2013 IL App (1st) 121176-U

FOURTH DIVISION
December 12, 2013

No. 1-12-1176

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, Illinois,
	)	County Department,
v.	)	Criminal Division.
	)	
REGINALD WASHINGTON,	)	No. 11 CR 10899
	)	
Defendant-Appellant.	)	Honorable
	)	Charles P. Burns,
	)	Judge Presiding

JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Presiding Justice Howse and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* It was plain error for the trial court to consider the defendant's proclamation of innocence as an aggravating factor in sentencing. Pursuant to Illinois Supreme Court Rule 615(b)(4) (Ill. S. Ct. R. 615(b)(4)) (eff. Aug. 27, 1999), we reduce the defendant's sentence to six years' imprisonment, which is the minimum sentence permitted under the statute (see 730 ILCS 5/5-8-1(a)(3) (West 2010)).

¶ 2 Following a bench trial in the circuit court of Cook County, the defendant, Reginald Washington, was found guilty of burglary and sentenced as a Class X offender to seven years' imprisonment. The defendant contends that at sentencing the trial court improperly considered

his assertion of innocence during his allocution as an aggravating favor in determining the length of his sentence. The defendant asks this court to vacate and reduce his sentence pursuant to Illinois Supreme Court Rule 615(b)(4) (Ill. S. Ct. R. 615(b)(4)) (eff. Aug. 27, 1999)) to the minimum allowed term of six years' imprisonment. For the reasons that follow, we reduce the defendant's sentence to six years' imprisonment and remand to the circuit court with directions to amend the sentencing order to reflect our decision.

¶ 3 I. BACKGROUND

¶ 4 On July 12, 2011, the defendant was charged with one count of burglary pursuant to section 5/19-1(a) of the Criminal Code of 1961 (Code) (720 ILCS 5/19-1(a) (West 2010). The defendant proceeded to a bench trial where the following relevant evidence was adduced.

¶ 5 The victim, Robert Sanders (hereinafter Sanders), testified that on the morning of June 24, 2011, he drove his gray, 2003 Ford Escape sport utility vehicle (SUV) to work. Sanders parked his SUV on 37th Street, facing east, near the intersection of 37th and State Streets. After leaving work at about 5:30 p.m. that evening, Sanders approached his SUV and observed a yellow City of Chicago "boot" on its front, driver's side tire. Sanders averred that aside from the boot, everything on the vehicle appeared intact and it was locked. Sanders took public transportation home that evening.

¶ 6 Sanders testified that sometime after 4 a.m. on June 25, 2011, a police officer woke him up and informed him that somebody had broken into his car. The officer gave Sanders a sealed bag containing items that were removed from the SUV. Sanders testified that inside that sealed bag he recognized his wife's telephone charger and a CD case, both of which had been in the

center console of the SUV, the morning before.

¶ 7 Sanders testified that later that day he went to the SUV and observed broken glass both inside the vehicle, and outside, next to the passenger side door. Sanders also observed that the glove compartment was open and that its contents were on the floor and seats of the SUV. In addition, according to Sanders, the radio from inside the SUV was missing. Sanders also testified that he does not know the defendant, and that he never gave the defendant permission to take the phone charger or the CD case from his car.

¶ 8 On cross-examination, Sanders admitted that the SUV was registered to his wife, but explained that he was the one mostly driving it, because his wife was ill. On cross-examination, Sanders also acknowledged that the radio taken from the SUV was never returned to him.

¶ 9 Chicago police officer Jacqueline Morris testified that at about 4 a.m. on June 25, 2011, she was in uniform in a marked squad car with her partner, Officer Shawn Kendall, when she received a dispatch reporting that "a male Black in a white baseball cap [was] going through a booted vehicle through a broken window" at 6 East 37th Street. Officer Morris and her partner, who were about three blocks away, proceeded to the scene, with Officer Kendall driving, and Officer Morris in the front passenger seat.

¶ 10 As the squad car turned onto 37th Street, Officer Morris observed a gray SUV with a yellow, City of Chicago "boot" on the front, driver's side wheel, parked on the south side of the street near a vacant lot. Officer Morris testified that she observed a man "hanging out of the [passenger's side] window" of the SUV.

