2013 IL App (2d) 111242-U
No. 2-11-1242
Order filed June 19, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 11-CF-986
JUSTIN L. GREENENWALD,	)	Honorable Christopher R. Stride,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Because the record did not show that the trial court gave any significant weight to an inherent factor in aggravation at sentencing, defendant did not meet his burden to show that the trial court committed second-prong plain error (structural error), as opposed to merely reversible error.

¶ 2 Defendant, Justin L. Greenenwald, appeals from his sentence of nine years' imprisonment, imposed upon his conviction of aggravated robbery (720 ILCS 5/18-5(a) (West 2010)). He asserts that the court's improper consideration of a factor inherent in the offense was second-prong plain error. That is, he asks us to hold that the improper consideration was "a clear or obvious error ***

[that was] is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process" (*People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)). The State agrees that the court erred, but disputes the applicability of the plain error-doctrine. We hold that defendant has not met his burden of persuasion to show the existence of plain error, and we thus affirm his sentence.

¶ 3 I. BACKGROUND

¶ 4 A jury convicted defendant of one count of aggravated robbery. The aggravating circumstance was that defendant was brandishing a BB pistol that looked like a firearm. By brandishing the BB pistol, defendant caused a cashier at a Fox Lake gas station to give him approximately $600 from the till.

¶ 5 At sentencing, the State presented evidence that defendant had participated in another robbery a week before he committed the Fox Lake robbery. In mitigation, defendant's mother testified that he had long suffered from a drug addiction that had made him a different person, but that he had, before his arrest, scheduled an appointment to be seen at a rehabilitation center. She said that she needed defendant's assistance and that his two children needed him to be a father.

¶ 6 The State argued that the court should sentence defendant to 12 years' imprisonment. It noted that his criminal history was extensive: a 2003 retail theft, a 2003 burglary charge pled down to a Class A theft, a 2006 burglary charge pled down to a Class 3 theft, a 2008 misdemeanor retail theft, a Kentucky charge of violation of an order of protection, and a Kentucky felony warrant for delivery of a controlled substance. Defendant had no significant employment history and a long history of drug abuse. The State further argued that, because the BB pistol looked very much like a firearm, its use made the robbery almost as dangerous as an armed robbery with a firearm.

¶ 7 Defendant argued that his heroin addiction had always driven his criminality. He had never had long-term treatment or rehabilitation. He asked for some form of intensive probation.

¶ 8 Defendant, in his statement in allocution, said that his arrest had saved him—that, after he went through heroin withdrawal in jail, he was sober for the first time in five years. His primary goal was to find a way to end his addiction. He told the court that he hoped that his imprisonment could be near his family.

¶ 9 The court suggested that the Kentucky felony warrant might disqualify defendant from impact incarceration. It then reviewed each of the statutory factors in aggravation.

¶ 10 It found that defendant did not intend the robbery to threaten serious harm to another, but that, because of the use of what looked like a firearm, the threat of harm existed nonetheless. Defendant did not act under strong provocation. No grounds existed tending to establish a defense. The robbery was not induced or facilitated by another. Defendant would most likely be unable to make restitution. Defendant had a history of recent criminal activity. The conduct was the result of circumstances that were likely to recur.

¶ 11 In addressing section 5-5-3.2(a)(2) of the Unified Code of Corrections (Code) (730 ILCS 5/5-5-3.2(a)(2) (West 2010)) (concerning compensation), the court stated, "He received compensation for committing the offense. There is about $600." That is, the court treated the proceeds of the robbery as the "compensation" of defendant.

¶ 12 Considering the statutory factors in mitigation, the court found that imprisonment would not cause excessive hardship to defendant's dependents. It said that, although defendant did have two children, they had not motivated him to become law-abiding. It found that the mitigating condition

that imprisonment would be medically injurious did not apply. It ruled that defendant was not likely to comply with a period of probation.

¶ 13 On the other hand, the court found defendant's expression of his desire to turn his life around unusually persuasive. It therefore found that the mitigating factor "that the defendant is unlikely to commit another crime" to be a "mixed bag." It said that the strength of his statement in allocution had lessened the sentence that it intended to impose.

¶ 14 The court said that it was taking into consideration the other robbery of which the State presented evidence. It also considered the fact that defendant was on misdemeanor probation when he committed this crime.

