2014 IL App (4th) 120910-U

NO. 4-12-0910

FILED
March 5, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Coles County
TIMOTHY N. SHAW, JR.,	)	No. 09CF117
Defendant-Appellant.	)	
	)	Honorable
	)	Teresa K. Righter and
	)	James R. Glenn,
	)	Judges Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Appleton and Justice Pope concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not (1) err in restoring defendant to fitness and (2) abuse its discretion in sentencing defendant to 28 years in prison for predatory criminal sexual assault of a child.

¶ 2 In February 2009, the State charged defendant, Timothy N. Shaw, Jr., with two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008)). In February 2010, the trial court, Judge Teresa K. Righter presiding, found defendant unfit to stand trial and ordered him to undergo treatment. In October 2010, the court restored defendant to fitness. In August 2011, the court, Judge James R. Glenn presiding, held a bench trial and found defendant guilty of one count of predatory criminal sexual assault of a child. In October 2011, the court sentenced defendant to 28 years' imprisonment.

¶ 3 Defendant argues the trial court did not hold a fitness hearing to determine whether he had been rehabilitated to a state of fitness, and it abused its discretion when it sentenced him to 28 years in prison. We disagree and affirm.

¶ 4 I. BACKGROUND

¶ 5 In February 2009, the State charged defendant with predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008)), in that he placed his finger in the sex organ of M.C. (count I); and predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008)), in that he placed his mouth on the sex organ of K.C. (count II).

¶ 6 A. Defendant's Fitness

¶ 7 In May 2009, defendant filed a motion for examination to determine fitness. In June 2009, the trial court, Judge Righter presiding, ordered defendant to undergo a fitness examination. In July 2009, Dr. Jerry Boyd filed a report, based on his examination of defendant, concluding defendant suffered from mental illness but was fit to stand trial. In November 2009, the court, on defendant's motion, ordered defendant be examined by Dr. Arthur Traugott. In February 2010, Traugott filed a report, based on his examination of defendant, opining defendant suffered from mental illness and "[i]f he is provided with an inpatient hospitalization, he should be able to obtain a status where he would be fit to stand trial ***." On February 17, 2010, the court found defendant unfit and ordered him to undergo treatment.

¶ 8 The Illinois Department of Human Services (DHS) submitted an initial report dated June 1, 2010, to the trial court. The report opined defendant was unfit to stand trial. It estimated defendant would be restored to fitness within "two to three months." DHS submitted a second report dated June 18, 2010, which opined defendant "is restored to fitness."

¶ 9 On July 6, 2010, the trial court held a status hearing. The parties stipulated to the content of the June 1, 2010, and June 18, 2010, reports. The court noted for the record it had the opportunity to observe defendant in court and believed his conduct was inconsistent with the report finding him fit. The court requested clarification and an explanation for the inconsistencies between the two DHS reports.

¶ 10 DHS submitted a clarification report dated July 9, 2010, and opined defendant was restored to fitness. It clarified its June 1, 2010, report estimated defendant would be restored to fitness within two to three months. Defendant responded "very positively" to medication and had "never presented with significant negative symptoms of mental illness." As a result, DHS interviewed defendant earlier than originally expected in the June 1, 2010, report and concluded he was fit. It opined defendant "is malingering unfitness in order to avoid return[ing] to jail and in hopes of avoiding proceeding with the charges filed against him." The report stated on the evening of the July 6 court hearing defendant told DHS staff he acted unfit in the courtroom because, "I don't want to go back to jail and this way I wouldn't have to." He admitted his actions and statements were "decided, volitional" and he was in "control of his thoughts, emotions [and] verbalizations."

¶ 11 In August 2010, DHS submitted a fourth report dated August 8, 2010. It opined defendant was restored to fitness and he "was malingering unfitness in order to avoid return[ing] to jail and in hopes of avoiding proceeding with the charges filed against him during his presentation in the courthouse on July 6, 2010." The reported stated "[defendant] was asked specifically, 'So, do you think you are fit to stand trial now?' and he promptly responded, 'Yes. I should have just kept my mouth shut the last time. I intend on behaving and keeping my mouth

shut—except for my attorney, of course.' "

¶ 12 On August 9, 2010, the trial court held another status hearing. At the conclusion of the hearing, the court stated, "given the clarification report that has been provided by DHS and the report that was [faxed] the end of last week by DHS, I am going to remand [defendant] back into the custody of the [county sheriff] at this time."

