2015 IL App (1st) 132167-U

FIFTH DIVISION
July 17, 2015

No. 1-13-2167

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. 12 CR 375
	)	
TIMOTHY ALEXANDER,	)	Honorable
	)	Mary Colleen Roberts,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Judgment entered on defendant's conviction for armed habitual criminal affirmed over his contention that in sentencing him to 17 years' imprisonment, the court improperly considered his prior convictions which were factors inherent in the offense; mittimus amended to reflect 556 days of presentence custody; fines and fees order modified.

¶ 2 Following a bench trial, defendant Timothy Alexander was found guilty of armed habitual criminal, armed violence, two counts of unlawful use of a weapon, and possession of cannabis with intent to deliver, then sentenced to 17 years' imprisonment on the merged counts.

On appeal, defendant contends that, in imposing that sentence, the trial court improperly considered two of his prior convictions, which were factors inherent in the offense of armed habitual criminal. Defendant also requests that his mittimus be amended to reflect 556 days of presentence custody, and that enumerated modifications be made to the fines and fees order.

¶ 3 The record shows that defendant was charged with armed habitual criminal, armed violence, unlawful use of a weapon, and possession of cannabis with intent to deliver in connection with an incident that occurred in the early morning hours of December 3, 2011, at 7043 South Justine Street in Chicago. At trial, Chicago police officer Desai testified that about 1 a.m. that day, he and 10 other officers arrived at that location to execute a warrant. Upon entering the apartment, he observed defendant run toward the back in his underwear. Officer Desai followed defendant into the rear bedroom where he observed defendant and another individual, and numerous bags containing suspect cannabis and a digital scale on a coffee table. On cross-examination Officer Desai stated that he never observed defendant with a gun in his hand.

¶ 4 Chicago police officer Kasper testified that he was with Officer Desai at the time and place in question, and that his role was to take pictures and recover contraband. He watched Officer Desai detain two individuals in the rear bedroom, then took pictures of the suspect cannabis and digital scale on the coffee table and another bag of suspect cannabis, which he found behind the couch. He also recovered a firearm and seven bullets that had been hidden in the fake fireplace in the bedroom, and bills sent to the apartment in defendant's name. On cross-examination he stated that he never observed defendant with a gun in his hand.

¶ 5 Chicago police officer David Madia testified that he and Chicago police officer McCollum spoke to defendant in the 7th District processing room. Defendant told the officers he sold cannabis and that he recently bought the gun for protection because he was trying to leave the Gangster Disciples. The State then introduced certified statements of defendant's 1995 conviction for attempt murder, and another for delivery of a controlled substance in 2006 as qualifying convictions to prove the offense of armed habitual criminal.

¶ 6 The parties then stipulated to the testing performed by Martinque Rutherford, a forensic chemist at the Illinois State Police Crime Lab. She received two inventory envelopes, marked as indicated by Officer Kasper, which contained items that tested positive for the presence of cannabis with an actual weight of 65.3 grams.

¶ 7 Defendant testified that on December 3, 2011, he and his roommate, Scott Lanier, were hosting a poker game at their apartment for several friends, including Antonio Larry. He played until 11:30 p.m., then went to the rear bedroom to smoke marijuana, and fell asleep. About 1 a.m., he heard the door crash in. Larry ran into the rear bedroom and told him the police were in the apartment, and hid a gun in the heater behind some fake logs. Defendant further testified that he had never seen the gun before and that he had never owned a gun, because he knew if he were convicted his sentence would be more severe. He also testified that selling marijuana was his job, that he was not trying to leave the Gangster Disciples, and that he has a "presence" within the gang.

¶ 8 In rebuttal, the State introduced certified copies of three of defendant's prior convictions for manufacture and delivery of cannabis in 2002, possession of a controlled substance in 2004,

and driving on a suspended license in 2005. The court allowed the first two convictions into evidence, but denied entry of his driving conviction.

