2019 IL App (2d) 170518-U
No. 2-17-0518
Order filed September 17, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. PEDRO GILES, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 02-CF-2749 Honorable Linda S. Abrahamson, Judge, Presiding.

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

ORDER

¶ 1 *Held*: As compensation was implicit in defendant's drug offenses, the trial court erred in considering it in aggravation; as we could not deem the error harmless, we remanded for resentencing.

¶ 2 Defendant, Pedro Giles, appeals from the judgment of the circuit court of Kane County sentencing him to concurrent 14-year prison terms on his convictions of unlawful delivery of a controlled substance (720 ILCS 570/401(a)(2)(A) (West 2002)) and unlawful possession of a controlled substance with intent to deliver (*id.* § 401(a)(2)(C)). He argues that the trial court improperly considered certain factors in aggravation and, alternatively, that the trial court abused

its discretion in imposing a 14-year sentence in light of the mitigating factors. For the reasons that follow, we vacate defendant's sentence and remand for resentencing.

¶ 3 I. BACKGROUND

¶ 4 On January 24, 2017, following a jury trial, defendant was found guilty of unlawful delivery of 15 or more grams but less than 100 grams of a substance containing cocaine (*id.* § 401(a)(2)(A)), unlawful possession with intent to deliver 400 or more grams but less than 900 grams of a substance containing cocaine (*id.* § 401(a)(2)(C)), and unlawful possession of 400 or more grams but less than 900 grams of a substance containing cocaine (*id.*).

¶ 5 The following relevant evidence was presented at trial. The State presented testimony from three officers—Troy Peacock, Gilberto Gutierrez, and Rick Rodarte—who each participated in the undercover drug investigation that resulted in defendant's arrest. On December 6, 2002, Peacock called Javier Perez and arranged to purchase three ounces of cocaine for $1400. Peacock and Gutierrez, traveling in an undercover vehicle, met with Perez at a laundromat in Aurora. When the officers arrived, Perez showed them a smaller amount of cocaine than they had wanted. Peacock told Perez that he wanted three ounces. Perez made a phone call to Ricardo Lopez-Magalion. Gutierrez spoke with Lopez-Magalion in Spanish and arranged to meet him at a grocery store in Aurora. After advising the surveillance agents of the new location, Peacock and Gutierrez drove to the grocery store while Perez remained at the laundromat.

¶ 6 When the officers arrived at the grocery store, they parked behind Lopez-Magalion's yellow pickup truck, and Gutierrez moved to the back seat. Lopez-Magalion exited his truck and entered the passenger side of the officers' undercover vehicle. Lopez-Magalion told Gutierrez that he needed to call "his guy" to get the additional cocaine. Lopez-Magalion informed them

that it would be $800 per ounce. Peacock showed him the money and Lopez-Magalion made a phone call. Peacock and Gutierrez then observed a gray Jeep Cherokee pull in and park behind their vehicle. Lopez-Magalion exited the undercover vehicle and entered the passenger side of the Jeep. A couple of minutes later, Lopez-Magalion returned with three bags of cocaine. The total weight was later determined to be 86.388 grams. Lopez-Magalion was then arrested. As the Jeep began to pull out of the parking lot, it was stopped by officers. Defendant, the only occupant of the Jeep, was arrested. The officers returned to the laundromat and arrested Perez.

¶ 7 Defendant was interviewed by Gutierrez at the police station. Gutierrez read defendant his *Miranda* rights and defendant voluntarily provided a statement, which was admitted into evidence. In his statement, defendant admitted to delivering three ounces of cocaine to Lopez-Magalion. Defendant would not say from whom he got the cocaine but stated that he would owe $1600 for it. Defendant also provided consent to search his residence. When the officers entered the residence, they found Alfredo Miranda, defendant's cousin. The officers also found two bags of cocaine located inside a small lunchbox inside a suitcase. One bag weighed 496.2 grams and tested positive for cocaine. The other bag weighed 125 grams but was not tested. Fourteen hundred dollars and paperwork linking defendant to the Jeep were located in a dresser. Defendant was again interviewed. Defendant stated that the value of the cocaine found in the residence was $16,000. Defendant also stated that the cocaine did not belong to Miranda.