¶ 11 Officer Kendall drove the squad car onto 37th Street and pulled up next to the driver's

side of the SUV. Officer Morris then saw the man "withdraw from the car buy pulling himself out of the window." According to Officer Morris, the man wore a white baseball hat and had a dog next to him. In court, Officer Morris, identified the defendant as the man she observed.

¶ 12 Officer Morris testified that at that point, the defendant started walking eastbound on 37th Street with his dog. The officers exited their squad car and followed him. Officer Morris observed that the defendant was carrying a CD case and a phone charger in his hand. She instructed the defendant to stop. After he obliged, Officer Morris asked him if the SUV belonged to him and the defendant replied that it did not. The officer then informed the defendant that he "needed to come with them so that they could further investigate the situation."

¶ 13 Officer Morris averred that she then observed that the front passenger's side window of the SUV was broken and that there was shattered glass inside and outside of the car. In addition, she saw that papers were strewn about the car and that the radio was missing. Officer Morris again asked the defendant if the SUV belonged to him and the defendant repeated that it did not. Officer Morris then ran the SUV's license plates through the squad car computer and determined that the vehicle was registered to a female. The officers then asked the defendant to accompany them to the police station. En route, they stopped at the defendant's home so that he could drop off his dog there.

¶ 14 Once at Area 2 police station, the officers processed the CD case and phone charger that the defendant had been carrying on him when he was apprehended. They inventoried the items before returning them to the owner. At the police station, the officers also performed a custodial search of the defendant and discovered a small (four-to-six inch) silver pipe with copper on both

ends on his person.

¶ 15 On cross-examination, Officer Morris admitted that she did not recover what she would classify as "burglary tools" on the defendant's person at the time of his arrest. She also acknowledged that the pipe found on the defendant's person was very small, about the size of a pen. Officer Morris further admitted that the defendant had no injuries to his hands at the time of his arrest, and that the radio, which was missing from the SUV, was never retrieved or found either on the defendant's person or in the vicinity of the crime scene.

¶ 16 On cross-examination, Officer Morris also acknowledged that she never observed the defendant breaking into the SUV. She sated, however, that during her tour of duty, which began at 9 p.m. on June 24, 2011, she observed the SUV twice, and on both occasions, the windows on the vehicle appeared intact.

¶ 17 The State rested and the defense presented no evidence at trial. After closing arguments, the trial court found the defendant guilty of one count of burglary. In doing so, the court first noted that burglary does not require a forcible entry onto a property. The court then stated that the defendant "might have been an opportunist. He might have [seen] a broken window and leaned inside the car." The court found credible Officer Morris' testimony that she observed the defendant leaning inside the car, and held that, "the fact that he leaned inside the car and took items inside the car, that in fact is a burglary under the statute."

¶ 18 The defendant's sentencing hearing was held on April 2, 2012. In aggravation, the State stood on the facts of the case and presented the defendant's past criminal history. The State noted that the defendant had three prior felony convictions: (1) a 1995 Class 1 conviction for

possession of a stolen motor vehicle (for which he was sentenced to five years' imprisonment); (2) a 1990 Class 2 conviction for possession of a stolen motor vehicle (for which he was sentenced to four years' imprisonment); and (3) a 1990 Class 3 conviction for violation of bail bond (for which he was sentenced to four years' imprisonment to run concurrently with his four-year sentence for the 1990 Class 3 possession of a stolen motor vehicle conviction). The State argued that on the basis of his background, the defendant was a mandatory Class X[1] offender and asked that the court "sentence him accordingly with [that] statute."

¶ 19 In mitigation, defense counsel argued that the defendant's felony convictions were 18 years old and that the defendant has not had any felony convictions since 1995. Defense counsel also pointed out that the defendant is 48 years old, that he is father of five children (three grown children and two young ones (four and three years old respectively)) and six grandchildren. According to defense counsel, the defendant has been self-employed and has worked as a mechanic from his garage for the past 15 years. The defendant earns about $350 a week and uses these funds to support himself and his two minor children.

¶ 20 The defendant's ex-wife and the mother of his three older children, Brenda Newell, appeared in court on the defendant's behalf. Defense counsel pointed out that although Newell and the defendant are divorced they maintain a close friendship and Newell has been taking care of the defendant's youngest child during his recent incarceration. According to Newell, the defendant takes good care of and provides for all of his children. She also indicated that it has

[1]A Class X felony has a sentencing range of 6 to 30 years' imprisonment. 730 ILCS 5/5-8-1(a)(3) (West 2010).

become a hardship for her to take care of the defendant's youngest child, since the defendant has been in jail.

