2015 IL App (1st) 131298-U

FIRST DIVISION
MARCH 30, 2015

No. 1-13-1298



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 07 CR 18684 |
| | ) | |
| JEMETRIC NICHOLSON, | ) | Honorable |
| | ) | Frank G. Zelezinski, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

**ORDER**

¶ 1 ***Held:*** Judgment entered on attempted first degree murder conviction affirmed over defendant's contention that resentencing was required because the trial court misapprehended the maximum aggregate term to which he could be sentenced; no miscalculation in the award of presentence custody credit.

¶ 2 Following a jury trial, defendant Jemetric Nicholson was found guilty of attempted first degree murder and sentenced to 50 years' imprisonment. On appeal, he contends that the court misapprehended the maximum aggregate term to which he could be sentenced that affected the term imposed. He also claims that this court should correct the miscalculation of his presentence custody credit.

¶ 3 Defendant was charged, in relevant part, with the attempted murder of Ronald Simpson. He was also charged with one count of aggravated discharge of a firearm involving Ronald Simpson, Constance Simpson, and Rick Jaunes, and two additional counts of aggravated discharge of a firearm involving Constance and Rick.

¶ 4 The evidence adduced at trial showed that at noon on November 1, 2005, Constance Simpson was driving eastbound on Robey Avenue in Harvey, Illinios, with her son, Ronald Simpson, and Ronald's friend, Rick Jaunes. As she reached the intersection of Sibley Boulevard and Robey Avenue, the light turned red. While she waited for the light to turn green, she noticed a man across the street wearing a hood and pacing back and forth, who started to walk toward her car. When the light changed, Constance began to drive, and Rick noticed that the hooded man had a gun, and yelled, "gun." The man then began to shoot at the car, and Ronald yelled it is "Lil Meechie," which is defendant's nickname. Defendant shot out the windows of the car as Constance drove away, and when she arrived home, she noticed that her car had multiple bullet holes. She called police, and when an officer arrived, Ronald named defendant as the perpetrator. The officer stated that he knew that person, and left. No evidence technician was sent out to examine the car, and they did not hear anything from Harvey police until February 2007, when Constance was told that the Sheriff's department was investigating the incident.

¶ 5 Ronald testified that three weeks after this incident, he was leaving the parking lot of a liquor store in a car when defendant fired his gun at him. Ronald acknowledged that he was a former gang member.

¶ 6 Sergeant William Dodaro, a State's Attorney Investigator, was assigned to investigate this

incident in January 2007, after learning that there were multiple complaints of unsolved violent crimes that were not being investigated in Harvey. During this investigation, he became aware of letters written by defendant that were at the home of his wife, Jasmine Woodson McCoy. In these letters, defendant admitted that he shot at Ronald, his friend and his mom, because of something Ronald's cousin "Willy" had done.

¶ 7 At the close of evidence, the jury found defendant guilty of the attempted first degree murder of Ronald, and three counts of aggravated discharge of a firearm. Defendant filed a motion for a new trial, which the court denied.

¶ 8 At the sentencing hearing, the State presented defendant's criminal history in aggravation. The State recounted that defendant was arrested on October 29, 2003, at the age of 14 for aggravated vehicular hijacking, in July 2005, he shot Lonnie Cooksey; and in November 2005, he shot at Ronald. He attended boot camp between March and August 2006, and in September 2006, he shot at Cooksey again. Around September 27, 2006, he fired at a car of rival gang members, and was chased by Harvey police, whom he fired at, then left his car and fled. In early October 2006, he shot Johnathon Chenault in the face and neck. The State thus requested the imposition of the maximum penalty for attempted murder in this case, which would be 30 years plus the enhancement of 20 years. The State also believed the court had the discretion to sentence defendant to an additional term of 15 years for aggravated discharge of a firearm, and noted that while he was incarcerated, defendant "picked up three separate incidences" where he was armed with a shank. The State explained that this evidence showed defendant's inability to be rehabilitated, his violent character, and the need for consecutive sentences.

