2017 IL App (1st) 152872-U

No. 1-15-2872

Order filed April 13, 2017

Fourth Division



IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | Nos. 07 CR 10215 |
| | ) | 07 CR 10216 |
| | ) | 07 CR 10700 |
| | ) | |
| JAMONTRELL BEGAY, | ) | Honorable |
| | ) | Brian K. Flaherty, |
| Defendant-Appellant. | ) | Judge, presiding. |

JUSTICE HOWSE delivered the judgment of the court.
Justices McBride and Burke concurred in the judgment.

**ORDER**

¶ 1 *Held*: Where the trial court did not misapprehend the sentencing range at defendant's resentencing hearing, defendant's sentence of three concurrent terms of 22 years in prison is affirmed.

¶ 2 Defendant, Jamontrell Begay, pled guilty to three counts of aggravated vehicular hijacking with a firearm and was sentenced to three concurrent terms of 22 years in prison. Thereafter, defendant filed a postconviction petition, alleging that his sentence violated the

proportionate penalties clause of the Illinois Constitution. The trial court granted the State's motion to dismiss defendant's postconviction petition and defendant appealed. We reversed the trial court's order, granted defendant's postconviction petition, vacated the sentences, and remanded for resentencing. *People v. Begay*, 2015 IL App (1st) 130118-U. On remand, the trial court resentenced defendant to three concurrent terms of 22 years in prison. On appeal, defendant argues that he is again entitled to resentencing because the trial court misapprehended the applicable sentencing range at the resentencing hearing. For the reasons explained below, we affirm.

¶ 3 In May 2007, defendant was charged in three separate cases for offenses that occurred on April 7, 2007, April 9, 2007, and April 11, 2007. With respect to the April 7, 2007, incident, defendant was charged with two counts of aggravated vehicular hijacking and armed robbery. With respect to the April 9, 2007, incident, defendant and codefendant, Rorey Allen, who is not a party to this appeal, were charged with aggravated vehicular hijacking and armed robbery. With respect to the April 11, 2007, incident, defendant and Allen were charged with two counts of attempted first degree murder, four counts of aggravated vehicular hijacking, and two counts of aggravated discharge of a firearm.

¶ 4 On August 6, 2008, in exchange for three concurrent sentences of 22 years in prison, defendant pled guilty to three counts of aggravated vehicular hijacking while armed with a firearm. At the hearing, after the trial court explained to defendant the charges and the rights he was giving up by pleading guilty, the trial court noted that aggravated vehicular hijacking is a Class X felony and that it could sentence defendant "anywhere from 7 to 30 years" in prison. The trial court further noted that, because defendant used a weapon, it had to add 15 years to the

sentence, which would make the minimum sentences 22 years and the maximum sentences 45 years. Thereafter, the State offered a factual basis for the plea for each case.

¶ 5 In Case No. 07CR10215, which arose from the incident that occurred on April 11, 2007, Jessica Betts and Sharetha Williams would have testified that, when they were driving in Betts's car, defendant and Allen came up to them and that defendant had a handgun. They would have further testified that "They approached the driver's side seat and stated, as they pointed the gun, that they wanted their car." Williams and Betts got out of the car, defendant got into the passenger's side, and Allen got into the driver's side. As Betts and Williams were running away, defendant fired one shot at them. Detective Escalante from the Harvey Police Department would have testified that he witnessed the incident, that he saw defendant and Allen take the car at gunpoint, and that he saw defendant shoot at Betts and Williams. The State would have played defendant's videotaped statement where he admitted to taking the car at gunpoint but stated that he "never shot the gun - - merely shot the gun in the air[.]" Defendant stipulated that the foregoing would be the testimony at trial.

¶ 6 In Case No. 07CR10216, which arose from an incident that occurred on April 9, 2007, Eric Shaw would have testified that defendant and Allen approached him when he was at his car, that Allen had a gun, and that Allen asked him, "Where is the money at[?]" Defendant and Allen took Shaw's money from his pocket, told him to lie down, got into his car and drove away. The State would have played defendant's videotaped statement where he admitted to committing the robbery and driving away in Shaw's car. Defendant stipulated that the foregoing would be the testimony.

¶ 7 In Case No. 07CR10700, which arose from an incident that occurred on April 7, 2007, Dock Donaly would have testified that he was in his garage when defendant walked up to him, pointed a gun at him, demanded and took his money and car keys, and drove away with his car. The State would have played defendant's videotaped statement where he testified that he took, at gunpoint, Donaly's car and $50. Defendant stipulated that the foregoing would be the testimony at trial.