¶ 9 Following closing arguments, the trial court found defendant guilty of all counts. The court specifically found the officers to be credible based on its observation of their demeanor, which contrasted with that of defendant whose testimony the court found incredible to the extent that it contradicted the officers' testimony.

¶ 10 At the subsequent sentencing hearing, the State initially outlined defendant's six prior felony convictions beginning in 1992, claiming that they showed that defendant is a violent individual, and has used that violence against others. The State further asserted that defendant has a long history of engaging in illegal behavior, including the manufacture and delivery of drugs, and by his own admission continues to sell cannabis. In addition, defendant continues to make weapons available to himself that readily lead to violence, and has not learned from his previous periods of incarceration. The State then referenced defendant's gang involvement, and requested that the court sentence him to a term of 20 years for this Class X offense.

¶ 11 In mitigation, defense counsel acknowledged that defendant cannot hide from his background, but attempted to ameliorate it by pointing out that defendant's sentence for the 1995 attempt murder conviction was low because he was the driver of a vehicle from which shots were fired, and it was never alleged that defendant had a weapon. Since that conviction, all of his crimes have been related to drug dealing, which counsel characterized as a "business that he engages in," rather than a history. Defense counsel also stated that defendant retired from active participation in the gang in 2009, but still has an affiliation with it, then pointed out that

defendant has three children, teenaged or older, and provides money to them when he can. Defense counsel asked for a reasonable sentence, not to exceed the State's offer of 12 years. Defendant stated in allocution that he told the truth about selling drugs, and that it was his apartment, but it was not his pistol.

¶ 12 In announcing its sentencing decision, the court initially stated that it believed defendant to be very intelligent and an articulate man who fashions his statements so that things will go right for him. The court pointed out that defendant told the arresting officers that he wanted out of the gang, and that he bought the gun to protect himself, but at trial he testified that he has a presence in the gang, which was illustrated by the gang graffiti around his apartment, and in his interview for the presentence investigation report, he stated that he had been out of the gang since 2009. The court then stated that although it believed defendant was intelligent, he used his "cunningness too much" and it has caught up with him. The court reiterated that it did not find his testimony disavowing ownership of the gun credible, and believed that defendant would say anything to minimize his sentence. The court noted that defendant had been incarcerated six times over a 20-year period, determined that the sentence imposed must be commensurate with his background, not only with his prior convictions, but also his tendency for violence and using illegal means to make a living, and sentenced him to 17 years' imprisonment.

¶ 13 In this appeal from that judgment, defendant does not challenge the sufficiency of the evidence to sustain his conviction, but contends that the court improperly considered his convictions for attempt murder and delivery of a controlled substance in determining his sentence. He maintains that these convictions were implicit in the underlying offense of armed

habitual criminal, and, therefore, the trial court was prohibited from considering them in aggravation because that would amount to "unfair double-counting" of a single fact.

¶ 14 The imposition of a sentence within the statutory range provided for the class of offense of which defendant was convicted is a decision committed to the sentencing court. *People v. Barney*, 111 Ill. App. 3d 669, 679 (1982). Generally, a factor implicit in the offense for which defendant has been convicted cannot be used as an aggravating factor in sentencing for that offense (*People v. Phelps*, 211 Ill. 2d 1, 11 (2004)), *i.e.*, a single factor cannot be used both as an element of an offense and as a basis for imposing a harsher sentence than might otherwise have been imposed (*People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 9).

¶ 15 In this case, defendant contends that the trial court improperly considered the convictions that qualified him to be sentenced under the armed habitual criminal statute, which is a legal error subject to *de novo* review. *People v. Chaney*, 379 Ill. App. 3d 524, 527 (2008). The State responds that the trial court properly considered the relevant factors in aggravation and mitigation, and that it did not abuse its discretion in sentencing defendant to 17 years' imprisonment. In his reply brief, defendant contends that the State has mischaracterized the issue raised, which is not that his sentence is excessive, but rather, that the trial court improperly considered a factor inherent in the offense in imposing his sentence, which is a purely legal question subject to *de novo* review.