¶ 8 Illinois State Police Sergeant Jeff File, an expert in drug investigations, delivery, and possession with intent to deliver, testified that, in his opinion, based on the weight of the cocaine, the currency found in defendant's residence, defendant's conduct, and defendant's statement, defendant possessed the cocaine with the intent to deliver.

¶ 9 Other evidence established that defendant was taken into custody on December 7, 2002, and posted bond. After failing to appear, a warrant for his arrest was issued, dated December 20, 2002. Defendant was arrested on November 3, 2014, and brought to Kane County from Texas.

¶ 10 Defendant testified that, although he admitted when interviewed that the cocaine located at his residence belonged to him, it actually belonged to an individual named "Niko." He said that it was his because he did not want Miranda to be blamed and because he was afraid of Niko. Defendant also testified that the $1400 found in his residence did not belong to him. He agreed that he delivered three ounces of cocaine to Lopez-Magalion and that he drove the Jeep. Defendant also agreed that, on December 7, 2002, he was given a court date to appear before the judge. He also agreed that his sister posted a $10,000 bond on his behalf. Defendant agreed that he did not appear in court, that he went to Texas, and that he was ultimately apprehended in October 2014.

¶ 11 Defendant's sentencing hearing took place on April 12, 2017. At the outset, the State noted the sentencing range for each conviction as follows. On the conviction of unlawful delivery of 15 or more grams but less than 100 grams of a substance containing cocaine, the State noted that the sentencing range was not less than 6 years and not more than 30 years. See *id.* § 401(a)(2)(A). On the conviction of unlawful possession with intent to deliver 400 or more grams but less than 900 grams of a substance containing cocaine, the State noted that the sentencing range was not less than 12 years and not more than 50 years (see *id.* § 401(a)(2)(C)) and that it would be served at 50 percent. The State noted that the conviction of unlawful possession of 400 or more grams but less than 900 grams of a substance containing cocaine (*id.*) merged into the conviction of unlawful possession with intent to deliver. The State further noted that the sentences would be served concurrently.

¶ 12 The State made the following argument in aggravation:

> "I then turn the court's attention to the Unified Code of Corrections and the factors in aggravation and factors in mitigation pursuant to 730 ILCS 5/5-5-3.2 and then 3.1 for mitigation. Judge, as outlined in the PSI, you have—I would state the defendant had—was receiving compensation for committing the offense in Paragraph (a)(2). He receiv[ed] or was going to receive compensation as it relates to drugs, the $2,500 as it relates to the sale of three ounces as it relates to Count 1.
>
> You also—as far as further distribution, I think when you look at this in drug sales as a whole, the purpose of committing the offense is that you are going to receive compensation for that particular—for this type of action."

The State also argued that, although defendant's criminal history was slight, defendant had two convictions of driving while his license was suspended, and that the court should find that the sentence must deter others from committing the same crime. The State then stated:

> "Judge, I have argued this in the past as far as (a)(1). Now, necessarily the facts in this particular circumstance, at least with caused or threatened serious harm, but it has the potential when you are dealing in drugs, where you have this voluminous amount of drugs, there is multiple subjects involved from what the evidence and testimony you heard was. There is officers involved. There is a myriad of different things that could go wrong and the potential for serious harm is what the drug trade brings to the community at large, [Y]our Honor.
>
> A lot of violence that you see in Kane County and in the United States circles around or is involved with the drug trade and when you are involved with trafficking, voluminous amounts such as what you have before you, it certainly has the potential

> which then leads me back to a sentence necessary to deter others from committing this type of crime, Your Honor."