¶ 8 Thereafter, the trial court indicated that defendant understood the nature of the charges and possible penalties, that the pleas were given freely and voluntarily, and that a factual basis existed for the pleas. The trial court accepted the pleas and found defendant guilty of one count of aggravated vehicular hijacking in each of his three cases. In aggravation, the State noted that defendant was previously found guilty of attempted aggravated arson, where he received four years probation, and that, when that case was pending, defendant escaped two times. In mitigation, defense counsel stated that defendant would rest on the agreement and noted that defendant was 21 years old. The trial court determined that, based on defendant's criminal history and the facts, it would go along with the agreement and sentenced him to three concurrent terms of 22 years in prison with three years mandatory supervised release.

¶ 9 Almost two years later, defendant filed a motion to withdraw his guilty plea and vacate judgment, which the trial court denied as untimely. Defendant's appeal was dismissed on his own motion. *People v. Begay*, No. 1-10-2156 (2014) (dispositional order).

¶ 10 In 2011, defendant filed a "Petition for Post-Conviction Relief," which alleged that his sentences violated the proportionate penalties clause of the Illinois Constitution. In particular, defendant alleged that aggravated vehicular hijacking with a firearm, which carried a sentencing

range of 21 to 45 years, contained the same elements as the offense of armed violence with a Category I weapon predicated upon the offense of vehicular hijacking, which carried a sentencing range of 15 to 30 years. Therefore, defendant alleged that, because these offenses contained the same elements but the sentencing range of aggravated vehicular hijacking with a firearm carried a more severe sentence, it violated the proportion penalties clause. The trial court granted the State's motion to dismiss defendant's postconviction petition, and defendant appealed.

¶ 11 On January 29, 2015, we issued an order on defendant's appeal in *People v. Begay*, 2015 IL App (1st) 130118-U. We found that defendant's sentences violated the proportional penalties clause. *Id.* ¶ 1. We reversed the trial court's order granting the State's motion to dismiss, granted defendant's postconviction petition, vacated his sentences, and remanded for resentencing. *Id.* ¶ 9. In our order, we noted, "The State concedes that at the time defendant committed the underlying offenses, the 15-year mandatory firearm enhancements were unconstitutional and therefore should not have been imposed," but that the parties did not agree on a remedy. *Id.* ¶ 5. After discussing the remedies that the parties had asserted on appeal, we concluded as follows:

> "Accordingly, we conclude that the appropriate remedy in the instant case is to remand for resentencing in order to allow the trial court to determine defendant's sentence for each offense while taking into account the totality of his sentence. See *People v. Toy*, 2013 IL App (1st) 120580, ¶ 30 (where the defendant's sentence enhancement violated the proportionate penalties clause, no factual dispute required an evidentiary hearing on the defendant's postconviction petition and the appropriate remedy was to reverse the dismissal of the petition, grant the petition on the

proportionate penalties issue, vacate the sentences, and remand for resentencing.)." *Id.* ¶ 7.

¶ 12 At the resentencing hearing, the trial court noted that it had previously tendered a presentence investigation report to the parties and the State presented the factual basis for the pleas. In aggravation, the State argued that defendant had a handgun in each case and that, in one case, defendant discharged the gun at the victims when they were running away. The State noted defendant's criminal history, including possession of a stolen motor vehicle and robbery, offenses he committed as a juvenile, and an adult conviction from 2006 for "felony escape from a police officer." The State requested that the trial court resentence defendant to the original 22-year sentence, concluding that it was appropriate due to "the violent nature of this defendant's background, the threat of harm."

¶ 13 In mitigation, defense counsel noted that defendant had already served eight years, that the sentencing range was 6 to 30 years, and that at the time of defendant's original sentence, when the State believed the minimum sentence was 22 years, "the State was willing to give the defendant the minimum" and that "I can't think of a reason why the Court would not give the minimum at this point." Defense counsel advised the trial court that defendant did not shoot at any of the victims, that no one was hurt or injured, and that there was no bodily harm. Defense counsel noted that "there may have been some wandering when he was a teen and a little rebellious" and that defendant may have abused drugs or alcohol when he was young, but that defendant was "ready to move forward." Defendant advised the trial court that "everything in my past was when I was young, you know" and that he was ready to get back to his parents and his daughter and to do things with his daughter that he had missed.

¶ 14 The trial court sentenced defendant to 22 years in prison for each offense to be served concurrently. In doing so, the trial court noted that defendant had guidance from his parents but that he did not listen to them and that defendant "wanted something else, the easy way out." The trial court noted that defendant's conduct threatened serious harm and that he had a criminal history. The trial court discussed the original sentence and enhancements as follows:

> "One of the things I think is important for all of us to understand is with these enhancements that we incorrectly believed were proper, with these enhancements we have to kind of fool around to the numbers to get what we think the case is worth.
>
> For example, I don't think there's anybody here that would - - well, I take that back. Most people would not think that these three cases together an appropriate sentence would be seven years, but we get to 22 because we have to deal with the enhancements.
>
> So if this case is worth let's say 15 years, we add the enhancement, that might be too much. So down here in the trial level we kind of fool around a little bit to get to what we think is appropriate."