¶ 13 In a letter dated September 28, 2010, DHS opined defendant was restored to fitness and had been since June 2010. It notified the court defendant was remanded to the county jail but, since the February 2010 unfitness order had not been superseded by a fitness order, defendant remained listed as a current DHS patient "Away By Court Order." It requested an order finding defendant fit.

¶ 14 On October 7, 2010, the trial court entered a written order finding defendant fit to stand trial. On October 18, 2010, the trial court held a status hearing where the parties informed the court they were considering a possible plea of guilty but mentally ill. Defendant requested an additional evaluation for the limited purpose of determining whether defendant would meet the criteria for such a plea. The trial court suggested counsel review the reports that had been done, and there could be a later determination of whether another examination needed to occur. Defendant did not object to the entry of the written order finding him fit to stand trial and never renewed his motion for another evaluation. No guilty but mentally ill plea was mentioned again.

¶ 15 B. Defendant's Trial and Sentencing

¶ 16 In August 2011, the trial court, Judge James R. Glenn presiding, held a stipulated bench trial. The stipulated evidence showed the following. Defendant's birthday is September 24, 1984. The victim, M.C., was six years old at the time of the offense. In February 2009, M.C.

told a nurse defendant "touched her private areas with his fingers and then tried to put his private area in her private area." M.C. told a Department of Children and Family Services investigator defendant "placed his private in her butt and it hurt, that it hurts when she goes poop, and that [defendant] placed his penis in her vagina." Defendant admitted to police investigators he had sexual contact with M.C. over the previous 3 1/2 years, beginning when she was three years old and he was 21 years old. He admitted placing his fingers inside M.C.'s vagina and placing his penis near her vagina. The court found defendant guilty but mentally ill of count I. The court, upon the State's request, dismissed count II.

¶ 17 In October 2011, the trial court held a sentencing hearing. The State introduced a presentencing investigation report (PSI). The PSI included the Traugott report, the Boyd report, and the DHS reports. The PSI showed a 2003 misdemeanor conviction for domestic battery, a 2003 felony conviction for aggravated battery, and a 2004 felony conviction for aggravated battery. Defendant presented testimony from his mother and an aunt. He made a statement in allocution. The State informed the court it had previously agreed to recommend no more than 20 years in prison if defendant waived his right to a jury trial and agreed to a stipulated bench trial. It recommended 20 years' imprisonment. Defendant requested 8 to 10 years in prison.

¶ 18 The trial court did not find any factors in mitigation. In aggravation, it found the sexual penetration of a young minor "certainly caused and threatened serious harm." It found defendant held a position of trust over M.C. and a severe sentence was necessary to deter others. The court sentenced defendant to 28 years' imprisonment and 12 years' mandatory supervised release (MSR).

¶ 19 In October 2011, defendant filed a motion for a new trial and to reconsider

sentence. The trial court denied defendant's motions.

¶ 20 This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 Defendant argues the trial court did not hold a fitness hearing to determine whether he had been rehabilitated to a state of fitness, and it abused its discretion when it sentenced him to 28 years in prison. We address defendant's arguments in turn.

¶ 23 A. Defendant's Fitness Claim

¶ 24 Defendant argues his right to due process was violated when the trial court failed to conduct a hearing to determine whether he was fit to stand trial after previously finding him unfit. Defendant asserts "there was no hearing of any sort to determine whether [he] was fit to proceed" and "there is no indication in this record that the trial court judge exercised any discretion in finding [him] fit." He points to the fact the October 2010 order came between court appearances. We disagree.

¶ 25 Defendant did not raise his fitness argument before the trial court and has forfeited this argument. He argues this court should consider his argument under plain-error review. The plain-error rule bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error in limited circumstances. *People v. Thompson*, 238 Ill. 2d 598, 613, 939 N.E.2d 403, 413 (2010). "The plain-error doctrine allows errors not previously challenged to be considered on appeal if either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v.*

Wilmington, 2013 IL 112938, ¶ 31, 983 N.E.2d 1015. The first step of plain-error review is to determine whether any error occurred. *Id.*