¶ 15 The court sentenced defendant to nine years' imprisonment with two years of mandatory supervised release. Defendant filed a motion to reconsider the sentence in which he asserted solely that the court gave inadequate weight to defendant's rehabilitative potential. The court denied the motion, and defendant timely appealed.

¶ 16 II. ANALYSIS

¶ 17 On appeal, defendant asserts that the court erred when it ruled that an applicable factor in aggravation was that defendant "received compensation." The parties agree that any weight given to a factor in aggravation inherent in the offense produces an impermissible double enhancement. See, *e.g.*, *People v. Gonzalez*, 151 Ill. 2d 79, 83-84 (1992) ("There is a general prohibition against the use of a single factor both as an element of a defendant's crime *and* as an aggravating factor justifying the imposition of a harsher sentence than might otherwise have been imposed" (emphasis in original)). They further agree that "compensation" was inherent in aggravated robbery.

¶ 18 Defendant admits that he did not contemporaneously object to the trial court's discussion of the improper aggravating factor or at least raise the issue in his postsentencing motion. He therefore properly concedes that, under standard principles of appellate review, he forfeited this argument on appeal. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) (to preserve a claim of sentencing error, a defendant must object at the sentencing hearing and object in a postsentencing motion). However, he argues that his claim is susceptible to review under the plain-error doctrine. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *Hillier*, 237 Ill. 2d at 545. In particular, he asserts that this was second-prong plain error as described above. On this matter, the State does not agree, asserting that, to show plain error, defendant had the burden to show that the court's consideration of the improper factor lengthened his sentence. We agree with the State.

¶ 19 To obtain relief under the plain-error rule, a defendant must show that error occurred (*Hillier*, 237 Ill. 2d at 545), and further show that that error is reversible error (*People v. Naylor*, 229 Ill. 2d 584, 602 (2008)). If no reversible error occurred, the reviewing court's analysis need go no further, as, when no reversible error exists, *a fortiori*, no plain error can exist. See *Naylor*, 229 Ill. 2d at 602 (there can be no plain error without reversible error).

¶ 20 If reversible error occurred, a defendant asserting plain error still has the burden to show that the error complained of meets one prong of the plain-error rule:

> "[T]he plain-error doctrine 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." *Piatkowski*, 225 Ill. 2d at 565.

"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." *Hillier*, 237 Ill. 2d at 545. In plain error-review, the burden of persuasion remains on the defendant; this is in contrast to review of preserved error, in which, once the defendant has shown error, the burden shifts to the State to show that the error was harmless. *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009).

¶ 21 Defendant asserts that the circumstances here satisfy the second prong of the test. Defendant has not met this last burden of persuasion. Certainly error did occur, in the form of the court's consideration of an aggravating factor implicit in the offense. Further, this consideration may have constituted reversible error, although defendant's ability to satisfy that standard is not obvious. Regardless whether the record shows reversible error, defendant has failed to explain how the error serious enough to be plain error.

¶ 22 As we said, the existence of reversible error is not obvious. "[E]very reference by the sentencing court to a factor implicit in the offense does not constitute reversible error." *People v. Burge*, 254 Ill. App. 3d 85, 91 (1993). In a preserved-error analysis, a "sentence based on improper factors [should] not be affirmed unless the reviewing court can determine from the record that the weight placed on the improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence." *People v. Heider*, 231 Ill. 2d 1, 21-22 (2008); see also *People v. Bourke*, 96 Ill. 2d 327, 332 (1983) (stating the same standard). In considering whether reversible error occurred, a reviewing court should not focus on a few words or statements of the trial court, but

should make its decision based on the record as a whole. *People v. Curtis*, 354 Ill. App. 3d 312, 326 (2004). Here, the record arguably shows that the court gave no significant weight to the improper factor.

¶ 23 Considering the record as a whole, it is apparent that the court gave, at most, slight weight to defendant's receipt of compensation. The reference to compensation was essentially one in passing. As the court went through the statutory factors one by one, it stated, "He received compensation for committing the offense. There is about $600." It otherwise did not refer to compensation. The court properly commented on the other statutory factors in aggravation and mitigation, and the overall impression is one of a slight mental slip that took place as the court focused upon defendant's history, the dangers of the use of a BB pistol, and, on the other hand, defendant's desire to change.

