2017 IL App (1st) 152893-U

No. 1-15-2893

Order filed December 18, 2017

First Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 8859
	)	
CHARLES VIRGIL,	)	Honorable
	)	James Michael Obbish,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Simon and Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction and six-year sentence for residential burglary affirmed over his challenge that the trial court considered an improper factor at sentencing.

¶ 2 Following a joint bench trial, defendant Charles Virgil and codefendant Tory McCray[1] were convicted of residential burglary and sentenced to six years' imprisonment. On appeal, defendant does not challenge the guilty finding, but contends that the trial court relied on an

[1] Codefendant McCray's appeal is pending before this court in case number 1-15-2892. He is not a party to this appeal.

improper sentencing factor by basing his sentence on its personal opinion about the emotional distress caused by residential burglary when there was no evidence in the record that the complainants were emotionally or mentally affected by the crime. We affirm.

¶ 3 At trial, Margo Street-Robinson testified that she lives with her son and daughter-in-law, Brian and Robyn Street, at 10505 South Wallace Street in Chicago. Their three-bedroom home is the second house from the corner on the east side of the street. There are two air conditioners mounted in the windows on the first floor. The home has an alarm system with outside wiring in the back of the house, and an indoor control box about five feet from the back door.

¶ 4 About 1 p.m. on May 7, 2014, Margo left her home. No one else was home. Everything in the house was in order, and the air conditioners were in place. On her way home, she received a call that her house had been burglarized. When she arrived home about 3 p.m., the police were there. The outside alarm wires had been disconnected. Inside, the alarm control box had been pulled from the wall. The air conditioner was on the floor in the living room. Upstairs, the dresser drawers were open in all three bedrooms, and the rooms were in disarray. In Margo's room, a metal box containing cancelled checks was removed from the back of her closet and placed on her bed, and a small jewelry box that she kept in a drawer was on her bed. She later discovered that her two diamond rings were missing. Margo did not know defendants and did not give them, or anyone else, permission to enter her home or take anything while she was away.

¶ 5 Robyn Street left home for work about 6 a.m. on May 7. That afternoon, she was notified that her house had been burglarized and returned home about 4 p.m. In her room, her clothes were removed from her drawers. All of the drawers from her jewelry box that sat on top of her dresser were removed and dumped on her bed. Multiple pieces of jewelry were missing

including her watches, bracelets, earrings, and rings. Four $50 bills she kept in her jewelry box were also missing. Her money and jewelry was later returned to her by police. No televisions, computers, or electronic items were taken. Robyn did not know defendants and did not give them, or anyone else, permission to enter her home and take her property. Across the street from their house is Fernwood Park.

¶ 6 Cordell Martin lived at 10459 South Wallace Street, on the corner of Wallace and 105th Streets. About 2 or 2:30 p.m. on May 7, Martin was outside watering his side lawn that abutted 105th Street. He noticed the defendants walking through Fernwood Park, directly across Wallace Street from his house. Defendant was wearing a red and black hoodie with dreads or braids in his hair. Codefendant McCray wore a dark blue or black jacket with a hood and a fisherman's hat. The defendants stood in front of the corner house at 10501 South Wallace, across 105th Street from Martin's house, for about five minutes. They then walked south on Wallace to 106th Street, turned the corner, and walked towards Parnell Avenue. Martin lost sight of them. About five minutes later, the defendants returned, walking west on 105th Street coming from Parnell towards Wallace. They again stood in front of the corner house across the street. McCray pulled a pair of dark-colored gloves from his pocket. The men then walked into the gangway on the north side of the house at 10505 South Wallace.

¶ 7 Five minutes later, Martin heard a loud crash and called police. He continued watering his lawn and watching the house at 10505 Wallace. When the police arrived, McCray ran from the back of the house and jumped over a wooden fence. He tossed his gloves into the bushes by the corner house at 10501. McCray ran north down the alley and was chased by police. A few minutes later, defendant came from the front area of the house at 10505, walked across the street,

and started walking through Fernwood Park. Martin made a second call to the police to convey that information. Defendant had his hands inside the pocket of his hoodie. The police followed defendant into the park and arrested him on the basketball court. Martin identified both defendants at the scene and in court.

