2015 IL App (4th) 13-0612-U

NO. 4-13-0612

FILED
February 17, 2015
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.	)	McLean County
CHARLES K. HAMILTON,	)	No. 11CF989
Defendant-Appellant.	)	
	)	Honorable
	)	Robert L. Freitag,
	)	Judge Presiding.

PRESIDING JUSTICE POPE delivered the judgment of the court.
Justices Harris and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the trial court's judgment, concluding defendant waived any claims of error regarding sentencing.

¶ 2 In March 2013, following a jury trial, *pro se* defendant, Charles K. Hamilton, was found guilty of unlawful possession of cannabis with intent to deliver (more than 5,000 grams) (720 ILCS 550/5(g) (West 2010)) (count I), unlawful possession of cannabis (more than 5,000 grams) (720 ILCS 550/4(g) (West 2010)) (count II), and cannabis trafficking (more than 2,500 grams) (720 ILCS 550/5.1(a) (West 2010)) (count III). In April 2013, the trial court sentenced defendant to 22 years in the Illinois Department of Corrections (DOC). Defendant appeals, arguing the court erred during sentencing by relying on a disputed prior felony conviction listed in the presentence investigation report (PSI) as a factor in aggravation. Because defendant filed

a posttrial motion to reconsider his sentence but later moved to strike the motion, he has waived this claim. Therefore, we affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 In November 2011, defendant was charged with unlawful possession of cannabis with intent to deliver (more than 5,000 grams) (720 ILCS 550/5(g) (West 2010)) (count I), unlawful possession of cannabis (more than 5,000 grams) (720 ILCS 550/4(g) (West 2010)) (count II), and cannabis trafficking (more than 2,500 grams) (720 ILCS 550/5.1(a) (West 2010)) (count III). These charges stemmed from a traffic stop of defendant on Interstate 55 near Chenoa, Illinois, when a computer check revealed his Florida driver's license was suspended. That traffic stop led to a search of defendant's truck. The police discovered approximately 60 pounds of marijuana in an auxiliary fuel tank in the bed of the truck.

¶ 5 Following an argument with his appointed defense counsel, defendant elected to proceed *pro se* for the duration of the proceedings in the trial court after the court admonished defendant on the potential consequences of that choice. Throughout the proceedings in this case, defendant accused the Illinois State Police, the assistant State's Attorney, and the trial court of tampering with evidence, conspiring against him, denying him the ability to defend himself, and generally denying him a fair trial.

¶ 6 The case eventually proceeded to a jury trial in March 2013. Some of defendant's last words to the jury during his closing argument were: "Anyway, all I got to say, I've never agreed with the law. I've smoked ganja since 1967. I enjoy it. State of Illinois can spend whatever amount of money but they're not going to rehabilitate me. I don't owe anybody 110 billion dollars. They're wasting money, and I'm sorry to have to lose any part of my life to laws

that I don't agree with. But I did come into your State with this stuff." At the conclusion of the trial, defendant was found guilty of all counts.

¶ 7 At the April 30, 2013, sentencing hearing, the trial court and parties reviewed the contents of the PSI regarding prior convictions. Of note in the PSI is the fact defendant "partially completed the Presentence Investigation packet, however, he declined to meet with this officer to review the packet before preparing his report. The defendant also refused to sign the releases for verification purposes for this report."

¶ 8 Regarding defendant's criminal history, the trial court noted the prior record was from other states and somewhat dated. The probation officer acknowledged it was difficult to obtain official information. In a discussion about which of the convictions were felonies, the trial court stated:

> "It's fairly clear to me that on page three of the report there is a [*sic*] August of 1986 entry from Brevard, Florida, including a burglary, that I think obviously would be a felony under Illinois law, so that would be a felony. February of 1990, DeKalb, Georgia, possession of cocaine, under Illinois law would also be a felony, possession of any amount of cocaine. And then there is the June 1990 Covington, Alabama, marijuana possession, first degree, that's a little less clear to me, frankly, whether that's a felony or a misdemeanor, but looking at the sentence, five years, I assume that C C means some kind of corrections center, but a five-year sentence would suggest to me a felony as well.

*** Those are the only three priors that I feel comfortable in looking at this and saying they are felonies, and I'm willing to listen to the parties here in just a minute. But let's just specifically focus on those three first."

¶ 9 Defendant contested the 1986 Brevard, Florida, burglary, stating he did not take anything. He maintained it was a fist fight where he beat up the other person's $1,000 truck, which he said he paid for "ten times." When asked if he had been convicted of burglary in Florida, defendant stated, "They made it out. I had ten charges over that. He started the damn fight and then when I started to win, he ran away, so I beat up his pickup truck. *** They got me for burglary because I went in the house and got the key. I didn't take anything. I didn't break into the damn house."