¶ 9 In mitigation, defense counsel noted that the State was essentially seeking 65 years' imprisonment, 30 years' imprisonment for attempted murder, plus a 20-year enhancement, and 15 years' imprisonment for aggravated discharge of a firearm. Counsel stated that consecutive sentencing in this case is discretionary, and that pursuant to the one-act one-crime rule, the court should not impose consecutive sentences.

¶ 10 The State then presented the testimony of Jasmine McCoy, defendant's wife. She read several letters defendant had written to her in which he acknowledged that he had shot several people, and planned on shooting and killing others with whom he has problems or their relatives.

¶ 11 The State also called Illinois State Police Master Sergeant Matthew Gainer who testified that on September 27, 2006, he investigated a murder in Harvey of Metra police officer Thomas Cook, and on October 6, 2006, he placed defendant under arrest for that murder. Sergeant Gainer read defendant his rights, and videotaped his interview of defendant in which defendant admitted to shooting Johnathon Chenault on October 1, 2006. Defendant also admitted his involvement in the shooting of Lonnie Cooksey and Eric Johnson on October 26, 2006. Sergeant Gainer also spoke to defendant at another time and inquired about the incident on September 27, 2006, in which Harvey police officer Gbur responded in a marked squad car to a shooting of another car, and when he arrived, people in a fleeing vehicle fired in his direction. Defendant admitted that he also participated in that incident, and told Sergeant Gainer that he keeps a mental list of people he feels have wronged him, and that he planned on killing everyone on that list. Defendant also acknowledged that he sells cannabis.

¶ 12 The State argued that the court has the option of imposing consecutive sentencing where

the State demonstrates that defendant is a threat to the public, and requested that the court do so here for an aggregate term of 65 years' imprisonment.

¶ 13 Defense counsel responded that consecutive sentencing is discretionary, and that concurrent sentences should be imposed because the aggravated discharge convictions arose from the same act as the attempted murder charge. Counsel asked, in the alternative, that the offenses merge. Counsel also described defendant's statements in his letters to McCoy as boasts which should be taken with a grain of salt.

¶ 14 Defendant then spoke in allocution. He stated that he did not intend to kill anyone, and is a changed person. He stated that he was 17 years old when the instant incident occurred and that he was defending himself.

¶ 15 The court noted that the sentencing range for attempted murder, a Class X offense is 6 to 30 years, but since he personally discharged a firearm, an additional 20 years must be added. The court also noted that the jury found defendant guilty of three counts of aggravated discharge of a firearm, which are "lesser" offenses. The court stated that defendant partook in a boot camp program, but, instead of improving himself, he left with a hit list. The court noted the mitigation of defendant's youth, but found that the aggravation presented shows that defendant is a threat to society and his potential for rehabilitation is "nil." The court noted that the State requested consecutive sentencing, which was within its discretion, but that it would not impose consecutive sentences. The court stated that it would "merge" the three aggravated discharge convictions into the attempted murder count, and after considering all factors in aggravation and mitigation, imposed a 50-year sentence on that offense.

¶ 16 In this appeal, defendant first contends that the trial court incorrectly imposed a 50-year term, the maximum non-extended term, under the mistaken belief that it could sentence him to an aggregate maximum term of 65 years' imprisonment. He maintains that the trial court misunderstood the sentencing range, believing that the maximum aggregate sentence was 15 years higher than the law actually allowed, then sentenced him to the maximum possible sentence of 50 years, without realizing it was doing so. He thus requests a remand for resentencing.

¶ 17 Defendant acknowledges his forfeiture of this issue by failing to raise it below, but insists that it may be reviewed as plain error under the second-prong of the plain error rule. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). In the sentencing context, defendant must show that the error was so egregious as to deny him a fair sentencing hearing. *People v. Thomas*, 178 Ill. 2d 215, 251 (1997).