¶ 26 Defendant asserts his case is similar to *People v. Greene*, 102 Ill. App. 3d 639, 430 N.E.2d 219 (1981), and *People v. Contorno*, 322 Ill. App. 3d 177, 750 N.E.2d 290 (2001). In *Greene*, the parties stipulated to the finding defendant was fit to stand trial. *Greene*, 102 Ill. App. 3d at 641, 430 N.E.2d at 221. The trial court responded " 'Very well, fine. Where do we go from here, gentlemen?' " *Id.* The appellate court concluded the trial court's decision to restore the defendant "rested solely upon stipulations to unsworn psychiatric testimony." *Id.* at 643, 430 N.E.2d at 222. It added, "the evidence produced was so minimal that the trial court had little before it upon which to exercise its discretion." *Id.* In *Contorno*, the parties stipulated to a psychiatrist's report finding the defendant fit to stand trial. *Contorno*, 322 Ill. App. 3d at 178, 750 N.E.2d at 292. The trial court entered a written order, relying on the psychiatrist's finding the defendant was fit to stand trial. *Id.* The appellate court concluded the record reflected the trial court "merely accepted" the psychiatrist's conclusion and did not indicate "the court conducted any analysis of the doctor's opinion or exercised its discretion in finding defendant fit." *Id.* at 179, 750 N.E.2d at 293. These cases are distinguishable from the present case.

¶ 27 The problem in both *Greene* and *Controno* was the trial court did not exercise its discretion but merely accepted the report's *conclusion* the defendant was fit. Compare *People v. Robinson*, 221 Ill. App. 3d 1045, 1050, 582 N.E.2d 1299, 1303 (1991). In the instant case, the trial court, Judge Righter presiding, conducted a hearing on July 6, 2010, to review the two June 2010 DHS reports. There, the parties stipulated to the contents of the two June 2010 reports. The court, observing defendant's conduct in the courtroom (which is not included in the record)

and the June reports' inconsistent fitness findings, requested additional evaluation and clarification on defendant's fitness. In August 2010, DHS submitted a clarifying report, explaining the reports were so close together in time because medication assisted to restore defendant to fitness. It added defendant was "malingering unfitness" to avoid trial. This report included defendant's admission he acted out at the July 6, 2010, hearing to avoid going to jail. Then, at a hearing on August 9, 2010, the parties again argued defendant's fitness. Defense counsel requested additional evaluation by Traugott to determine if he agreed with DHS's fitness determination. The court did not rule on defendant's motion but ordered defendant remanded to the county sheriff. Then, in late September, DHS notified the court defendant was still in its custody because the court had not entered a fitness order superseding the February 2010 order. The court did so on October 7, 2010. While the fitness determination did not neatly occur in a single hearing, the record reflects the trial court considered defendant's fitness at both the July 6, 2010, and August 9, 2010, hearings. It considered the June 2010 reports' different conclusions and requested *additional* evaluation and clarification (which included defendant's admission he was faking his behavior at the July 2010 hearing). The record shows the court did not merely accept the DHS report's fitness conclusion. The record explains why the October 2010 order occurred between court appearances. At the August 2010 hearing, the court remanded defendant to the county sheriff without entering a formal fitness order. DHS informed the court it needed a formal fitness order to release defendant from its custody. The court responded with the October 7, 2010, order. Although this practice made the record more complicated, the court's failure to enter the order at the August 2010 hearing does not amount to error.

¶ 28 B. Defendant's Excessive-Sentence Claim

¶ 29 Defendant argues his sentence is excessive. He argues the trial court "ignored" the parties' recommendations and imposed a sentence "40% greater than the sentence the prosecution recommended." He asserts the court (1) improperly considered his conduct caused or threatened serious harm because harm is inherent in the offense, and (2) failed to consider his mental history as a mitigating factor. We disagree.

¶ 30 1. *Standard of Review*

¶ 31 A sentence which falls within the statutory guidelines is not an abuse of discretion unless it is manifestly disproportionate to the offense and cannot be justified by any reasonable review of the record. *People v. Mays*, 2012 IL App (4th) 090840, ¶ 66, 980 N.E.2d 166; *People v. Pippen*, 324 Ill. App. 3d 649, 651-52, 756 N.E.2d 474, 477 (2001). "A reviewing court must afford great deference to the trial court's judgment regarding sentencing because that court, having observed the defendant and the proceedings, is in a far better position to consider such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, and habits than a reviewing court, which must rely on a 'cold' record." *People v. Little*, 2011 IL App (4th) 090787, ¶ 24, 957 N.E.2d 102. A sentencing court is presumed to have considered all relevant mitigating evidence before it. *People v. Somers*, 2012 IL App (4th) 110180, ¶ 24, 970 N.E.2d 606. "The most important sentencing factor is the seriousness of the offense." *People v. Flores*, 404 Ill. App. 3d 155, 159, 935 N.E.2d 1151, 1155-56 (2010).

