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2012 IL App (3d) 091060-U

Order filed July 2, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 2012

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 13 th Judicial Circuit
)	Bureau County, Illinois.
Plaintiff-Appellee,)	
)	Appeal No. 3-09-1060
v.)	Circuit No. 08-CF-57
)	
)	
MATTHEW R. WRONA,)	The Honorable
)	Cornelius J. Hollerich
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Wright and Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant did not show that the trial court committed plain error by considering that his conduct caused psychological harm to the victim when it sentenced him. The defendant also did not show that defense counsel provided ineffective assistance for failing to object to the trial court's consideration of this factor. Furthermore, pursuant to the supreme court's decision in *People v. Rinehart*, 2012 IL 111719, the defendant's proper term of MSR is three years to natural life.

¶ 2 A jury convicted Matthew Wrona, the defendant, of two counts of predatory criminal sexual assault of a child. 720 ILCS 5/12-14.1(a)(1) (West 2006). The court sentenced the defendant to consecutive terms of imprisonment of nine years, and also imposed a three-year term of mandatory supervised release (MSR). Once he was incarcerated, the Department of Corrections (DOC) modified his MSR from three years to an indeterminate period of three years to natural life. The defendant appeals, contending that: (1) the trial court erred when it sentenced him by improperly considering that his conduct caused psychological harm to the victim because this factor was inherent in the offense; and (2) this court should order the DOC to amend the defendant's sentencing information to reflect the determinate MSR term of three years imposed by the court. We affirm.

¶ 3 FACTS

¶ 4 The State charged the defendant with three counts of predatory criminal sexual assault of a child. 720 ILCS 5/12-14.1(a)(1) (West 2006). It was specifically alleged that in August 2007, the defendant placed his penis in the mouth of A.G., the seven-year-old daughter of his live-in girlfriend, and more generally alleged that between July 3, 2007, and November 30, 2007, the defendant placed his penis in the mouth and on the anus of A.G.

¶ 5 After a trial, a jury found the defendant guilty of the two counts of predatory criminal sexual assault involving the defendant placing his penis into A.G.'s mouth, but not guilty of the remaining count. After this finding, the defendant escaped from the custody of the deputy sheriff, but the police apprehended him a few blocks from the scene of the escape.

¶ 6 On December 17, 2009, the court conducted a sentencing hearing. In preparation for this hearing, the State filed a presentence investigation report (PSI). The PSI revealed, among other

things, that the defendant had a prior conviction for aggravated battery, and that he was the father of an infant son.

¶ 7 At the sentencing hearing, the State emphasized the victim's youth, the defendant's escape attempt, and the defendant's prior criminal conviction. Defense counsel, on the other hand, asserted the defendant's own youth, noting that he was only 23 years old, and argued that he did not present a future risk of harm to society and that a lengthy sentence was not necessary to protect the public or for deterrence. Defense counsel thus contended that the court should impose the statutory minimum sentence of six-years, or a sentence close to the statutory minimum.

¶ 8 In arriving at a sentence, the court stated that it had considered all of the factors in aggravation and mitigation. It discussed some of the aggravating factors, specifically noting the defendant's prior conviction for aggravated battery and also his attempted escape, but stated that it was not giving the escape "huge weight in [the sentencing] decision but [was] considering it." The court also specifically addressed the mitigating factor of whether the defendant's conduct either caused or threatened serious physical harm to another, and found, in aggravation, that "[t]here [was] no question that [the defendant's conduct] caused serious harm." The court also found, in aggravation, that as the victim's mother's live-in boyfriend, the defendant held a position of trust relative to the victim. The court also cited the need for deterrence.

¶ 9 In mitigation, the court found that a term of imprisonment would entail significant hardship on the defendant's dependants. Although it was not sure of the extent of this hardship, the court was "sure it [would] create some hardship." Concerning the mitigating factor of whether the defendant's conduct caused serious physical harm, the court commented that in sexual assault cases, "in a sense the victim [was] being robbed of something that you can never

be paid back[.]" and that "the harm that [was] created [could] never really be fixed." The court concluded that while this harm was perhaps not physical, there was no doubt that the victim sustained harm.

¶ 10 The court "want[ed] to emphasize that [it was] not giving any one of these factors undue emphasis or weight. [It was] considering all of them together with all of the evidence that was presented at the sentencing hearing." It also stated that it had "given this case a lot of thought[.]"