¶ 18 In his briefs, defendant string-cites cases for the proposition that there was plain error under the second-prong of the plain error rule, but has not presented argument as to how this prong is satisfied in this case. The burden is on defendant to establish plain error. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). By failing to explain why the error is so severe that it must be remedied to preserve the integrity of the judicial process, he has forfeited plain error review. *People v. Nieves*, 192 Ill. 2d 487, 503 (2000); *People v. McDade*, 345 Ill. App. 3d 912, 914 (2004); see also *People v. Rathbone*, 345 Ill. App. 3d 305, 311 (2003).

¶ 19 In the alternative, defendant contends that his trial counsel was ineffective for failing to raise this issue. Under the two-prong test for examining a claim of ineffective assistance of

counsel, defendant must establish that his attorney's performance fell below an objective standard of reasonableness, and that but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail, defendant must satisfy both prongs of the *Strickland* test, and if this court concludes that defendant did not suffer prejudice, we need not decide whether counsel's performance was deficient. *People v. Harris*, 206 Ill. 2d 293, 304 (2002). For the reasons that follow, we find no prejudice in this case.

¶ 20 Defendant contends that his counsel should have raised the one-act, one-crime issue when he filed his motion for a new trial, after it was clear the jury returned verdicts on both attempted murder and aggravated discharge of a firearm. He asserts that the court was prohibited from entering a judgment or sentence on the lesser charges, and that counsel, by failing to raise the one-act, one-crime rule prior to the sentencing hearing, allowed the court to determine defendant's sentence under its misconception of the available maximum aggregate term.

¶ 21 As set forth above, defendant was charged with and found guilty of one count of attempted murder regarding Ronald, and aggravated discharge of a firearm of all three victims. It is well settled that crimes committed against separate victims constitute separate criminal acts and require separate convictions and sentences. *People v. Pryor*, 372 Ill. App. 3d 422, 434-35 (2007). Under that authority, we conclude that defendant was subject to separate convictions and sentences for the multiple shots fired at the separate victims. *Pryor*, 372 Ill. App. 3d at 435. It therefore follows that there was no one-act, one-crime violation, and defendant has failed to demonstrate prejudice resulting from counsel's decision not to raise this issue.

¶ 22 Defendant insists, however, that because the victims were all grouped together in a single charge of aggravated discharge of a firearm, the State foreclosed a guilty finding on multiple counts for a single shooting. As noted, however, defendant was charged with three counts of aggravated discharge of a firearm, and the mittimus reflects that the court merged those counts (10, 11, and 12) with count 4 (attempted murder), before sentencing him solely on that offense to the maximum term. Defendant's claim of resulting prejudice based on the "reasonable probablity" that it imposed a greater term than would have occurred if counsel had raised the issue, is not borne out by the record. Accordingly, we find his present contention without merit.

¶ 23 The decision in *People v. Hardin*, 2012 IL App (1st) 100682, cited by defendant, is distinguishable. In that case, defendant was convicted of two counts of aggravated discharge of a firearm at a vehicle known to be occupied by two peace officers, and the court found that defendant may only be convicted of one count where the offense provided that defendant is guilty if he discharged a firearm in the direction of a vehicle known to be occupied by a peace officer. *Hardin*, 2012 IL App (1st) 100682, ¶26. Here, by contrast, defendant was charged with aggravated discharge of a firearm in that he fired his gun in the direction of another person (720 ILCS 5/24-1.2(a)(2) (West 2014)), not the vehicle, there were three named victims, and defendant fired multiple shots. Under these circumstances, multiple convictions were proper and the one-act, one-crime rule does not apply. *People v. Leach*, 2011 IL App (1st) 090339, ¶30.

¶ 24 We also find defendant's reliance on *People v. Green*, 339 Ill. App. 3d 443 (2003) and *People v. Petermon*, 2014 IL App (1st) 113536, misplaced. In *Green*, 339 Ill. App. 3d at 446-47, 459, and *Petermon*, 2014 IL App (1st) 113536, ¶¶1, 46, the trial court improperly imposed

convictions on multiple offenses involving the same victims. Here, the attempted murder was of Ronald, and two of the aggravated discharge of a firearm counts listed the victims as Constance and Rick. Accordingly, unlike *Green,* and *Petermon,* the aggravated discharge of a firearm counts were not based on the same victims as the attempted murder.

