for sentencing judge to have called crime "disgusting"); *People v. Bolyard*, 61 Ill. 2d 583, 587 (1975) (improper for sentencing judge to have refused to consider sentencing option of probation in indecent liberties with a child case due to his personal opinion that such offenders do not deserve that option); *People v. Jeter*, 247 Ill. App. 3d 120, 130 (1993) (improper for sentencing judge to have called prison system "not a place where rehabilitation takes place"). However, at the same time, a trial judge is presumed to be impartial, and the defendant has the burden of overcoming this presumption by clearly showing the trial judge's bias or prejudice. See *People v. Cunningham*, 2012 IL App (3d) 100013, ¶ 14; accord *People v.*

Faria, 402 Ill. App. 3d 475, 482 (2010); *People v. Shelton*, 401 Ill. App. 3d 564, 583 (2010). And, once again, any allegations of such bias or prejudice must be viewed in their appropriate context and evaluated in terms of the specific events that took place. See *People v. Hardin*, 2012 IL App (1st) 100682, ¶ 18; accord *Faria*, 402 Ill. App. 3d at 482, citing *People v. Jackson*, 205 Ill. 2d 247, 277 (2001).

¶ 58 Defendant has not met his burden in overcoming the presumption of propriety here. First, as we have noted throughout our decision, Judge Linn, who was not the original trial or sentencing judge, was careful to thoroughly outline every detail of the procedural posture of this cause. This would include the fact that, in the 25-plus years since defendant committed the instant murder for hire, the legislature changed the law regarding the available sentences to be imposed; what these differences are; and that defendant chose to be sentenced under the old law rather than the new law. This is exactly, and only, what Judge Linn commented on here. Contrary to defendant's view, he never once provided any personal opinion with respect to this change, to defendant's choice or to the prison system. As is clear from the entirety of his colloquy, he never used any subjective words to express any feelings he had about the differences in the old and new law, nor did he ever comment with respect to defendant himself or his beliefs regarding the crime he committed in a manner indicating he was reluctant to sentence him according to his rightful choice of law.

¶ 59 Moreover, the parties were, at all times, in agreement when it came to the available sentencing options for defendant here. As we noted earlier, defendant expressly knew, under the old law pursuant to which he chose to be sentence, that, no matter the minimum term available,

the maximum available sentence he faced was natural life in prison without the possibility of parole. Thus, contrary to any inference he inserts in his argument, the trial court was not obligated or required to sentence him to any term of years under the old code. Rather, it is undeniable that natural life was an appropriate sentencing option under the old code. To say, as he does, that the trial court's imposition of this available sentencing option "nullified" his choice to be sentenced under the old law simply because it was a option that had remained unchanged under the new law is to presume that such a sentence was somehow inappropriate. Clearly, and by agreement of all the parties, including defendant himself, it was not. Thus, without more, we fail to find any merit to defendant's assertion of error with respect to these cited comments.

¶ 60 Ultimately, based upon our review of the record here, as well as on our particular consideration of Judge Linn's lengthy colloquy at the conclusion of defendant's resentencing hearing as a whole, we find that defendant's resentence of natural life without parole for the murder-for-hire of the victim was not excessive and that, when taken in their appropriate context, the cited comments do not exhibit any abuse of discretion on the part of the trial court.

¶ 61 CONCLUSION

¶ 62 Accordingly, for all the foregoing reasons, we affirm the judgment of the trial court.

¶ 63 Affirmed.