2012 IL App (4th) 120066-U

Filed 6/29/12

NO. 4-12-0066

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
THOMAS M. SINCLAIR,	)	No. 10DT453
Defendant-Appellant.	)	
	)	Honorable
	)	Richard P. Klaus,
	)	Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.
Justices Pope and Cook concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not improperly rely on its own private opinions when sentencing defendant to 18 months' conditional discharge rather than a term of court supervision. Also, defendant forfeited a sentencing issue by raising for the first time in his reply brief and failing to raise the issue with the trial court.

¶ 2 Defendant, Thomas M. Sinclair, pleaded guilty to driving under the influence of drugs (625 ILCS 5/11-501(a)(4) (West 2008)) and the trial court sentenced to him to 18 months' conditional discharge. He appeals his sentence, arguing the court inappropriately weighed sentencing factors and improperly relied upon its own private opinion that teenage offenders should not receive court supervision. We affirm.

¶ 3 On August 29, 2010, defendant was ticketed for driving under the influence of drugs (625 ILCS 5/11-501(a)(4) (West 2008)) and the issuing officer noted defendant had been driving with "no lights when required." On January 5, 2011, defendant entered an open plea of

guilty. The State provided its factual basis, showing defendant was 18 years old and was stopped by police at 12:38 in the morning. Defendant seemed confused and officers discovered a bag on the floorboard of his vehicle that contained 3.4 grams of a substance that tested positive for tetrahydrocannabinol (THC). Officers also found a pipe in defendant's pocket with residue. Defendant admitted he smoked between five and seven pipes while driving from Charleston to Rantoul, Illinois. He then vomited profusely. Results from laboratory testing showed defendant had THC in his urine. The trial court advised defendant of his rights and accepted his plea as being knowingly, intelligently, and voluntarily made.

¶ 4 On February 9, 2011, the trial court conducted defendant's sentencing hearing. The court took note of the presentence investigation report, showing defendant was a high school senior, worked as a newspaper carrier, and had no prior criminal record. The State presented no other evidence. Defendant submitted grade reports and a letter showing his acceptance to Southern Illinois University. He argued for a sentence of court supervision. In reaching its decision, the trial court noted it considered court supervision for defendant as a sentencing option but stated as follows:

> "Having said that, in my mind there are two severe aggravating factors present in this case. First and foremost, his age. While I have considered court supervision in every case in which the defendant is eligible, to date, *** I have never yet entered that order for a high school student. And here is why. High school students are, by their very nature, a risk to the public when they drive. Statistically[,] it is clear that the vast majority of accidents

involve inexperienced drivers. They are statistically more likely to be involved in accidents. When you take into account then, either driving under the influence of alcohol, and /or driving under the influence of marijuana, then they become a clear and present danger to everyone around them when they are driving. And what I will not have is a message sent that you can be a young person, you can be driving under the influence, and that the court will be lenient with you.

Unfortunately for [defendant], the message needs to be sent, loud and clear, to deter anyone else of his age in high school, from thinking that they can drive under the influence of any substance.

Secondly, and not any less significantly, in [the court's] view, the consumption of cannabis is of a wholly different nature than the consumption of alcohol. The consumption of cannabis, in and of itself, is a separate crime. Now frankly because of his age, the mere consumption of alcohol would also be a Class A misdemeanor. His possession of marijuana is a completely different crime, and I do not subscribe to the theory that marijuana is a harmless drug.

I get to sit in juvenile abuse court almost every afternoon and see an endless array of parents who cannot and will not take

> care of their own children, because they're more interested in getting high, than they are in taking care of their children. And it's, in most cases, frankly, cannabis. This is not an appropriate case in which to defer the judgment."

The court then ordered defendant to serve 18 months' conditional discharge, pay a $1,000 fine, pay a $5 local anti-crime assessment fee, pay a monthly $25 court services fee, perform 150 hours of public service work, and attend a victim impact panel presentation.

¶ 5 On March 4, 2011, defendant filed a motion to reconsider his sentence, arguing the trial court erred by imposing a sentence of conditional discharge rather than court supervision. He maintained the court failed to consider the circumstances of his particular offense, history, character, and condition and, instead, improperly focused on his age and status as a high school student.

¶ 6 On March 16, 2011, the trial court conducted a hearing on defendant's motion to reconsider. The court clarified its comments during sentencing, stating it had considered a sentence of court supervision for defendant but declined to enter such an order. It further asserted it had recently imposed a sentence of court supervision on a student for a cannabis-related charge. The court then took the matter under consideration. On March 21, 2011, the court denied defendant's motion.

¶ 7 Defendant appealed but the matter was remanded to the trial court for the filing of a certificate pursuant to Illinois Supreme Court Rule 604(d) (eff. July 1, 2006), the opportunity to file a new postplea motion, a hearing on the motion, and strict compliance with Rule 604(d). On August 1, 2011, defendant filed a second motion to reconsider his sentence, raising the same

argument as before. On January 18, 2012, the court, again, denied defendant's motion

¶ 8 This appeal followed.