¶ 11 The court further noted that the victim's mother had written a letter urging that the defendant be sentenced to two consecutive 30-year terms—the maximum for these crimes. The State sought consecutive 15-year terms. The court found both of these recommendations to be excessive. It similarly rejected the defendant's suggestion of consecutive six-year terms of imprisonment, finding the minimum sentence under the law was not justified in light of the aggravating and mitigating factors, and "[p]articularly the defendant's prior criminal record." The court then imposed consecutive nine-year terms of imprisonment, to be followed by three years of MSR.

¶ 12 The defendant appeals.

¶ 13 ANALYSIS

¶ 14 Sentence

¶ 15 On appeal, the defendant first contends that the trial court erred when it improperly considered that his conduct caused psychological harm to the victim because this factor was inherent in the offense. The defendant requests that this court review this claim for plain error, or, in the alternative, for ineffective assistance of counsel, because counsel failed to challenge the court's consideration of this factor at the sentencing hearing and to file a posttrial motion raising this issue.

¶ 16 A trial court's sentencing decision is entitled to great deference because it is in a better position than the reviewing court to determine appropriate sentences (*People v. Stacey*, 193 Ill. 2d 203 (2000)) and to balance the need to protect society with the rehabilitative potential of the defendant (*People v. Spencer*, 303 Ill. App. 3d 861 (1999)). The sentencing judge has the opportunity to weigh the defendant's credibility, his demeanor and general character, and his mentality, social environment, habits, and age. *People v. Streit*, 142 Ill. 2d 13 (1991); *People v. Perruquet*, 68 Ill. 2d 149 (1977). Consequently, the trial court's sentencing determination will not be reversed absent an abuse of discretion. *Streit*, 142 Ill. 2d 13. A sentence that falls within the statutory range is not an abuse of discretion unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *Stacey*, 193 Ill. 2d 203. Here, the offense of predatory criminal sexual assault of a child is a Class X felony that is punishable by a term of imprisonment ranging from 6 to 30 years. 720 ILCS 5/12-14.1(b)(1); 730 ILCS 5/5-8-1(a)(3) (West 2006). Defendant's nine-year sentence falls at the lower end of that range.

¶ 17 A trial court is to consider the statutory aggravating and mitigating factors in arriving at a proper sentence for a defendant. 730 ILCS 5/5-5-3.1(b), 3.2(a) (West 2006); see *People v. Lawrence*, 254 Ill. App. 3d 601 (1993). A trial court may consider in aggravation, among other things, that: (1) the defendant's conduct caused serious harm; (2) the defendant's prior criminal history; (3) the sentence is necessary to deter others from committing the same crime; and (4) the defendant held a position of trust or supervision over the victim. 730 ILCS 5/5-5-3.2 (West 2006). In mitigation, a trial court may consider whether the defendant's conduct caused serious physical harm. 730 ILCS 5/5-5-3.1 (West 2006).

¶ 18 Here, what the defendant argues and this court has previously noted is that a trial court's consideration of an improper aggravating factor *is* an abuse of discretion, as doing so affects a defendant's fundamental right to liberty. *People v. McAfee*, 332 Ill. App. 3d 1091 (2002). The defendant has, however, failed to preserve this issue by objecting at trial and filing a posttrial motion to reconsider his sentence, and it is thus forfeited. *People v. Munson*, 206 Ill. 2d 104 (2002); *People v. Enoch*, 122 Ill. 2d 176 (1988). He asks that we consider his unpreserved issue under plain error analysis, or, in the alternative, for ineffective assistance of counsel. In doing so, we are mindful that a trial court's consideration of an improper aggravating factor does not always require a remand; rather, a remand is only necessary when the reviewing court is unable to determine the weight the trial court afforded to the improper factor. *McAfee*, 332 Ill. App. 3d 1091.

¶ 19 We first consider whether the court committed plain error. However, before we may conduct a plain error analysis, we must determine if the court erred by considering the improper aggravating factor of harm to the victim.

¶ 20 In general, when a court fashions a defendant's sentence, it may not consider in aggravation a factor that is inherent in the offense for which the defendant was convicted. *People v. Phelps*, 211 Ill. 2d 1 (2004). However, reviewing courts have sustained a trial court's decision to consider in aggravation the harm to the victim of a sexual assault. Specifically, one court noted that "[t]he degree of harm caused to the victim may be considered as an aggravating factor in determining [a] sentence even in cases where serious bodily harm is arguably implicit in the offense for which the defendant is convicted." *People v. Smith*, 215 Ill. App. 3d 1029, 1038 (1991). The *Smith* court thus affirmed a 40-year term of imprisonment for the offense of

aggravated criminal sexual assault, out of a possible range of 30 to 60 years, in an instance where the victim described the assault as "'vicious and brutal.'" *Smith*, 215 Ill. App. 3d at 1039.