¶ 25 We further find that *People v. Crespo*, 203 Ill. 2d 335, 344 (2001), also relied upon by defendant, does not call for a different conclusion. There was only one victim in *Crespo,* with multiple stabbings, and the issue was whether separate convictions could be entered for each stabbing. Here, there were multiple shots and multiple victims.

¶ 26 We, therefore, find that defendant was not prejudiced by his counsel's failure to raise the one-act, one-crime rule in his motion for a new trial, or to object to the trial court's allegedly mistaken belief regarding the aggregate maximum sentence available. *People v. Betance-Lopez,* 2015 IL App (2d) 130521, ¶28.

¶ 27 In light of a recent ruling by this court in another case in which the charge and the age of the defendant in that case are similar to the charges and age of the defendant in this case, we believe further comment is warranted regarding the sentence in this case as it differs greatly from the sentence in the other case. The defendant in this case although relatively young, has an unusually violent and lengthy history of attempting to kill people. Indeed, he memorialized his violent intentions in a letter in which he vowed to harm everyone on the list of people who he believed had wronged him. Further, defendant allegedly committed other crimes while awaiting trial on the charges associated with the instant case. The record suggests that defendant reveled in the violence he wrecked on others. In spite of his young age, defendant's violent history

covered several years. It is clear from the record that the trial court considered all of the appropriate factors in mitigation and aggravation prior to imposing sentence. In fact, the court went on to say that after balancing all of the factors, it was clear that the defendant's rehabilitative potential was "nil." In so doing, the court acknowledged that rehabilitation is an important factor when sentencing youthful offenders. Nevertheless, that factor must be balanced against public safety and the demonstrated potential for rehabilitation. Although his arguments are couched in different terms, the underlying theme of defendant's contention that his sentence should be vacated is based on the theory, though not plainly stated, that his sentence is excessive. The parties make multiple arguments regarding the propriety of the State's argument that defendant was convicted of multiple counts of attempted murder, notwithstanding the State's failure to charge him individually with the attempted murder of each occupant of the car. However, the result of the trial court's misapprehension of the law, if any, did not result in prejudice to defendant in his sentence. There is no indication that the trial court believed it could impose an improper sentence. On the contrary, the court understood the discretionary parameters of its power and the sentence it imposed confirms that. In this case, under these facts, we cannot say that the trial court abused its discretion in sentencing defendant to 50 years of imprisonment.

¶ 28 Defendant next contends that he is entitled to additional credit for time served between the date of the announcement of the sentence and until the alleged stay of the mittimus was lifted. He maintains that the mittimus was originally issued December 20, 2012, but then was stayed until January 10, 2013. Defendant, therefore, maintains that he is entitled to 1953 days of

presentence custody credit, instead of 1934 days.

¶ 29 Sentencing credit may be awarded for the period spent in custody *prior to sentencing.* (Emphasis added.) 730 ILCS 5/3-6-3 (West 2-14). Defendant is not entitled to presentence custody credit for the date he is sentenced, and the mittimus is issued, which, in this case, was December 20, 2012. *People v. Williams*, 239 Ill. 2d 503, 510 (2011). Therefore, defendant is not entitled to presentence custody credit for any time he spent in custody *after* he was sentenced.

¶ 30 In addition, the correction of defendant's mittimus on January 10, 2013, to reflect that he must serve 85% of his sentence, does not result in interim presentence custody credit, and defendant has not provided any case law supporting his position that it does. We also observe that the court stated that it would stay "shipment" of defendant, but that Cook County Jail could ignore its request. There is no indication in the record that shipment was in fact stayed, where the mittimus was only corrected, and we thus find that defendant was serving his sentence at the institution where he was being detained as of December 20, 2012, the date the mittimus was originally issued. Accordingly, the court correctly calculated the presentence custody credit. *Williams*, 239 Ill. 2d at 510.

¶ 31 In light of the forgoing, we affirm the judgment of the circuit court of Cook County.

¶ 32 Affirmed.