The State also argued that the court should consider defendant's flight from Kane County, although it was not a statutory factor in aggravation, and that the court should not consider the fact that defendant had not gotten into trouble during those years. The State asked the court to impose a sentence of 24 years.

¶ 13 In mitigation, defense counsel argued that defendant's conduct did not cause serious harm. Defense counsel argued that the court should also consider in mitigation that defendant did not contemplate that the offense would cause serious harm. Defense counsel further argued that defendant had a minimal criminal history and that he had not committed any offenses in the past 12 years. Defense counsel noted that, instead, during that time, defendant got married, had two daughters, and for the better part of eight years had been working and supporting his family. Defense counsel also argued that, although defendant absconded from justice, that fact did not warrant the 24-year sentence requested by the State, which was double the minimum sentence. Defense counsel also noted that the amount of cocaine possessed—496 grams—was on the low end of the 400-900-gram range. Defense counsel asked that the court impose a 12-year sentence.

¶ 14 In imposing sentence, the trial court stated as follows:

> "All right. In sentencing I have considered the contents of the PSI, the argument of counsel, factors in aggravation and mitigation and I will kind of talk about those generally.
>
> The state argued about in aggravation, No. 1, that the defendant's conduct caused, threatened—caused or threatened serious harm, that he received compensation for committing the offense. Certainly on the delivery charge that was about to happen.

Also argued a prior history of criminal activity based on the driving tickets; as well, that a sentence is necessary to deter others from the same crime.

I think sometimes when there is a mandatory minimum that is large, certain other factors in aggravation are kind of built into that mandatory minimum and I think in this case that the defendant—the conduct caused or threatened serious harm as argued in this case certainly is something that kind of might be subsumed into this mandatory minimum sentence, especially under the circumstances where no guns were found or other indicia of possession with intent other than the magnitude of the amount of cocaine found. But I do think that all the items mentioned by the state are things that I need to consider.

In mitigation I will note that no serious physical harm was caused by this defendant and there was no evidence that this defendant contemplated that his activity would cause serious harm.

I don't think that the two driving tickets are quite serious, so I think that the lack of criminal history is certainly something that I can consider in mitigation.

However, I do note for 12 years this defendant was ignoring conditions of bond by being away from this jurisdiction and stepping forward to be—to continue the prosecution of this case, so that kind of cuts both ways a little bit, the 12 years he was out and apparently law-abiding but 12 years ignoring that the conditions of bond that said he couldn't leave the state and needed to come back to court.

In looking at the PSI, based on some of the statements that he made there, I think the defendant also took some responsibility in the PSI, but being, again, gone from our jurisdiction for 12 years, he was not taking responsibility, so that kind of—one sort of neutralizes the other.

So in considering all relevant factors in aggravation and mitigation and giving them their due weight, I am going to order the fines, costs and fees generally, not the drug fine or the street value. I am just referring to the $400 and the CAC fee and all of those. There was not an argument that any of those were not appropriate, so *** those will all be ordered.

I looked up—our verdict was rendered on January 24, which was a Tuesday, so I believe the trial would have been a two day trial.

Obviously pretrial detention credit would be necessary to apply to those which—to which it's applicable.

I will also order the $52,100 street value and then the sentence will be a term of 14 years and that will be on each. That will be served at 50 percent.

Upon your release from prison, you will have to serve three years of mandatory supervised release. And 12 [*sic*] years on each. Again, those will be concurrent to one another."

¶ 15 Defendant filed a motion for reconsideration of his sentence. At the hearing, defense counsel asked that defendant's sentence be reduced to 12 years based on the fact that defendant had no criminal history. The State argued that the sentence was appropriate. The court denied the motion, stating "I believe at sentencing I did consider all relevant factors in aggravation and mitigation and gave them the proper weight."

¶ 16 Defendant timely appealed.