¶ 21 Furthermore, in a case where another defendant was convicted of sexually assaulting a six-year old girl in his care, the reviewing court noted that the trial court found that "the defendant's conduct scarred the victim for life, both physically and psychologically[.]" and that a trial court may properly "consider as a factor in aggravation that defendant's conduct caused or threatened serious harm." *People v. Calva*, 256 Ill. App. 3d 865, 875 (1993). The *Calva* court further noted, however, that because no evidence was presented indicating that the victim suffered psychological harm greater than what was implicit in any sexual assault against a child, that psychological harm could not be considered as a factor in aggravation. *Calva*, 256 Ill. App. 3d 865.

¶ 22 Here, the trial court erred by considering any psychological harm to the victim when it sentenced the defendant. Two reasons underlie this conclusion. First, when the trial court found that the victim suffered psychological harm, it did so while observing that the mitigating factor that the defendant's conduct did not cause or threaten serious physical harm was not present. Thus, the court improperly grouped physical and psychological harm in rejecting this mitigating factor. Second, although the legislature has not precluded a trial court's consideration of psychological harm as a factor in aggravation, the record does not disclose that either party presented evidence of psychological harm to A.G. above what was implicit in the underlying offenses. Consequently, the trial court improperly considered this type of harm to the victim in fashioning the defendant's sentence.

¶ 23 We now consider whether this error rose to plain error so as to affect the defendant's right to liberty and necessitate a remand.

¶ 24 Plain error is a narrow and limited exception to the rule of forfeiture. *People v. Hillier*, 237 Ill. 2d 539 (2010). The plain error doctrine does not require a reviewing court to consider all forfeited errors, as it is not a general savings clause preserving for review all errors affecting substantial rights notwithstanding whether the errors were brought to the attention of the trial court. *People v. Herron*, 215 Ill. 2d 167 (2005). Rather, under plain error, a reviewing court may review a forfeited sentencing error where: (1) the evidence at the sentencing hearing was closely balanced; or (2) the error was so egregious that the defendant was denied a fair sentencing hearing. *People v. Hall*, 195 Ill. 2d 1 (2000).

¶ 25 The defendant has the burden of persuasion under both prongs of the plain error doctrine. *People v. Naylor*, 229 Ill. 2d 584 (2008). If the defendant does not meet this burden, a reviewing court will honor the procedural default of the issue. *Naylor*, 229 Ill. 2d 584. Our supreme court has long recognized that if the defendant "neither argues that the evidence was closely balanced nor explains why the error is so severe that it must be remedied to preserve the integrity of the judicial process," his plain error argument is forfeited. *People v. Nieves*, 192 Ill. 2d 487, 503 (2000); see also *Hillier*, 237 Ill. 2d at 545-46 (supreme court stated that if the "defendant fails to present an argument on how either of the two prongs of the plain-error doctrine is satisfied, the defendant forfeits plain-error review").

¶ 26 Here, the defendant does not assert that the evidence was closely balanced. He only offers a one-sentence argument that a trial court's consideration of a factor inherent in an offense affects a defendant's fundamental right to liberty and will be considered under plain error. In support of this sentence, the defendant cites *People v. Martin*, 119 Ill. 2d 453 (1988).

¶ 27 This bald assertion is insufficient to satisfy the defendant's burden of showing how or why the sentencing error was so serious as to affect the integrity of the judicial process. We

further note that the *Martin* court found that the trial court's consideration of harm to the victim during sentencing for involuntary manslaughter was invalid under the *first* prong of the plain error analysis. *Martin* does not stand as precedent that the trial court's error constitutes a violation of the *second* prong. The defendant has advanced no other argument in support of his claim. Additionally, here, the defendant has not alleged that the evidence at the sentencing hearing was closely balanced. Thus, we conclude that the defendant has forfeited plain error review of this issue. See *Hillier*, 237 Ill. 2d 539.