¶ 32 2. *The Applicable Sentencing Range and Factors*

¶ 33 Predatory criminal sexual assault of a child is punishable by 6 to 60 years' imprisonment. 720 ILCS 5/12-14.1(b)(1) (West 2008). Factors in aggravation include (1) "the defendant's conduct caused or threatened serious harm"; (2) "the defendant has a history of prior

delinquency or criminal activity"; (3) "the sentence is necessary to deter others from committing the same crime"; and (4) "the defendant held a position of trust or supervision such as, but not limited to, [a] family member." 730 ILCS 5/5-5-3.2(a)(1), (3), (7), (14) (West 2008).

¶ 34 3. *Defendant's 28-year Prison Sentence is Proper*

¶ 35 We reject any suggestion the trial court abused its discretion by ignoring the parties' sentencing recommendations and imposing a sentence greater than the State's recommendation. See *People v. Streit*, 142 Ill. 2d 13, 21-22, 566 N.E.2d 1351, 1354 (1991) ("a court is not bound by the sentencing recommendation of the State"); *People v. Nussbaum*, 251 Ill. App. 3d 779, 783, 623 N.E.2d 755, 758 (1993) ("counsels' [sentencing] recommendations are deserving of whatever weight the sentencing court wishes to accord them and nothing more"). The court had the discretion to impose *any* sentence within the applicable sentencing range.

¶ 36 Defendant asserts the trial court considered a factor inherent in the charged offense when it found defendant's conduct caused and threatened serious harm to the victim. Defendant does not provide any citation in support of his contention serious harm is an inherent factor in the charged offense of predatory criminal sexual assault of a child. Compare 720 ILCS 5/12-14.1(a)(2) (West 2008) (including "accused caused great bodily harm to the victim"); *People v. Freeman*, 404 Ill. App. 3d 978, 996, 936 N.E.2d 1110, 1125-26 (2010) (child's age is an inherent factor). The evidence reflected the six-year-old victim complained of pain as a result of defendant's penetration. The court properly considered whether defendant's conduct caused and threatened harm. See *People v. Saldivar*, 113 Ill. 2d 256, 269, 497 N.E.2d 1138, 1143 (1986) ("While the classification of a crime determines the sentencing range, the severity of the sentence depends upon the *degree of harm* caused to the victim and as such may be considered

as an aggravating factor in determining the exact length of a particular sentence, *even in cases where serious bodily harm is arguably implicit in the offense for which a defendant is convicted*." (Emphases in original.)).

¶ 37 Defendant asserts the trial court failed to properly consider his mental illness as a mitigating factor during sentencing. Defendant's assertion *Robinson* holds a court must consider mental health as a mitigating factor is misplaced. The *Robinson* court's discussion of the defendant's mental-health issues is *dicta* as it concluded the sentencing court abused its discretion because it "improperly considered the criminal acts of others in imposing sentence on defendant." *Robinson*, 221 Ill. App. 3d at 1052, 582 N.E.2d at 1304. This court recently noted mental-health issues are not set forth in the list of mitigating factors in section 5-5-3.1(a) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-5-3.1(a) (West 2010)), and the General Assembly's omission to amend the listed mitigating factors to include them was "no oversight." *People v. Brunner*, 2012 IL App (4th) 100708, ¶ 64, 976 N.E.2d 27; see also *People v. Coleman*, 183 Ill. 2d 366, 406, 701 N.E.2d 1063, 1083 (1998) (quoting *People v. Tenner*, 175 Ill. 2d 372, 382, 677 N.E.2d 859, 864 (1997)) (" 'information about a defendant's mental or psychological impairment is not inherently mitigating' "). Defendant asserts it was error for the court to impose the same sentence it would have imposed if defendant was not mentally ill. We reject this contention. Section 5-2-6 of the Unified Code expressly states "[t]he court may impose any sentence upon the defendant which could be imposed pursuant to law upon a defendant who had been convicted of the same offense without a finding of mental illness." 730 ILCS 5/5-2-6(a) (West 2008). The court did not abuse its discretion when it weighed the evidence of defendant's conduct, the aggravating factors (including his prior convictions), and

found a sentence of 28 years' imprisonment was appropriate.

¶ 38 III. CONCLUSION

¶ 39 We affirm the judgment of the trial court. As part of our judgment, we award the State its $50 statutory assessment as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2012).

¶ 40 Affirmed.