¶ 8 Chicago police officer Michael Wrobel and his partner, Officer Simmons, responded to a call regarding a man with dreads wearing a black and red hoodie inside Fernwood Park. Defendant, who matched the description, was at the edge of the grass by the basketball courts. Defendant swung both of his arms extended out sideways from his body on both sides in an outward and upwards motion. Wrobel saw items fall from defendant's hands but could not tell what they were. Defendant walked to the basketball court, removed his hoodie and threw it to the ground. He then pretended that he was playing basketball by himself without a ball. Several other men were playing basketball at the time. The officers detained defendant. They searched the area where they initially saw him and recovered jewelry that was scattered throughout the grass. They brought defendant to 105th and Wallace where Martin identified him as the man he saw coming from the gangway of the burglarized house. Defendant was then arrested. During a custodial search, Wrobel recovered four $50 bills from defendant. Wrobel also recovered a pair of multi-colored shoes from defendant and a pair of black shoes from McCray. Margo and Robyn identified the recovered jewelry as that which was taken from their home.

¶ 9 Chicago police evidence technician Stephen Balcerzak arrived at the burglarized home at 4:50 p.m. on May 7. He found footwear impressions on the window air conditioner that had been pushed into the living room, which was the point of entry. He took scaled photographs of the impressions and also lifted the impressions with an adhesive plastic.

¶ 10 Forensic scientist Aimee Stevens specializes in footwear identification, which determines whether a footwear impression was made by a particular shoe. In this case, she received two pairs of athletic shoes and four hinge lifters containing footwear impressions. One pair of shoes was size 8½ black Adidas and the other was size 9½ multi-colored Nikes. Stevens made test impressions from the shoes and compared them to the lifted impressions and scaled photographs of footprints taken by police at the crime scene. One of the impressions from the crime scene was consistent with the outsole pattern size and design of the left Adidas shoe, and another impression was consistent with the outsole pattern size and design of the right Nike shoe. In other words, the features on the bottoms of the shoes were of the same design and size as the impressions from the scene. She was unable to identify any individual characteristics of the shoes due to a lack of features that could be utilized for that purpose. Stevens acknowledged that her analysis connects impressions and prints to a shoe, not to a particular person.

¶ 11 Defendant testified that about 3:15 or 3:30 on May 7, he was playing basketball in Fernwood Park when a detective asked him whose hoodie was on the ground. Defendant replied that a man had just walked past and dropped it. The detective remarked that it was a coincidence that defendant had a prior conviction for residential burglary. The police handcuffed defendant, placed him in a vehicle, and drove him to 104th Street. An hour later, they took him to the police station. The police recovered four $50 bills from defendant's pocket. The money had been given to him the previous day by his girlfriend, Yvonne Coleman, so defendant could go shopping for Mother's Day on behalf of his daughter. Defendant denied knowing anything about the jewelry recovered in the park. He denied wearing the hoodie and dropping it on the ground. He also denied breaking into the house and taking any property.

¶ 12 On cross-examination, defendant testified that he had been at his mother's house and left when he got into an argument with his girlfriend. He walked to the park and played basketball with several people for 15 to 20 minutes before the police came. Defendant acknowledged that the multi-colored shoes were his and that he was wearing them when he was arrested. He denied seeing police recover any jewelry. He acknowledged that he had previously seen McCray a couple of times, but denied knowing him or ever being with him.

¶ 13 Tiffany Mathis, defendant's mother, testified that on May 1 she gave defendant's girlfriend four $50 bills so she and her sister would not be evicted. On cross-examination, Mathis acknowledged that she never told the police that she had given her son the money.

¶ 14 The trial court found that all of the State's witnesses "testified in a very credible manner." The court concluded that the evidence against both defendants was overwhelming.