The trial court also noted that it considered factors in aggravation and mitigation, the attorneys' arguments, and the presentence investigation report. The court indicated that this case was "worth" 22 years in prison "without having to fool around with these numbers that I talked about that we fool around with."

¶ 15 Thereafter, defendant filed a motion to reconsider sentence. At the hearing on the motion, defense counsel argued that the trial court should reduce defendant's sentence to the minimum, that, under the correct statute, the sentencing range was 6 to 30 years, and that defendant had

already served more than the minimum sentence. The trial court denied defendant's motion. This appeal followed.

¶ 16 On appeal, defendant argues he should receive a new sentencing hearing because the trial court misapprehended the sentencing range, as it used the Class X sentencing range of 6 to 30 years when it sentenced him. Defendant contends that, pursuant to section 5-5-4(a) of the Unified Code of Corrections (Code) (730 ILCS 5/5-5-4(a) (West 2014)) and *North Carolina v. Pearce*, 395 U.S. 711, 723-25 (1969), the trial court was statutorily and constitutionally prohibited from imposing a greater sentence than his original 22-year sentence, as there was no evidence of new misconduct since his original sentencing hearing. Therefore, defendant argues that the correct sentencing range was 6 to 22 years. Defendant asserts that even though his new 22-year sentence is within the correct range of 6 to 22 years, resentencing is required because the trial court imposed a sentence using an incorrect sentencing range. Defendant acknowledges that he did not object to the sentencing range at the resentencing hearing or in his motion to reconsider the sentence. However, defendant argues that we should review this issue under the second prong of the plain error doctrine, or, in the alternative, that his counsel provided ineffective assistance because she agreed that the correct sentencing range was 6 to 30 years and did not argue that this range did not apply to defendant's sentences. Defendant requests that we vacate his sentence and remand for resentencing.

¶ 17 To preserve a sentencing claim for review, a defendant must both object at the sentencing hearing and include the issue in a written postsentencing motion. *People v. Bannister*, 232 Ill. 2d 52, 76 (2008). Pursuant to the plain-error doctrine, the reviewing court may review a forfeited issue affecting substantial rights if one of two circumstances is met: "(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). A trial court's misunderstanding of the sentencing range falls within the second prong of the plain error doctrine. *People v. Hausman*, 287 Ill. App. 3d 1069, 1072 (1997). However, before we apply the plain-error doctrine, we must first determine whether the trial court committed error. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 18 "A defendant is entitled to be sentenced by a trial judge who knows the minimum and maximum sentences for the offense." *Hausman*, 287 Ill. App. 3d 1069 at 1071-72. When a trial court imposes a sentence using an incorrect sentencing range, we must vacate the sentence, even if that sentence falls within the correct sentencing range. *People v. Owens*, 377 Ill. App. 3d 302, 305-06 (2007). However, "[a] misstatement of the understanding of the minimum sentence by the trial judge necessitates a new sentencing hearing only when it appears that the mistaken belief of the judge arguably influenced the sentencing decision." *People v. Eddington*, 77 Ill. 2d 41, 48 (1979).

¶ 19 Due process of law requires that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *Pearce*, 395 U.S. at 725. In *Pearce*, the United States Supreme Court held that to ensure there is no "retaliatory motivation" from the sentencing judge after a defendant has exercised his right to appeal or collaterally attack the first conviction, "whenever a judge

imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear" and "must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Pearce*, 395 U.S. at 725-26. However, in *Alabama v. Smith*, 490 U.S. 794, 799 (1989), the United States Supreme Court held that *Pearce* is "limited" to circumstances "in which there is a 'reasonable likelihood,' [citation] that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority," and, "[w]here there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness." *Smith*, 490 U.S. at 799. The "Resentences" statute in Illinois, states, in pertinent part, as follows:

> "(a) Where a conviction or sentence has been set aside on direct review or on collateral attack, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence less the portion of the prior sentence previously satisfied unless the more severe sentence is based upon conduct on the part of the defendant occurring after the original sentencing." 730 ILCS 5/5-5-4(a) (West 2014).

"[T]he purpose of section 5-5-4 of the Code is to ensure the due process rights set forth in *Pearce* by preventing vindictiveness in resentencing a defendant for having exercised his appeal rights or his right to file a post-judgment motion." *People v. Woolsey*, 278 Ill. App. 3d 708, 710 (1996). We review *de novo* whether a sentence is constitutional, as it is a question of law. *People v. Taylor*, 2015 IL 117267 ¶ 11.