¶ 24 Further, in another indication that the court did not place much if any weight on compensation as an aggravating factor, defendant's receipt of compensation was not a factor argued by State. In *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶¶ 11, 12 and *People v. Dowding*, 388 Ill. App. 3d 936, 944 (2009), in contrast to what occurred here, we concluded that, because the court, in giving its reasons for the sentence, "mirrored" the improper factors that the State argued, the court in fact relied on the improper factors.

¶ 25 Even if we assume that the record shows reversible error, defendant has failed to meet the burden of persuasion of showing that such error was plain error. The supreme court has equated second-prong plain error with structural error. *People v. Thompson*, 238 Ill. 2d 598, 613-14 (2010) (citing *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009), with approval and describing it as making this equation). "Structural error" is "systemic error which serves to 'erode the integrity of the

judicial process and undermine the fairness of the defendant's trial.' " *Glasper*, 234 Ill. 2d at 197-98 (quoting *People v. Herron*, 215 Ill. 2d 167, 186 (2005)). Defendant has failed to show that the error here is in that category. He implies that the applicable plain-error standard is indistinguishable from the applicable preserved-error reversible error standard; indeed, in oral argument, he made clear that he wanted us to apply the standard of *Heider*, and to require reversal when we cannot determine from the record the weight the court gave the improper factor. However, as noted, showing plain error is an additional burden, and without showing that the court gave actual, significant weight, defendant cannot meet that burden.

¶ 26 Defendant cites two cases in primary support of his claim that the error here rose to the level of plain error: *People v. Myrieckes*, 315 Ill. App. 3d 478 (2000), and *People v. Bahena*, 296 Ill. App. 3d 67 (1998). Neither case aids defendant. The circumstances in *Bahena* (which concerned a sentence that the court could not properly impose) are so different as to make the case inapposite. The analysis in *Myrieckes* is so unclear as to be incapable of being extended to other facts.

¶ 27 In *Bahena*, we can be certain that the improper dual enhancement increased the sentence. This is because the improper enhancement was the only basis upon which the court could have justified the imposition of the defendant's extended-term sentence. *Bahena*, 296 Ill. App. 3d at 69. Therefore, the unfair effect was clear. Moreover, although the *Bahena* court did not note it, the sentence at issue was void. See *People v. Arna*, 168 Ill. 2d 107, 112-13 (1995) (a sentence that does not conform to statutory requirements is void). Thus, the more naturally applicable forfeiture exception would have been that which applies to void sentences. See *People v. Roberson*, 212 Ill. 2d 430, 440 (2004) (a defendant may challenge a void sentence at any time).

¶ 28 In *Myrieckes*, the trial court, as in *Bahena*, mistakenly concluded that the defendant was extended-term eligible. *Myrieckes*, 315 Ill. App. 3d at 483. However, unlike in *Bahena*, the sentence it imposed was within the nonextended-term range. Nevertheless, the reviewing court concluded that plain error had occurred, stating, "based upon our review of the record in this case, we find that a substantial right of defendant has been affected." *Myrieckes*, 315 Ill. App. 3d at 483. In support of this, it cited only *People v. Lindsay*, 247 Ill. App. 3d 518, 527 (1993), a case in which, as in *Bahena*, the court imposed an unauthorized extended-term sentence. Because the *Myrieckes* court's reasoning is opaque, we cannot apply it to other facts. That said, a court's belief that a sentencing range goes much higher than it does is a mistake that is quite likely to place strong upward pressure on a sentence. Thus, *Myrieckes* has distinguishable facts as well.

¶ 29 Defendant has also pointed to *People v. Martin*, 119 Ill. 2d 453 (1988), a case in which the supreme court held that the trial court's improper consideration of an inherent factor was plain error. The analysis in *Martin* is inapplicable here; there, the supreme court noted that the "plain error doctrine may be used in reviewing a sentence if the evidence is closely balanced" and held that the "evidence presented at the sentencing hearing was not simply closely balanced, it strongly favored leniency for the defendant." *Martin*, 119 Ill. 2d at 458. In other words, *Martin* is a first-prong plain-error case, and the analysis is not applicable to the burden of showing second-prong plain error.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm defendant's sentence.

¶ 32 Affirmed.