¶ 15 At sentencing, in aggravation, the State pointed out that defendant had prior felony convictions for residential burglary and attempted residential burglary. It argued that defendant had previous chances to change his behavior when he was sentenced to probation as both a juvenile and an adult, but it did not appear to make a difference. The State noted that defendant's employment history consisted of working part-time for four months. It argued that rather than contributing to society and supporting his child, defendant chose to break into people's homes to support his lifestyle. The State requested a sentence greater than the minimum term.

¶ 16 In mitigation, defense counsel acknowledged defendant's two prior convictions and that he could not receive probation in this case. Counsel noted that defendant was 24 years old, had no contact with his father, and was raised by his grandfather and a very young mother who is disabled. Counsel noted that defendant has a four-year-old daughter with his girlfriend, and that

he wanted to return home to raise his child. Counsel stated that although the presentence investigation report (PSI) indicated that defendant had a gang affiliation, he claimed he did not. Counsel argued that defendant had spent more than a year in custody for this case, and came to the realization that it was not the kind of life he wanted to lead. At the time of his arrest, defendant was attending GED classes and now recognizes that he needs to complete that education. Counsel requested that defendant receive the minimum term of four years' imprisonment. In allocution, defendant requested mercy from the court.

¶ 17 The trial court noted that defendant had not completed his GED and that he had once threatened a teacher. The court acknowledged that defendant stated that he wanted to be there to raise his daughter. The court remarked that was a wonderful choice and what defendant is supposed to do, but that he cannot raise her if he is in prison. The court then stated:

> "That's what parents are there for, to try to – supposed to be there for. So that you don't end up having your children standing in front of somebody like me with the ability to separate you from society so that you try to learn a lesson so that you don't continue to pray [*sic*] upon the people that are just – in your case, all they're trying to do is have a home, have a home where when they get there, they can close the door and feel safe because nobody's broken in, nobody's taken their property, nobody's smashing their window and stealing their stuff out of it.
>
> I mean, there's an old saying that I assume you would have heard somewhere along the way that a home is a person's castle, and it's supposed to mean and signify the security that all of us should feel when we're in our house.

I mean, even the law protects police officers and law enforcement officers from going into people's homes with extraordinary diligence. Officers can't go into a house unless they have a warrant or what's called exigent circumstances. I mean, it's just a right that should be guaranteed to all citizens of our community.

A home should be safe, not that you should be in danger every time you walk outside the door, which is unfortunately the case in some neighborhoods. But at least when you're at home you should feel secure.

I can see, you know, you gentlemen here have been raised not by two-parent homes always, but still you've always had adults in your life that I'm sure tried to teach you the right way.

It's disappointing, Mr. Virgil, when I see that you've got a prior sentence, which included the boot camp program at the Illinois Department of Corrections on a residential burglary because those programs are designed to try to really get people like yourselves to start realizing the consequences of your actions, to make you realize some of the things that I'm saying that what you do affects other people.

When you break into somebody's house and they come home and find it, you've destroyed something that they can't immediately put aside. Now, every time they walk back into that house, they always wonder, you know, what am I going to find. When they're away, they're worried. When they're home, they're worried that somebody might break in while they're there. You destroy that person's sense of safety and security within their own home that every one of us, including yourselves and your family members are all entitled to. That's why a residential burglary is treated as a nonprobationable offense."

¶ 18 The trial court noted defendant's prior convictions for residential burglary and attempted residential burglary. Defendant also has a juvenile delinquency finding for an aggravated battery, which the court found was an indication of an inability to control his behavior. The court stated that it considered the matters in both aggravation and mitigation, and sentenced defendant to a term of six years' imprisonment. Defendant immediately filed a written motion to reconsider the sentence which the court denied.

¶ 19 On appeal, defendant contends that the trial court relied on an improper sentencing factor by basing his sentence on its personal opinion about the emotional distress caused by residential burglary when there was no evidence in the record that the complainants were emotionally or mentally affected by the crime. Defendant notes that neither Margo nor Robyn testified that their mental health suffered from the incident, or that they were fearful or anxious. Nor did they provide victim impact statements. Defendant claims the court's remarks reflect its own personal distaste for the offense. In addition, defendant acknowledges that the court's comment that residential burglary is nonprobationable is correct, but argues that fact is not a permissible rationale for imposing a higher sentence. Defendant asks this court to reduce his sentence or remand his case for resentencing.