¶ 17 II. ANALYSIS

¶ 18 Defendant argues that his 14-year sentence should be reduced or vacated because the trial court relied on two factors in aggravation that are implicit in the offense: "compensation" and "societal harm."

¶ 19 Defendant concedes that he forfeited this claim because he failed to raise it in his postsentencing motion. See 730 ILCS 5/5-4.5-50(d) (West 2016) ("A defendant's challenge to the correctness of a sentence or to any aspect of the sentencing hearing shall be made by a written motion filed with the circuit court clerk within 30 days following the imposition of sentence."); *People v. Heider*, 231 Ill. 2d 1, 15 (2008) ("[S]entencing issues must be raised in a postsentencing motion in order to preserve them for appellate review."). Nevertheless, he contends that the issue is reviewable under the plain-error rule.

¶ 20 To obtain relief under the plain-error rule, a defendant must first show "a clear or obvious error." *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). "In the sentencing context, a defendant must then 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." *Id.* Here, defendant argues that the issue is reviewable under the second prong of the plain-error rule, because the court's consideration of improper sentencing factors resulted in an unfair sentencing hearing. See *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 7. (Alternatively, he argues that the issue is reviewable as ineffective assistance of counsel.) The State agrees that a trial court's reliance on improper sentencing factors affects a defendant's fundamental rights and thus may be reviewed under the plain-error doctrine.[1] Nevertheless, the State contends that the court

[1] We note that this court has questioned the viability of this view of plain-error review, noting that second-prong plain error is limited to errors "affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." (Internal quotation

committed no error. See *People v. Camacho*, 2018 IL App (2d) 160350, ¶ 38 (quoting *People v. Cosby*, 231 Ill. 2d 262, 273 (2008)) ("We begin a plain-error analysis by determining if there was reversible error in the first instance, as '[a]bsent reversible error, there can be no plain error.' ").

¶ 21 It is well established that a trial court has wide latitude in sentencing, so long as it neither ignores relevant mitigating factors nor considers improper aggravating factors. *People v. Watt*, 2013 IL App (2d) 120183, ¶ 49. Accordingly, we ordinarily will not disturb a sentence absent an abuse of discretion. *Id.* However, when the issue is whether the court relied on an improper sentencing factor, our review is *de novo*. *People v. Morrow*, 2014 IL App (2d) 130718, ¶ 14.

¶ 22 "It is improper for a trial court to rely upon an aggravating factor which is implicit in the crime charged because the legislature is presumed to have provided for such factors when it established the applicable penalty range." *People v. McCain*, 248 Ill. App. 3d 844, 850 (1993). "[C]ompensation is an implicit factor in most drug transactions; therefore, it is generally improper to consider compensation to be a factor in aggravation." *Id.* at 851. In addition, "if a trial court intends to consider the societal harm defendant's conduct threatened to cause as an aggravating factor, the record must demonstrate that the conduct of the defendant had a greater propensity to cause harm than that which is merely inherent in the offense itself." *Id.* at 852.

¶ 23 The question here is whether the court improperly considered "compensation" and "societal harm" in imposing sentence. We first address defendant's argument regarding "societal harm" and find that the court did not consider it. At the sentencing hearing, the State argued, citing section 5-5-3.2(a)(1) of the Unified Code, that the court should consider in aggravation that drug offenses bring "the potential for serious harm" to the "community at large." See 730

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marks omitted.) *People v. Johnson*, 2017 IL App (2d) 141241, ¶¶ 51, 53 n.1. However, the State does not challenge its applicability here.

