2012 IL App (4th) 100816-U

Filed 5/30/12

NO. 4-10-0816

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
PATRICK DeVERGER,	)	No. 10CF192
Defendant-Appellee.	)	
	)	Honorable
	)	Diane M. Lagoski
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Turner and Justice McCullough concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant forfeited his argument on appeal where he failed to raise the argument in a posttrial motion to reconsider his sentence, but even if he had not, his argument fails on the merits because the record does not show the trial court's sentence was based on its misapprehension of the evidence; (2) defendant was not prejudiced by counsel's failure to object to the imposed sentence; and (3) the trial court's sentence of four years on defendant's conviction of two counts of aggravated battery was not excessive.

¶ 2 In April 2010, the State charged defendant, Patrick DeVerger, with three counts of aggravated battery (720 ILCS 5/12-4(b)(15) (West 2008)) and one count of retail theft (720 ILCS 5/16A-3(a) (West 2008)). In a July 2010 jury trial, the jury found defendant guilty of two counts of aggravated battery and one count of retail theft, acquitting him of the third aggravated-battery count. The retail-theft conviction merged with the two aggravated-battery convictions, and in October 2010, the trial court sentenced defendant to two concurrent, four-year terms in prison. Defendant did not

file a motion to reconsider his sentence. He appeals, arguing the court misapprehended the evidence and fashioned a sentence commensurate with the erroneous information.

¶ 3 I. BACKGROUND

¶ 4 In March 2010, defendant and Shawn Fowler entered the County Market grocery store in Quincy, Illinois. An assistant store manager, David Barton, testified at defendant's trial that he watched as the two men each picked up a bottle of liquor. Defendant put his back on the shelf, while Fowler put his in his jacket. They walked to the front of the store and exited. Meanwhile, Barton alerted Dwayne Brown and Brian Toumbs, other County Market employees, that Fowler had shoplifted and was exiting the store. Barton, Brown, and Toumbs followed the men into the parking lot. Fowler began running across the parking lot. Brown caught him and pulled off his jacket, causing the bottle to fall to the ground. Barton and Toumbs were helping Brown detain Fowler when defendant ran at and into Barton, dislocating his left shoulder and breaking his finger. Defendant hit Toumbs twice in the face with his fist. Toumbs and another employee, Kevin Doellman, tackled defendant and held him until police arrived. Doellman testified that, before defendant was apprehended, defendant took off his jacket and threw it in Doellman's face.

¶ 5 The police arrested defendant and Fowler and noticed that neither had money or credit cards with them. Fowler testified for the defense, stating he had pleaded guilty to retail theft. He said he entered County Market with the intent to steal alcohol, but he did not tell defendant of his plan. However, he did admit that defendant saw him place the alcohol in his coat.

¶ 6 Defendant testified he went to County Market to buy soda for his mother. When he realized he was without money, he followed Fowler to the liquor aisle. Fowler asked defendant to pick up a bottle for him, which he did. He said he put the bottle back when an employee walked by.

They walked out of the store, defendant ahead of Fowler. Fowler began running and several men tackled him. Defendant said he went to help Fowler, but he denied running into Barton or hitting Toumbs.

¶ 7 The jury found defendant guilty of aggravated battery to Barton (count I), aggravated battery to Toumbs (count II), and retail theft (count IV). The jury acquitted defendant of aggravated battery to Doellman (count III). Prior to sentencing, in a separate case, defendant pleaded guilty to aggravated driving under the influence of alcohol (DUI), an offense he committed prior to the incident at issue, as he committed the aggravated batteries and retail theft while on bond.

¶ 8 In October 2010, the trial court conducted a combined sentencing hearing. The State presented the presentence investigation report (PSI), but no evidence in aggravation. Defendant did not present evidence in mitigation, but presented a statement in allocution. After considering all applicable factors, the PSI, and the arguments of counsel, the court pronounced defendant's sentence, first noting defendant's extensive criminal history. On that subject, the court stated: "Truthfully, [defendant] has either been charged, in custody, on probation, or in jail mostly since he was 13 years old. Now, I find that very sad."