¶ 20 Procedurally, defendant acknowledges that he has completed serving his term of imprisonment, but argues that his issue is not moot because he is currently serving his term of mandatory supervised release (MSR), and thus, has not completed his sentence. Defendant also acknowledges that he did not preserve the issue for appeal because he did not object to the court's statements during the sentencing hearing and did not raise the issue in his post-sentencing

motion. He argues, however, that this court may review his claim under both prongs of the plain error doctrine.

¶ 21 The State responds that the issue is moot because this court cannot grant defendant any effectual relief where there is no prison term remaining to modify, and his MSR term cannot be shortened. The State also argues that defendant forfeited the issue and that the plain error doctrine does not apply where no error occurred. The State asserts that defendant has taken the court's comments out of context, and when read in context, the record shows that the remarks are in response to defendant's expressed desire to return home to raise his daughter. The State argues that the court was attempting to impress upon defendant that his actions affect others, and its remarks were merely commentary, not a factor considered when determining the sentence.

¶ 22 As a threshold matter, we find that defendant's issue is not moot. An issue is moot where it is impossible for the reviewing court to grant any effectual relief. *People v. Jackson*, 199 Ill. 2d 286, 294 (2002). This court has held that although a defendant has completed his term of imprisonment, a challenge to the length of his prison term is not moot when it is brought before he has completed his term of MSR because the MSR term is considered part of his sentence. *People v. Hall*, 2014 IL App (1st) 122868, ¶ 6. In this case, whether defendant's sentence was six years or some lesser term would affect how long he could be reincarcerated if he violated the conditions of his release. See 730 ILCS 5/3-3-9(a)(3)(i)(B) (West 2014); *Jackson*, 199 Ill. 2d at 294. Accordingly, the issue is not moot.

¶ 23 The parties agree that defendant failed to properly preserve his sentencing challenge for appeal because he did not object to the court's comments during the sentencing hearing and did not raise the issue in his post-sentencing motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010).

Consequently, the issue is forfeited. *Id.* at 544-45. Defendant argues, however, that his claim may be reviewed under both prongs of the plain error doctrine.

¶ 24 The plain error doctrine is a limited and narrow exception to the forfeiture rule which can only be invoked after defendant first demonstrates that a clear or obvious error occurred. *Id*. at 545. Thereafter, defendant must show that the evidence at the sentencing hearing was closely balanced, or that the error was so egregious that he was denied a fair sentencing hearing. *Id*. The burden of persuasion is on defendant, and if he fails to meet that burden, his procedural default will be honored. *Id*.

¶ 25 Residential burglary is a Class 1 felony with a sentencing range of 4 to 15 years' imprisonment. 720 ILCS 5/19-3(b) (West 2014); 730 ILCS 5/5-4.5-30 (West 2014). The trial court has broad discretion in imposing an appropriate sentence, and where, as here, that sentence falls within the statutory range, it will not be disturbed on review absent an abuse of discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). An abuse of discretion exists where a sentence is at great variance with the spirit and purpose of the law, or is manifestly disproportionate to the nature of the offense. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010).

¶ 26 The Illinois Constitution mandates that criminal penalties be determined according to the seriousness of the offense, and with the objective of restoring the offender to useful citizenship. Ill. Const.1970, art. I, § 11; *People v. Ligon*, 2016 IL 118023, ¶ 10. In light of these objectives, "[t]he trial court is charged with fashioning a sentence based upon the particular circumstances of the individual case, including the nature of the offense and the character of the defendant." *People v. Fern*, 189 Ill. 2d 48, 55 (1999). The court's sentencing decision is entitled to great deference because, having observed the defendant and the proceedings, it had the opportunity to

weigh defendant's demeanor, credibility, general moral character, mentality, habits, social environment and age. *Alexander*, 239 Ill. 2d at 213. "The sentencing judge is to consider 'all matters reflecting upon the defendant's personality, propensities, purposes, tendencies, and indeed every aspect of his life relevant to the sentencing proceeding.' " *Fern*, 189 Ill. 2d at 55, quoting *People v Barrow*, 133 Ill. 2d 226, 281 (1989).