¶ 10 When questioned about the DeKalb, Georgia, possession of cocaine conviction, defendant stated:

"I wasn't even in DeKalb County, Georgia. That's what I was trying to tell you. Somebody is using my [identification (ID)]. It starts right here in 1972 when actually if you check my date of birth[,] I was only 17. This was supposed to be an adult conviction. This says two felonies here in DeKalb County, Georgia. I was in California at that time. I was in the military. My time was not my own. I didn't have any money, any car, any driver's license, no way to go all the way to Florida and cop two felonies. So somebody was using my name and my date of birth as

an ID. They did the same thing to me in 1990 in DeKalb County, Georgia, and I'm glad you pointed that out to me because I'm going to sue the bejeezus out of somebody in DeKalb County, Georgia. They have been giving you false information for what, 22, 23 years. That ought to be worth something. As far as this other case that she mentions here of passing forged and a count of forgery, both felony charges of September 15th, 1986, that's not true either. I mean somebody, probably the guy I was fighting with, was using my ID again."

¶ 11 The trial court stated, for purposes of sentencing, it would consider defendant had only the following felony convictions: (1) a burglary conviction out of Brevard, Florida in 1986; (2) a first degree marijuana possession out of Covington, Alabama in 1990; and (3) although disputed by defendant, a 1990 felony conviction out of DeKalb County, Georgia for possession of cocaine.

¶ 12 The State noted defendant's sentencing range was 12 to 60 years. The State argued:

"With the offenses and evidence in this case, it's a little hard to recommend an exact sentence to this court as to what measures the balance of justice in a case like this. It's really just in the State's opinion how much is appropriate, because when you look at what our system is set to do, deter individuals, punish individuals, and rehabilitate individuals, those are the things that

this court has to look at. And what is unique in this case is that this defendant has outright told this court, you can't rehabilitate me. So we'll take that one off of the measuring scale.

And when you look at deterrence, he's made it clear from the beginning, that you can't deter him. He's a lifetime criminal. He's an individual that's only life profit was trafficking drugs. That was clear in this trial on [*sic*] during his cross-examination when he went through just how many miles he had put on his truck over the course of going back and forth.

* * *

*** And in his conversations that were recorded and offered here in court at the previous hearing, it was clear that he talked with Trooper Albin about basically what he does and why he does it. So, we're not going to deter him either."

The State argued, therefore, the purpose of the sentence was twofold, *i.e.*, punishment and deterrence of others from committing this type of crime. The State recommended 42 years in DOC.

¶ 13 Defendant argued:

"I have, time and time again, in writing and both approaching this court, I have a hard time respecting this individual (the assistant State's Attorney) who has taken it upon himself to remove items from the evidence and switched them

right before I walked out. *** He and these two officers who testified against me conspired and colluded with the guy who had control of my truck. They got together and refilmed those videos and used them, corrected them, took the time and text and data off of them so that they could switch the scenes, put in new scenes to lengthen them, so I'm supposed to respect that? He has no respect for the rule of law, and he's going to sit here and make comments about me, who hasn't even bothered to get to know me. He has only just basically used his position of authority as a means of screwing me to get a name for himself, a job, I don't know what, to preserve some type of quota.

This court has entertained this evidence as if it were real when it wasn't. I tried to—I tried to correct everyone. But no one would listen to me. Perhaps the appeals court will. This is certainly where it's going."

¶ 14 Defendant maintained he had been gainfully employed in the construction field until three years prior to this offense. He stated he only did what he did because he was broke; he had no job. Defendant blamed the United States government for letting millions of Mexicans cross the border and take jobs away from people like him. Defendant argued he was being punished for exercising his right to a jury trial, and he maintained the system had done all it could to interfere. Defendant argued, while the justice system should have proved he had a valid driver's license, it did not because it needed that charge to stick to prove the right to search his

truck.

¶ 15 The trial court noted it considered the PSI, the recommendations of the parties, defendant's statement, and all the relevant statutory factors in mitigation and aggravation. The court stated further:

> "Just a couple of very brief points to point out. First of all, we are talking about a case that involves the defendant having brought into the state some 60 pounds of illegal substance, that being cannabis, from another state. A serious offense, which is noted to be serious simply because of the fact the legislature has deemed the mandatory minimum penalties to be 12 years in [DOC] with a possible maximum of up to 60 years. So that in and of itself I think highlights the severity of how the State of Illinois views this case.
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> * * *
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> In addition to that, the defendant does have a prior criminal order, although, I would dispute a little bit [the assistant State's Attorney's] characterization of him as a lifetime criminal because the convictions, although serious, were some time ago, in fact, the most recent being, the most recent felony being in 1990, so over 20 years ago, and the last conviction itself, the misdemeanor in 1993. So I guess I understand the characterization, and I understand the insinuation and argument made about other trips, but [defendant] is

correct. The evidence here, he's only been convicted of this one incident, and no other convictions of any kind in the last 20 plus years. So, while this prior record is serious, while the court does think it should be thought of in aggravation, especially the fact that the defendant has three prior felony convictions, two of which are drug related, that would certainly suggest that aggravation.