¶ 16 The supreme court has held that the double-enhancement rule, *i.e.*, that a single factor cannot be used both as an element of an offense and as a basis for imposing a harsher sentence than might otherwise have been imposed, is a question of statutory construction, which is

reviewed *de novo*. *Phelps*, 211 Ill. 2d at 12. Similarly, this court has held that although the imposition of a sentence is a matter within the trial court's discretion, the issue of whether the trial court erroneously subjected defendant to double enhancement is a question of law subject to *de novo* review. *Chaney*, 379 Ill. App. 3d at 527. Consistent with this authority, we find that the issue raised by defendant is a legal question, which we review *de novo*.

¶ 17 In contending that the court improperly considered his previous convictions for attempt murder and delivery of a controlled substance, defendant points to the court's statement during sentencing that he had a "tendency for violence and using illegal means to make a living." He argues that the only aspect of his conduct that could be construed as violent is his prior conviction for attempt murder, which the court was precluded from considering during sentencing as it was one of the offenses that gave rise to the armed habitual criminal conviction.

¶ 18 We initially observe that in determining whether a sentence is improperly imposed, a reviewing court should not focus on a few words or statements of the trial court, but should consider the record as a whole. *People v. Estrella*, 170 Ill. App. 3d 292, 297-98 (1988); see also, *People v. Csaszar*, 375 Ill. App. 3d 929, 952 (2007) (the trial court's statements at sentencing may not be considered in isolation). In this case, the qualifying convictions to support the charge of armed habitual criminal were attempt murder and delivery of a controlled substance. The record shows that in considering the sentencing factors applicable to defendant's case, the court referred to defendant's tendency for violence and use of illegal means to make a living. From these references, defendant assumes that the trial court imposed a longer sentence than it

otherwise would have without them. We find this assumption unwarranted where the court identified a number of aggravating factors in determining the length of the sentence.

¶ 19 The record shows that the court commented on defendant's lengthy criminal history, his continued possession and distribution of cannabis as a way to earn a living, and his manipulative manner, which showed his failure to learn from his past mistakes and rectify his behavior, all of which impacted negatively on his potential for rehabilitation. *People v. Shumate,* 94 Ill. App. 3d 478, 485 (1981). Moreover, this court has held that it is unrealistic to suggest that the court must avoid mentioning a factor inherent in an offense in determining a sentence or risk committing reversible error. *People v. Martin,* 112 Ill. App. 3d 486, 503 (1983); *Barney*, 111 Ill. App. 3d at 679. Here, defendant himself referred to his ongoing drug activity, and the prior convictions intended to impeach his testimony were also drug related. In addition, during the sentencing hearing, the State referred to the violence attendant to defendant making weapons available to himself, and considered *in toto*, we find that the references to defendant's tendency for violence and illicit drug activity do not show that the court was explicitly referring to the qualifying offenses or improperly considered them as aggravating factors in setting the term. *Barney*, 111 Ill. App. 3d at 679.

¶ 20 Even assuming, *arguendo*, that the mention of defendant's tendency for violence shows improper consideration of an element of the offense as an aggravating factor, the weight placed on it was so insignificant that it did not lead to a greater sentence. *Csaszar*, 375 Ill. App. 3d at 952-53. The comments made by the trial court prior to announcing sentence show that it did not give greater weight to this factor than to others (*id*.) or that the court imposed a harsher sentence

than it otherwise would have, given the other factors the court identified in aggravation (*Abdelhadi*, 2012 IL App (2d) 111053, ¶ 9). We thus find no basis for reversal on the record. *Csaszar*, 375 Ill. App. 3d at 952-53.