¶ 20 We conclude that the trial court did not err when, at resentencing, it imposed the 22-year sentences using the sentencing range of 6 to 30 years. The offense of aggravated vehicular

hijacking with a firearm is a Class X felony, which carries a sentencing range of 6 to 30 years in prison. 720 ILCS 5/18-4(a)-(b) (West 2006); 730 ILCS 5/5-4.5-25(a) (West 2006). Defendant contends that, on remand, the sentencing range for his offenses was actually 6 to 22 years because, pursuant to section 5-5-4(a) and *Pearce*, the trial court could not impose sentences that were greater than his original 22-year sentences, unless there was evidence of new misconduct. However, defendant has not cited any authority to support the proposition that, when section 5-5-4(a) or the principles in *Pearce* apply at resentencing such that the trial court cannot impose a greater sentence than the original sentence absent evidence of new misconduct, then the sentencing *range* for the particular offense changes. Therefore, we disagree with defendant's contention that the sentencing range at resentencing was 6 to 22 years. See *People v. Taylor*, 2015 IL 117267 ¶¶ 6, 18, 23, 33 34 (where the defendant's 24-year sentence for armed robbery, a Class X felony with a sentencing range of 6 to 30 years and subject to a 15-year sentencing enhancement, violated the proportionate penalties clause, the court remanded for resentencing, noting that the statutory sentencing range was 6 to 30 years and indicating that the trial court should "affirmatively state its legitimate reasons for granting a more severe sentence if it finds such increase to be necessary").

¶ 21 Furthermore, in our ruling in defendant's prior appeal, where we found that defendant's original sentences violated the proportionate penalties clause, we vacated his original sentences and remanded for resentencing in order "to allow the trial court to determine defendant's sentence for each offense while taking into account the totality of his sentence." *Begay*, 2015 IL App (1st) 130118-U ¶ 7. Because we vacated defendant's original sentences as unconstitutional, the sentencing requirements in section 5-5-4(a) and *Pearce* did not apply to defendant's new

sentences at resentencing. *People v. Barnes*, 364 Ill. App. 3d 888, 898 (2006) ("our supreme court has held that only valid sentences may serve as the baseline for assessment of compliance with prohibitions against increase"); *People v. Woolsey*, 278 Ill. App. 3d 708, 710 (1996) ("In the instant case, there is no evidence in the record of vindictiveness on the State's part. The defendant was resentenced because his original sentence was illegal, not because he appealed or filed a post-judgment motion. Accordingly, *Pearce* and section 5-5-4 of the Code are not implicated in the present case.***[S]ection 5-5-4 of the Code only applies to an original sentence within statutory limits imposed upon an erroneously obtained conviction or to an original sentence within statutory limits later held to have been obtained or aggravated in error. [Citation.] Accordingly, section 5-5-4 of the Code does not apply to the correction of an illegal sentence.").

¶ 22 Even if section 5-5-4(a) and *Pearce* did apply to defendant's sentences at resentencing such that the trial court could not impose a sentence more than 22 years, they were not violated because the trial court's 22-year sentences imposed at resentencing did not exceed defendant's original 22-year sentences. Moreover, at resentencing, the trial court expressly indicated that it considered the attorneys' arguments, the PSI, and the factors in aggravation and mitigation and it stated that the case was "worth" 22 years in prison "without having to fool around with these numbers that I talked about that we fool around with." Given the trial court's consideration of the PSI, attorneys' arguments, and factors in aggravation and mitigation, and that we remanded "to allow the trial court to determine defendant's sentence for each offense while taking into account the totality of his sentence," there is nothing in the record to suggest that the trial court imposed the new sentences with vindictiveness against defendant. Finally, given the trial court's

consideration of the PSI, attorneys' arguments, and factors in aggravation and mitigation, even if we were to assume that the trial court was prohibited from imposing a sentence more than 22 years, the record does not support that, when the trial court fashioned its sentences at resentencing, it was influenced by, or relied on its identification of, a sentencing range of 6 to 30 years. *People v. Chears*, 389 Ill. App. 3d 1016, 1026 (2009) ("There is nothing in the record to suggest Judge Sacks was in any way influenced by the incorrectly identified sentencing range. Nor has the defendant made a showing that Judge Sacks relied on the incorrectly identified sentencing range in imposing a sentence of 30 years. In fact, Judge Sacks made clear the sentencing range did not influence the sentence he actually imposed.").

¶ 23 In sum, we find that the trial court did not err when it used the Class X sentencing range of 6 to 30 years at resentencing for defendant's offenses of aggravated vehicular hijacking with a firearm. There being no error, the plain error doctrine does not apply and defendant's claim remains forfeited. Given this disposition, defendant's argument that his counsel was ineffective when she agreed at resentencing that the sentencing ranges for each of his offenses was 6 to 30 years also fails.

¶ 24 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 25 Affirmed.