¶ 21 Defense counsel argued that based on all of the aforementioned mitigating facts, the defendant has strong rehabilitative potential. Defense counsel also pointed out that the defendant has never severed more than five years in the Illinois Department of Corrections, and accordingly asked the court to sentence the defendant to the minimum permissible sentence for a Class X offender, to six years' imprisonment.

¶ 22 In allocution, the defendant made only a brief statement to the court, saying, "I just want to say, I didn't do this. I didn't do this. I didn't do this, your Honor."

¶ 23 After hearing arguments in mitigation and aggravation, the trial court sentenced the defendant to seven years' imprisonment, stating:

> "I take into consideration matters in aggravation, mitigation. Mitigation is the fact that, while you do have three felony convictions, I do take into consideration that they did occur an extended period of time ago.
>
> You have spent time in the penitentiary, but for misdemeanor arrests that are indicated and convictions that are indicated in the presentence investigation report. But apparently, you have not been involved with any felony cases since that time.
>
> I do note that some of the misdemeanor cases were, in fact, domestic battery charges, resisting arrest, and also some criminal vehicle and criminal trespass-relating offenses as well as retail theft.
>
> The aggravation, obviously, I look at the prior convictions, I look at the fact that,

apparently, for whatever reason, even though I believe you were caught, literally red-handed in this matter, you are not acknowledging your own responsibility in this case.

Weighing both the factors in aggravation and mitigation, I could sentence you for a period of time from 6 to 30 years in the penitentiary because of your background. The–that is possible because of the fact that you have two Class 2 or greater offenses before this, and you've been convicted of a third.

I will sentence you to 7 years Illinois Department of Corrections."

The defendant now appeals his sentence.

¶ 24 II. ANALYSIS

¶ 25 On appeal, the defendant contends that the trial court erred when at the sentencing hearing it considered his claim of innocence as a factor in aggravation. The State initially notes, and the defendant concedes, that he has waived this issue for purposes of appeal by failing to properly preserve it for review. See *People v. Hall*, 194 Ill. 2d 305, 352 (2000) (To preserve an issue for purposes of appeal, the "defendant was required to make a contemporaneous objection at the sentencing hearing and to raise the issue in a post-sentencing motion.") The defendant nevertheless asks this court to review his claim under the plain error doctrine. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967) ("[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court"); *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005).

¶ 26 The plain error doctrine is a narrow and limited exception to the general rule of forfeiture

(*People v. Bowman*, 2012 IL App (1st) 102010, ¶ 29 (citing *Herron*, 215 Ill. 2d at 177)), and it "allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *Herron*, 215 Ill. 2d at186-87); see also See *People v. Hillier*, 237 Ill. 2d 539, 545 (2010) ("In the sentencing context, a defendant must *** show either that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing.") Under either prong of the plain error doctrine, the burden of persuasion remains on the defendant. *Bowman*, 2012 IL App (1st) 102010, ¶ 29 (citing *People v. Lewis*, 234 Ill. 2d 32, 43 (2009)).

¶ 27 "The first step of plain-error review is to determine whether any error occurred." *Lewis*, 234 Ill. 2d at 43; see also *People v. Wilson*, 404 Ill. App. 3d 244, 247 (2010) ("There can be no plain error if there was no error at all."). This requires "a substantive look" at the issue raised. *People v. Johnson*, 208 Ill. 2d 53, 64 (2003). We will therefore first review the defendant's claim to determine if there was any error before considering it under plain error.