¶ 21 Defendant next contends that this court should amend his mittimus to reflect that he spent 556 days in presentence custody. The record shows that defendant was arrested on December 3, 2011, and remained in custody until he was sentenced on June 11, 2013. At the sentencing hearing, defense counsel mistakenly informed the court that defendant was entitled to 555 days of presentence custody, which was reflected on defendant's mittimus. However, defendant now contends, the State concedes, and we agree, that defendant is entitled to 556 days of credit. We therefore order the clerk to amend defendant's mittimus to reflect that he spent 556 days in presentence custody. *People v. Whitmore*, 313 Ill. App. 3d 117, 121 (2000).

¶ 22 Defendant also contends that he is entitled to offset certain fines using his presentence custody credit. Defendant spent 556 days in presentence custody, for which he was entitled to a $5-per-day presentence custody credit to offset his fines. 725 ILCS 5/110-14(a) (West 2012). Defendant first contends, the State concedes, and we agree, that defendant is entitled to offset the $500 Controlled Substances fine, the $30 Children's Advocacy Center fine, the $10 Mental Health Court fine, and the $5 Youth Diversion fine, for a total of $545.

¶ 23 Defendant next contends that he should be permitted to use his presentence custody credit to offset the $2 Public Defender records automation fee and the $2 State's Attorney records automation fee because, despite their label as fees, they are actually fines. The Public Defender records automation fee requires defendant to pay a $2 assessment "to discharge the expenses of

the Cook County Public Defender's office for establishing and maintaining automated record keeping systems." 55 ILCS 5/3-4012 (West 2012). Similarly, under the State's Attorney records automation fee, defendant is required to pay a $2 assessment "to discharge the expenses of the State's Attorney's office for establishing and maintaining automated record keeping systems." 55 ILCS 5/4-2002.1(c)(West 2012).

¶ 24 As the State points out, the Fourth District appellate court recently determined that the State's Attorney records automation assessment was compensatory in nature, and, therefore, a fee. *People v. Rogers*, 2014 IL App (4th) 121088, ¶ 30. Citing *People v. Warren*, 2014 IL App (4th) 120721, ¶ 108, the court in *Rogers* stated that the "assessment is a fee because it is intended to reimburse the State's Attorney for their expenses related to automated record-keeping systems." *Rogers*, 2014 IL App (4th) 121088, ¶ 30. Defendant acknowledges the decision in *Rogers*, but urges us to apply the supreme court's holding in *People v. Graves*, 235 Ill. 2d 244, 250 (2009), where the court stated that a fee is intended to compensate the State for the costs of prosecuting defendant, while fines are punitive in nature. He maintains that these assessments do not reimburse the State for costs incurred in defendant's specific prosecution, but are collected to finance future purchases of automated record-keeping systems.

¶ 25 We believe that the Fourth District properly interpreted the supreme court's holding in *Graves* in deciding *Warren* and *Rogers*. The statutory language of 55 ILCS 5/4-2002.1(c) shows that the assessment is intended to compensate the State for the costs of prosecuting defendant by offsetting the State's costs in establishing and maintaining automated record keeping systems (55 ILCS 5/4-2002.1(c)(West 2012)), and, as such, is a fee, which may not be offset by presentence

custody credit (*People v. Jones*, 397 Ill. App. 3d 651, 664 (2009)). It therefore follows that the $2 Public Defender records automation fee is a fee in that it is intended to compensate the office of the public defender for costs incurred in defending defendant, and may not be offset by defendant's presentence custody credit.

¶ 26 Accordingly, we order the clerk of the circuit court of Cook County to amend defendant's mittimus to reflect that he spent 556 days in presentence custody; modify the fines and fees order to reflect the offset of the $500 Controlled Substances fine, the $30 Children's Advocacy Center fine, the $10 Mental Health Court fine, and the $5 Youth Diversion fine, for a total of $545, with a remaining assessment of $394; and affirm the judgment of the circuit court of Cook County in all other respects.

¶ 27 Affirmed, mittimus amended, fines and fees order modified.