¶ 9 Initially, we note, on June 5, 2012, defendant filed a motion for expedited disposition. He argued his appeal presented a meritorious issue that could result in remand for resentencing. Defendant further pointed out that his sentence of conditional discharge ends on August 9, 2012. We grant defendant's motion.

¶ 10 On appeal, defendant argues the trial court improperly sentenced him to 18 months' conditional discharge rather than court supervision. Specifically, he argues the court erred by refusing to consider his youth and its impact on his rehabilitative potential and, instead, relied upon "its private opinion that all teenagers should not receive court supervision."

¶ 11 The Illinois Constitution provides "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. On review, substantial deference is given to the trial court's sentencing decision because it had the opportunity to observe the defendant and the proceedings and "is in a much better position to consider factors such as the defendant's credibility, demeanor, moral character, mentality, environment, habits, and age." *People v. Snyder*, 2011 IL 111382, ¶ 36, 959 N.E.2d 656, 663. "Therefore, a reviewing court may not modify a defendant's sentence absent an abuse of discretion." *Snyder*, 2011 IL 111382, ¶ 36, 959 N.E.2d at 663.

¶ 12 "However, a trial court must in fact exercise its discretion and may not refuse to consider an alternative simply because the defendant is in a class disfavored by the court." *People v. Jones*, 284 Ill. App. 3d 975, 980, 673 N.E.2d 456, 459-60 (1996) (citing *People v.*

Bolyard, 61 Ill. 2d 583, 587, 338 N.E.2d 168, 170 (1975)). In *Bolyard*, 61 Ill. 2d at 585-86, 338 N.E.2d at 169, the trial court expressed its personal policy that crimes involving physical or sexual violence were not probationable and denied the defendant's request for probation. The supreme court found the defendant entitled to a new sentencing hearing, finding the record showed "the trial judge arbitrarily denied probation because [the] defendant fell within the trial judge's category of disfavored offenders." *Bolyard*, 61 Ill. 2d at 587, 338 N.E.2d at 170. Specifically, the court noted the judge "heard [the] defendant's argument for granting probation and then expressed his opinion that perpetrators of [defendant's] crime should not receive probation." *Bolyard*, 61 Ill. 2d at 587, 338 N.E.2d at 170.

¶ 13 Although defendant cites *Bolyard* as supportive of his position, the facts in the present case are distinguishable from *Bolyard* as well as the other cases defendant cites. Here, the trial court expressly stated at sentencing that it considered a sentence of court supervision for defendant. Further, at the hearing on defendant's motion to reconsider, the court acknowledged that its comments "may not have been very artful" but stressed its awareness of defendant's eligibility for court supervision and its consideration of such a sentence. Moreover, the trial court in *Bolyard* had a blanket policy of rejecting probation for a specific class of probation-eligible offenses. Here, however, the court denied defendant's request for court supervision based upon factors personally relevant to defendant, *i.e.*, his young age and consequent lack of driving experience, not simply the type of offense he committed.

¶ 14 Additionally, we note "[a] trial judge's inclusion of some personal observations does not necessarily rise to an abuse of discretion." *People v. Thurmond*, 317 Ill. App. 3d 1133, 1142, 741 N.E.2d 291, 299 (2000). While the trial court in this case expressed some personal

observations, those observations did not amount to reversible error. Overall, the court's comments emphasized its belief in the seriousness of the offense and the need to deter other inexperienced drivers from operating a vehicle while impaired, both relevant and proper considerations. In particular, the Unified Code of Corrections (Code) provides as follows:

> "[T]he court *may* enter an order for supervision after considering the circumstances of the offense, and the history, character and condition of the offender, if the court is of the opinion that:
>
> (1) the offender is not likely to commit further crimes;
>
> (2) the defendant and the public would be best served if the defendant were not to receive a criminal record; and
>
> (3) in the best interests of justice an order of supervision is more appropriate than a sentence otherwise permitted under this Code." (Emphasis added.) 730 ILCS 5/5-6-1(c) (West 2010).

The court had discretion to order a sentence of court supervision and its comments undeniably show it believed the second two factors listed in the Code weighed against court supervision.

¶ 15 Here, the trial court considered defendant's request for court supervision but exercised its discretion to deny that request. The court based its decision upon its belief that defendant's offense was serious in nature and that there was a need to deter other similarly situated individuals. The court did not commit reversible error and the cases defendant cites are distinguishable.

¶ 16 On appeal, defendant also argues the trial court improperly considered a factor inherent in his offense, the use of cannabis, as a factor in aggravation. However, he has forfeited

this issue by raising it for the first time in his reply brief. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) ("Points not argued [in the appellant's brief] are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing"). Additionally, defendant forfeited this issue by failing to raise it before the trial court or in his motion to reconsider. Ill. S. Ct. R. 604(d) (eff. July 1, 2006) ("Upon appeal any issue not raised by the defendant in the motion to reconsider the sentence or withdraw the plea of guilty and vacate the judgment shall be deemed waived"); see also *People v. Thompson*, 375 Ill. App. 3d 488, 492, 874 N.E.2d 572, 576 (2007). Defendant does not acknowledge his forfeiture or provide any reason why this court should excuse his failure to preserve the issue. As such, we will not address the merits of this issue.

¶ 17 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal.

¶ 18 Affirmed.