¶ 28 The imposition of a sentence is normally a matter within the discretion of the trial court and it will not be disturbed absent a showing of abuse of discretion, or unless the trial court relied on improper factors in imposing the sentence. *People v. Morgan*, 306 Ill. App. 3d 616, 633 (1999); see also *People v. Dowding*, 388 Ill. App. 3d 936, 942-43 (2009); see also *People v.*

Perkins, 408 Ill. App. 3d 752, 762-63 (2011) ("So long as the trial court ' "does not consider incompetent evidence, improper aggravating factors, or ignore[s] pertinent mitigating factors, it has wide latitude in sentencing a defendant to any term within the statutory range prescribed for the offense." ' [Citations.]"); *People v. Hill*, 408 Ill. App. 3d 23, 29-30 (2011). Where, however, the trial court relies on improper aggravating factors, the sentence must be vacated and the cause remanded for a new sentencing hearing. *People v. Zapata*, 347 Ill. App. 3d 956, 964 (2004). "The question of whether a court relied on an improper factor in imposing a sentence ultimately presents a question of law to be reviewed *de novo*. [Citation.]" *People v. Abdelhadi*, 2012 IL App (2d) 111053 ¶ 8 (citing *People v. Chaney*, 379 Ill. App. 3d 524, 527 (2008)).

¶ 29 Although in imposing a sentence a trial court may consider the defendant's lack of remorse, or his veracity on the witness stand, as both bear on the defendant's rehabilitative potential, it unequivocally may not rely on the defendant's proclamation of innocence as an aggravating factor in determining the defendant's sentencing. See *e.g., People v. Speed*, 129 Ill. App. 3d 348, 349 (1984) ("[i]t is well established that a more severe sentence may not be imposed merely because a defendant claims he is innocent at the time of sentencing."); see also *People v. Byrd*, 139 Ill. App. 3d 859, 866 (1986) ("[a] more severe sentence may not be imposed because a defendant refuses to abandon his claim of innocence"); *People v. Carlson*, 293 Ill. App. 3d 984, 990 (1997) ("It is well established that a trial judge's imposition of a penalty based on a defendant's refusal to admit guilt *** is violative of due process.") (citing *People v. Moriarty*, 25 Ill. 2d 565, 567 (1962)); see also *People v. Ward*, 113 Ill. 2d 516, 526 (1986) ("when it is evident from the judge's remarks that the punishment was, at least in part, imposed

because the defendant had refused to plead guilty but had instead availed himself of his constitutional right to trial, the sentence will be set aside."). This rule was designed to protect a defendant's right of appeal or his prospects of postconviction relief, which might otherwise be jeopardized by rewarding a defendant's admission of guilt following trial. *Speed*, 129 Ill. App. 3d at 349 (citing *People v. Sherman*, 52 Ill. App. 3d 857, 859 (1977)).

¶ 30 In determining whether a sentence was improperly influenced by the defendant's failure to admit his guilt following conviction, reviewing courts focus on whether the trial court indicated, either expressly or impliedly that there would be better treatment on sentencing if the defendant abandoned his claim of innocence. *Speed*, 129 Ill. App. 3d at 349; see also *Byrd*, 139 Ill. App. 3d at 866. If there is such an indication, then the sentence likely was improperly influenced by the defendant's persistence in his innocence; if, however, the record establishes that the court did no more than address the factor of remorsefulness as it bore upon defendant's rehabilitation, then the court's reference to a defendant's persistent claim of innocence will not amount to reversible error. *Speed*, 129 Ill. App. 3d at 349; see also *People v. Coleman*, 135 Ill. App. 3d 186, 188 (1985).

¶ 31 In the present case, the record reflects that after the defendant made a statement in allocution denying his guilt, the trial judge stated:

> "*The aggravation*, obviously, I look at the prior convictions, *I look at the fact that, apparently, for whatever reason, even though I believe you were caught, literally red-handed in this matter, you are not acknowledging your own responsibility in this case*." (Emphasis added.)

Contrary to the State's assertion, we see no context in which this statement by the trial court could reflect the court's consideration of the defendant's lack of remorse rather than his protestation of guilt. The court expressly stated that it was considering the defendant's refusal to acknowledge his participation in the crime, "despite having been caught, literally red-handed," as a factor in aggravation. Accordingly, we must conclude that the defendant's sentence was improperly influenced by his denial of guilt. See *e.g.*, *Byrd*, 139 Ill. App. 3d at 862 (holding that a trial court's reference during the sentencing hearing to the defendant's refusal to admit guilt was sufficient indication that the defendant's sentence may have been improperly influenced by such refusal, so as to require vacature of the sentence and remand for a new sentencing hearing); *Speed*, 129 Ill. App. 3ed at 351-52 (reducing the defendant's 12 year sentence for a rape conviction to 10 years because the sentence was improperly influenced by the defendant's denial of guilt as to the rape); see also *Coleman*, 135 Ill. App. 3d at 188 ("The defendant's attitude as it reflects his rehabilitative potential is the standard by which courts of review determine whether sentencing was improperly influenced by a failure to admit guilt following conviction. [Citation.] If the sentencing court indicated in some manner that an admission of guilt would reduce the defendant's sentence, then the sentence was improperly influenced by the defendant's claim of innocence.")