¶ 27 Where the trial court relies on an improper sentencing factor or makes comments which indicate that it did not consider the statutory factors, a defendant may be entitled to a new sentencing hearing. *People v. Walker*, 2012 IL App (1st) 083655, ¶ 30. However, even if the court considered an improper factor, remand for resentencing is required only if the consideration resulted in a greater sentence. *Id.* When reviewing the trial court's comments at sentencing, this court will not focus on isolated statements, but instead, will consider the record as a whole. *Id.* Personal comments or observations by the court, though ill-advised, are generally inconsequential where the record shows that it otherwise considered proper sentencing factors. *Id.* ¶ 33.

¶ 28 Here, we find no error by the trial court in sentencing defendant to a term of six years' imprisonment, which falls within the statutory range and is only two years above the minimum term. *Jones*, 168 Ill. 2d at 373-74. The record shows that in imposing that sentence, the court expressly stated that it considered the matters in aggravation and mitigation. The court noted that defendant had a prior felony conviction for residential burglary, the same offense in this case, and attempted residential burglary. The court also noted that defendant had been found delinquent for aggravated battery, which was an indication of his inability to control his behavior.

¶ 29 Defendant's argument that the trial court based his sentence on its personal opinion about the emotional distress caused by residential burglary, and its personal distaste for the offense, is unpersuasive. In presenting the challenged comments in his brief, defendant has omitted multiple sentences and paragraphs. In doing so, he has changed the tone of the court's comments. When read in their full context, as presented above, the remarks show that the court was directly responding to defendant's expressed desire to return home to raise his daughter. *Walker*, 2012 IL App (1st) 083655. ¶ 30. The court commented that parents are supposed to be there for their children so that they do not end up in the criminal justice system.

¶ 30 The record reveals that the remainder of the challenged comments was the court's attempt to educate defendant about the consequences of his actions in an effort to help him realize how his criminal behavior affects other people. This is evident in one of the paragraphs defendant omitted wherein the court stated:

> "It's disappointing, Mr. Virgil, when I see that you've got a prior sentence, which included the boot camp program at the Illinois Department of Corrections on a residential burglary because those programs are designed to try to really get people like yourselves to start realizing the consequences of your actions, to make you realize some of the things that I'm saying that what you do affects other people."

¶ 31 In addition, there is no indication in the record that the court imposed a higher sentence based on the fact that residential burglary is a nonprobationable offense. The record shows that after the court explained how the offense affects people, it stated "[t]hat's why a residential burglary is treated as a nonprobationable offense." The court was merely explaining to defendant

why probation is not a sentencing option for the offense. The court did not use that fact as a consideration in determining the length of defendant's sentence.

¶ 32 The record therefore shows that the trial court did not base defendant's sentence on its personal opinion, or any other improper factor. Instead, the court properly based defendant's sentence on its consideration of the seriousness of the offense, the factors in aggravation and mitigation, defendant's criminal history which included the same offense, the information contained in the PSI, and the arguments presented at the sentencing hearing. *Id.* ¶ 33. The court then determined that a six-year sentence was appropriate in this case.

¶ 33 This court will not reweigh the sentencing factors or substitute our judgment for that of the trial court. *Alexander*, 239 Ill. 2d at 213. Based on the record before us, we cannot say that the sentence imposed by the court is excessive, manifestly disproportionate to the nature of the offense, or that it departs significantly from the intent and purpose of the law. *Fern*, 189 Ill. 2d at 56. Since no error occurred, we conclude that the plain error doctrine does not apply and we honor defendant's forfeiture of the issue. *Hillier*, 237 Ill. 2d at 545-46.

¶ 34 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 35 Affirmed.