ILCS 5/5-5-3.2(a)(1) (West 2016) ("the defendant's conduct caused or threatened serious harm"). In sentencing defendant, at the outset, the court noted the State's arguments and then made clear that the fact that "the conduct caused or threatened serious harm as argued in this case certainly is something that kind of might be subsumed into this mandatory minimum sentence." Moreover, with respect to whether defendant actually caused harm, the court specifically found in mitigation that "no serious physical harm was caused by this defendant and there was no evidence that this defendant contemplated that his activity would cause serious harm." See *id.* § 5-5-3.1(a)(1) ("The defendant's criminal conduct neither caused nor threatened serious physical harm to another."); *id.* § 5-5-3.1(a)(2) ("The defendant did not contemplate that his criminal conduct would cause or threaten serious physical harm to another."). No other reference to harm, societal or otherwise, was made. Thus, there is no indication that the court considered "societal harm" as a factor in aggravation.

¶ 24 We reach the opposite conclusion with respect to defendant's argument that the trial court improperly considered in aggravation the fact that defendant would receive compensation. At the sentencing hearing, citing section 5-5-3.2(a)(2) of the Unified Code, the State argued in aggravation that defendant "receiv[ed] or was going to receive compensation as it relates to drugs, the $2,500 as it relates to the sale of three ounces as it relates to Count 1." See *id.* § 5-5-3.2(a)(2) ("the defendant received compensation for committing the offense"). The trial court, in sentencing defendant, specifically referred to the State's argument concerning compensation and commented: "Certainly on the delivery charge that was about to happen." Although the court later commented on "certain other factors in aggravation" being built into the offense's mandatory minimum, it mentioned only the threat of serious harm; it made no reference to compensation. To the contrary, it stated: "I do think that all the items mentioned by the state are

things that I need to consider." Thus, we cannot conclude, as we did with respect to harm, that the court considered compensation as being factored into the mandatory minimum. In our view, given the State's explicit argument concerning compensation as an aggravating factor, the court's reference to the State's argument and its agreement that compensation was, in fact, about to occur, and the court's comment that it needed to consider all of the items mentioned by the State, it is clear that the court considered compensation in fashioning sentence. See *Abdelhadi*, 2012 IL App (2d) 111053, ¶¶ 11-12 (one indication that the trial court placed weight on a specific aggravating factor is a mirroring by the court of the factors the State argued in aggravation).

¶ 25 We reject the State's argument that, to the extent the trial court considered compensation, it did so only in terms of the nature and circumstances of the offense. See *People v. Saldivar*, 113 Ill. 2d 256, 268-69 (1986). To be sure, we noted in *McCain* that "the *amount* of profit a defendant derives from a criminal enterprise, and the actions taken to maximize that amount, reflect on the nature of the crime." (Emphasis in original.) *McCain*, 248 Ill. App. 3d at 851. Thus, compensation can relate to several "proper sentencing considerations such as the extent and nature of a defendant's involvement in the particular criminal enterprise, a defendant's underlying motivation for committing crime, the likelihood that a defendant will commit similar offenses in the future, and the need to deter others from committing similar crimes." *Id.* Here, however, the court did not discuss the amount of compensation in terms of the nature and circumstances of the offense as the State suggests. Rather, as noted above, the court commented on the fact of compensation in the context in which it was raised by the State—as an aggravating factor under section 5-5-3.2(a)(2) of the Unified Code. Accordingly, we find that defendant has established plain error.

¶ 26 Having found that the trial court improperly considered compensation as an aggravating factor, we next consider whether remand is required. "When a trial court considers an improper factor in aggravation, the case must be remanded unless it appears from the record that the weight placed upon the improper factor was so insignificant that it did not lead to a greater sentence." *People v. Dowding*, 388 Ill. App. 3d 936, 945 (2009).

¶ 27 Here, we cannot determine that the trial court placed insignificant weight on the improper factor. (We note that the State makes no argument on the issue of weight, arguing only that the trial court did not consider the improper factor at all.) Aside from noting that the sentence must deter others, defendant's expectation of compensation was the only factor that the trial court deemed definitively aggravating. Thus, we cannot say that this factor did not affect the sentence, and we remand for a new sentencing hearing.

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we vacate defendant's sentence and remand for resentencing.

¶ 30 Vacated and remanded.