¶ 32 Having found error, we must next determine whether this error rose to the level of plain error, so as to require our review. As already noted above, in the sentencing context, such as this one, to establish plain error the defendant was required to show either: (1) that the evidence at the sentencing hearing was closely balanced, or (2) that the error was so egregious as to deny the

defendant a fair sentencing hearing. *Hillier*, 237 Ill. 2d at 545. After a review of the record, for the reasons that follow, we conclude that the evidence at the sentencing hearing was so closely balanced that the improper consideration of the defendant's protestation of guilt tipped the scales of justice against him in favor of imposing a sentence above the statutorily mandated six year minimum.[2]

¶ 33 In that respect, we note that aside from the defendant's two prior felony convictions, both for non-violent crimes and both committed over 18 years prior to the offense at hand, in aggravation, the State only offered the facts of the case. Those facts establish that the defendant took two items of little value (a telephone charger and a CD case) from an SUV parked on the street, and temporarily immobilized by a City of Chicago yellow boot. The evidence further establishes that more valuable items belonging in the vehicle, namely the radio, were never retrieved from the defendant's person or found near the scene of the crime. What is more, noone testified that they observed the defendant breaking into the SUV. Under this record, even the trial judge acknowledged that the defendant was most likely an "opportunist" who took items from a vehicle that had already been burglarized.

¶ 34 On the other spectrum, in mitigation, the record establishes that the defendant had a

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[2]We note that even though the defendant was convicted of burglary, which is a Class 2 felony, punishable by three to seven years' imprisonment (see 720 ILCS 5/19-1(b) (West 2010); 730 ILCS 5/5-4; 5-35(a) (West 2010)), because of his prior criminal history, which included two prior felony convictions, the circuit court was required to sentence him as a Class X offender to anywhere between six and thirty years' imprisonment. See 730 ILCS 5/5-8-1(a)(3) (West 2010).

strong rehabilitative potential. The defendant, who was 48 years' old at the time the offense was committed, is a father of five and a grandfather of six. For over 15 years, he has consistently worked as a mechanic from his own garage, earning $350 a week, which he has uses to provide for his large family. In addition, in mitigation the defendant offered the testimony of Newell, the defendant's ex-wife and mother of his three older children, with whom he maintains a close friendship. Newell averred that the defendant is a good person, and a family man who provides for all of his children. The record further reflects that Newell has taken on the responsibility of caring for the defendant's youngest child during his incarceration, but that without the defendant's financial support, she has begun to experience hardship in taking care of the minor child.

¶ 35 Under this record, we are compelled to conclude that when weighed against the seriousness of the offense and the defendant's criminal history, the evidence of the defendant's rehabilitative potential was very strong, so that any improper consideration of the defendant's protestation of guilt, would necessarily have tipped the scales of justice against him and in favor of imposing a sentence higher than the statutorily authorized minimum. Accordingly, under the facts of this case, we find plain error. See *Hillier*, 237 Ill. 2d at 545.

¶ 36 Rather than remand this cause for a new sentencing hearing to be held without consideration of the defendant's denial of guilt, for purposes of judicial economy, we use the authority granted to us pursuant to Illinois Supreme Court Rule 615(b)(4) (Ill. S. Ct. R. 615(b)(4) (eff. Aug. 27, 1999)) to order that the defendant's sentence be reduced to six years' imprisonment. See *People v. Martin*, 2012 IL App (1st) 093506 ¶ 49 ("Pursuant to Supreme Court Rule 625(b)(4) [citation] we may use our authority to reduce an excessive sentence where the record

demonstrates that the trial court abused its discretion."); see also *Speed*, 129 Ill. App. 3d at 352.

¶ 37 III. CONCLUSION

¶ 38 For the aforementioned reasons, we reduce the defendant's sentence to six years in the Illinois Department of Corrections. We remand this case to the trial court with directions to amend the sentencing order accordingly.

¶ 39 Sentence reduced; and remanded with directions.