¶ 9 Recalling the evidence presented to the jury, the trial court stated:

> "As I recall the evidence, and I was wondering, when [defense counsel] was arguing, if there was something I didn't remember correctly, but it seems to me what [defendant] said was he and his friend went into County Market, and [defendant] did not know they were going to go in there to steal alcohol. That his friend had the plan, but then [defendant] did, in fact, take a bottle, stick it under his

> coat and walk out the door. I think that's how the evidence came in. I don't think he was accountable for, in any way for his friend who had the alcohol, just my recollection of it."

¶ 10 The trial court sentenced defendant on his aggravated-battery convictions to two concurrent four-year terms in prison to run consecutively to the sentence imposed upon defendant's aggravated DUI conviction. Defendant did not file a motion to reconsider. This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 Defendant argues his sentence is excessive, given that the trial court misapprehended the trial evidence. He claims the court's stated recollection of the evidence, that it was defendant who walked out of County Market with a concealed bottle of alcohol, was incorrect and served to erroneously enhance his sentence. Further, he claims the court "mistakenly disregarded a factor in mitigation" by failing to consider that defendant was acting under a strong provocation to assist his friend in the parking lot. Defendant claims the court's errors require his sentence be vacated.

¶ 13 Defendant raises these issues for the first time in this appeal. He did not object at sentencing, nor did he file a motion to reconsider his sentence citing the alleged errors. Therefore, he has forfeited the claims. See *People v. Montgomery*, 373 Ill. App. 3d 1104, 1123 (2007). However, he urges this court to review the claims despite his forfeiture under the plain-error doctrine. In *Montgomery*, we stated:

> "In *People v. Rathbone*, 345 Ill. App. 3d 305, 308-10 *** (2003), this court deemed a defendant's sentencing argument on appeal forfeited, pointing out that section 5-8-1(c) of the Unified Code [of Corrections (Unified Code) (730 ILCS 5/5-8-1(c) (West

2004)) now 730 ILCS 5/5-4.5-50(d) (West 2008), incorporating amendments of Pub. Act 95-1052, § 5 (eff. July 1, 2009) (2008 Ill. Laws 4204, 4212-13))] required a defendant's challenge to any aspect of sentencing to be made by a written motion filed within 30 days of the imposition of sentence. [Citation.] We also noted that the Supreme Court of Illinois, in *People v. Reed*, 177 Ill. 2d 389, 394, *** (1997), held that the language of section 5-8-1(c) is mandatory. Citing section 5-8-1(c) and *Reed*, this court concluded in *Rathbone* that the defendant had forfeited the sentencing argument he raised on appeal, and we explained as follows:

> 'In so concluding, we note that defendant's claim is precisely the type of claim the forfeiture rule is intended to bar from review when not first considered by the trial court. Had defendant raised this issue in the trial court, that court could have answered the claim by either (1) acknowledging its mistake and correcting the sentence, or (2) explaining that the court did not improperly sentence defendant ***. If the court did not change the sentence, then a record would have been made on the matter now before us, avoiding the need for this court to speculate as to the basis for the trial court's sentence.' *Rathbone*, 345 Ill.

App. 3d at 310 ***.

> The rationale and holding of *Rathbone* are equally applicable in this case. Defendant's failure to raise this issue in the trial court was in violation of section 5-8-1(c) of the Unified Code [(730 ILCS 5/5-8-1(c) (West 2004))] and denied that court the opportunity to correct or clarify its ruling." *Montgomery*, 373 Ill. App. 3d at 1123.