¶ 28 We also conclude that defense counsel did not provide ineffective assistance by failing to object to the trial court's consideration of the improper sentencing factor and to file a motion to reconsider the defendant's sentence. In order for a defendant to establish ineffective assistance of counsel, he must show that counsel rendered an objectively deficient level of assistance, and that he was prejudiced in that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 US 668 (1984). The assistance of counsel is judged by the totality of his conduct, and not isolated incidents. *People v. Gordon*, 378 Ill. App. 3d 626 (2007).

¶ 29 Here, the record indicates that defense counsel argued for a sentence of the statutory minimum, or one close to it, and asserted the mitigating factors in support of such a sentence. The defendant received a sentence at the low end of the sentencing range. In imposing this sentence, the court cited numerous aggravating factors, "particularly the defendant's prior criminal record," and that the defendant held a position of trust over A.G., his attempted escape, and the need for deterrence. Thus, based on the record, the defendant's sentence slightly above the minimum was based on the trial court's consideration of relevant aggravating factors.

Consequently, we do not find that the totality of counsel's performance fell below an objective standard of reasonableness or that counsel's error unfairly prejudiced the defendant.

¶ 30 MSR

¶ 31 Finally, the defendant contends that this court should order the DOC to amend the defendant's sentencing information to reflect a determinate MSR term of three years as imposed by the court, instead of the modified indeterminate term of three years to natural life. We conclude that based on the Supreme Court's holding in *People v. Rinehart*, 2012 IL 11719, the proper term of MSR for the defendant is an indeterminate term of three years to natural life.

¶ 32 Pursuant to section 5-8-1(d) of the Unified Code of Corrections (Unified Code), "every sentence shall include as though written therein a term [of MSR] in addition to the term of imprisonment." 730 ILCS 5/5-8-1(d) (West 2006). Section 5-8-1(d)(4) specifically provides that the term of MSR for individuals convicted of certain sex offenses, including predatory criminal sexual assault of a child, "shall range from a minimum of three years to a maximum of the natural life of the defendant." 730 ILCS 5/5-8-1(d)(4) (West 2006).

¶ 33 Prior to the supreme court's decision in *Rinehart*, the appellate districts were split on the interpretation of section 5-8-1(d)(4) of the Unified Code. Specifically, the Fourth District had interpreted this section to indicate that a trial court had the discretion to impose a term of MSR anywhere between three years and the natural life of the defendant. *People v. Rinehart*, 406 Ill. App. 3d 272, rev'd by *Rinehart*, 2012 IL 111719. However, the Second District believed that section 5-8-1(d)(4) indicated that the trial court must impose an indeterminate MSR term of three years to the natural life of the defendant, and then permit the DOC to administer the MSR term and ultimately decide the length of time the defendant must remain on MSR after three years. *People v. Schneider*, 403 Ill. App. 3d 301 (2010).

¶ 34 The supreme court agreed with the *Schneider* court, finding that section 5-8-1(d)(4) contemplated that the trial court would set the defendant's MSR term at an indeterminate term of three years to natural life. In so holding, the court stated that the "*Schneider* court saw the impetus behind section 5-8-1(d)(4) more clearly: '[p]resumably the legislature, in using indeterminate language with regard to MSR long after it generally abolished indeterminate sentences, specifically intended indeterminate MSR terms in sexual assault cases.'" *Rinehart*, 2012 IL 11719 at ¶ 29, citing *Schneider*, 403 Ill. App. 3d at 308. The supreme court also noted that section 3-14-2.5 of the Unified Code (730 ILCS 5/3-14-2.5 (West 2006)) provided for extended supervision of sex offenders, and that this section was part of a "comprehensive scheme regarding MSR for certain sex offenses, which marked a philosophical and procedural change in how parole operate[d] for defendants convicted of such offenses." *Rinehart*, 2012 IL 11719 at ¶ 29.

¶ 35 In this case, a jury convicted the defendant of predatory criminal sexual assault, an offense subject to the terms of MSR under section 5-8-1(d)(4) of the Code. Pursuant to this section, the defendant was eligible for a term of MSR from three years to natural life. The trial imposed three years of MSR—a result prohibited by *Rinehart*. See *People v. Wade*, 116 Ill. 2d 1 (1987) (supreme court noted that a trial court is not permitted to fashion a sentence other than the sentence provided by the relevant statutory guidelines, and thus, a sentence that does not conform to these guidelines is void). Instead, we conclude that the defendant's MSR must remain at a term of three years to natural life.

¶ 36 CONCLUSION

¶ 37 For the foregoing reasons, the judgment of the circuit court of Bureau County is affirmed.

¶ 38 Affirmed.