¶ 14 Likewise, the trial court here did not have the opportunity to clarify its ruling or to correct its recollection of the evidence as presented at trial because defendant did not comply with the requirements of section 5-4.5-50(d) of the Unified Code (730 ILCS 5/5-4.5-50(d) (West 2010) (formerly 730 ILCS 5/5-8-1(c) (West 2006))), the statute which requires a defendant to present any challenge to his sentence in a motion filed within 30 days of sentencing. See also *People v. Ahlers*, 402 Ill. App. 3d 726, 731-32 (2010) (the defendant forfeited his sentencing claims not previously raised). As this court has consistently noted, the plain-error doctrine is not a general savings clause preserving for review all errors affecting substantial rights. *Montgomery*, 373 Ill. App. 3d at 1123. Forfeiture applies to those claims not previously raised. See *People v. Tyus*, 2011 IL App (4th) 100168, ¶¶ 85-86 (the defendant's apparent attempt to avoid the above-cited case law by asserting a plain-error argument fails when considering there was no error). We find the claims forfeited.

¶ 15 Defendant further argues that he received newly appointed counsel immediately prior to sentencing, and because his new attorney was not familiar with the trial record, he failed to correct the trial court's misperception of the evidence, which constituted ineffective assistance of counsel and prejudiced defendant. See *Strickland v. Washington*, 466 U.S. 668, 692 (1984). The State claims the trial court did not err and thus, defendant cannot have suffered prejudice. We agree

with the State.

¶ 16 "A sentence which falls within the statutory guidelines will not be disturbed on review unless it is manifestly disproportionate to the nature of the offense." *People v. Nussbaum*, 251 Ill. App. 3d 779, 783 (1993). In sentencing a defendant, the trial court "enjoys wide latitude in determining and weighing factors in mitigation or aggravation, and this court gives great deference and weight to the sentence the trial court thought appropriate in any given case." *Nussbaum*, 251 Ill. App. 3d at 781. Further, this court indulges a strong presumption that the trial court based its sentencing decision upon proper considerations only. *People v. Dowding*, 388 Ill. App. 3d 936, 942-43 (2009).

¶ 17 Here, the trial court sentenced defendant to four years in prison. Defendant was convicted of aggravated battery (720 ILCS 5/12-4(b)(15) (West 2008)), a Class 3 felony (720 ILCS 5/12-4(e)(1) (West 2008)). He was eligible for a term of imprisonment between two and five years. 730 ILCS 5/5-4.5-40 (West 2008) (as amended by Pub. Act 95-1052, § 5 (eff. July 1, 2009) (2008 Ill. Laws 4204, 4210)).

¶ 18 From our review of the sentencing-hearing transcript, it appears the trial court did not rely on its mistaken recollection that defendant himself stole a bottle of alcohol. On that subject, the court stated the retail theft was "a minor offense," which turned into "something much more serious once [defendant] got outside of the store, and he created or caused serious harm to the victim. I can't ignore that." From these statements, it is clear that any argument that the court sentenced defendant as a principal, rather than as simply being accountable for Fowler's conduct, upon the conviction for retail theft is without merit. In other words, we find the sentence of four years was not affected by whether the court applied an accountability theory to the retail theft conviction. The court was clear

that the sentence was based on the more serious offense of aggravated battery.

¶ 19 The trial court also specifically rejected the theory that defendant acted under a strong provocation to assist his friend. On this matter, the court stated:

> "[Defendant] caused serious harm. He was not provoked. I can't buy the: I'm going to defend my friend. You know, you just don't do that. These people were doing their job. They were acting legally, and you don't go beat them up or try to harm them. There is no justification or excuse for his behavior."

¶ 20 In sentencing defendant to four years in prison, the trial court properly considered the offenses for which defendant was convicted, in light of the PSI, recommendations of counsel, defendant's statement in allocution, and the factors in mitigation and aggravation. The sentence of four years falls within the applicable range of two to five years. Our review of the record supports our conclusion that the court's incorrect recall of the evidence did not affect the sentence or cause defendant prejudice. Accordingly, we find (1) defendant forfeited review of his sentencing arguments, (2) he was not prejudiced by counsel's representation, and (3) his sentence was not excessive.

¶ 21 III. CONCLUSION

¶ 22 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 23 Affirmed.