* * *

However, the court thinks its weight was somewhat lessened by the length of time that passed since that. So I don't give it quite as much weight as I think the State would suggest here today.

I think I would be somewhat remiss if I didn't comment upon or remark upon the State's additional argument here that the defendant has by his conduct during this trial shown that he is someone who is likely not to be deterred himself and likely not to be rehabilitated. This court, as I've stated before, I'm an eternal optimist, I think all people can change, and I think all people can change their behavior. So I don't necessarily rule out the fact that the defendant can be—can or can not [*sic*] be rehabilitated. I think that's his choice to make, and I think he still has the right and the option to make that choice if he should choose to abide by the laws of society, but I would certainly concur in the observation that

based on his conduct throughout the case, the confidence in his willingness to be rehabilitated and to follow the laws of society are not very great."

The court noted, although defendant made it very difficult, he had received fair treatment throughout the case by the court, the State, and the police. For those reasons the court found there was certainly merit to the State's argument deterrence and rehabilitation for this defendant was not likely to occur no matter what sentence was imposed. Consequently, deterrence of others and punishment of defendant became the overriding goals of sentencing in this case and merited a sentence above that which might otherwise be considered appropriate. Thereafter, on count III (cannabis trafficking) the court sentenced defendant to 22 years in DOC with 541 days of sentence credit for time served and merged the other two counts with count III.

¶ 16 The trial court advised defendant it was going to explain his rights of appeal and how to exercise those rights. The court suggested defendant listen carefully and advised it would answer any questions defendant might have. Thereafter, the court admonished defendant he had the right to appeal and in order to do so, he (1) was required to file a notice of appeal within 30 days, (2) could request the clerk prepare and file that notice of appeal, (3) was entitled to transcripts of the proceedings at no cost, and (4) was entitled to appointment of counsel on appeal without cost.

¶ 17 The trial court further advised defendant as follows:

"Now before taking an appeal, if you want to challenge the sentence that was just imposed, the 22-year sentence, or any aspect of this hearing today, then you must first, before any appeal, you

must file in the trial court within 30 days of today a written motion asking the court to reconsider the sentence imposed or to consider any challenge to the sentencing hearing.

That motion must be in writing and must set forth in it all issues or claims of error regarding the sentence imposed or the sentencing hearing.

Any issue or claim of error regarding the sentence imposed or any aspect of the sentencing hearing that is not raised in that written motion to reconsider shall be deemed to be waived.

* * *

Now, those are your appeal rights. That's the process. I know—I'm very well aware that you want to appeal, sir, absolutely. I want to make sure that that occurs for you. But I want to make sure you understand that if you want to appeal this sentence as a part of that appeal, then before you file a notice of appeal, you have to file that motion to reconsider sentence, and that would have to be within 30 days. Do you understand that?

* * *

All right, sir I want to make sure you understand the first thing you have to do is file that motion to reconsider the sentence, and that has to be within 30 days of today.

[DEFENDANT]: I'll make one up tonight."

¶ 18 On May 6, 2013, defendant filed a notice of appeal and a motion to reconsider his sentence. In the motion to reconsider his sentence, defendant alleged, *inter alia*, the court "refused to accept the *FACT* that this defendant was not in DeKalb County, Georgia in 1990, was *not* convicted of possession of cocaine, because someone else was pretending to be *this* defendant." (Emphases in original.) On June 6, 2013, this court granted defendant's motion to dismiss the appeal. That same day, defendant filed a motion to strike his motion for reconsideration of his sentence. He alleged, "defendant has no reason to believe, or expect, this judge to rule favorably in this or any matter concerning him" and indicated "this sentence is appealable because the circuit court used, and referred to a [PSI] that was replete with errors, and falsehoods, concerning the defendant's prior convictions." Defendant sought to rescind the motion and indicated he would raise the issues on appeal. This court granted leave to file a late notice of appeal.

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 On appeal, defendant contends the trial court erred procedurally by relying on a disputed third prior felony conviction listed in the PSI. Defendant further contends he is entitled to a new sentencing hearing because he was actually not the person who was convicted of the prior offense and it is not obvious from the record the court's reliance on this wrongfully-attributed conviction did not contribute to the length of his sentence.

¶ 22 Defendant sought, and this court granted, leave to file a motion for judicial notice of public records, asking this court to take notice of a certified copy of public records from DeKalb County, Georgia, in case No. 91-CF-3340, indicating the "Charles Hamilton" who was

convicted of felony possession of cocaine in that court in 1990 was a black male who was born on July 1, 1949. Defendant also asked this court to take judicial notice of his publicly available inmate profile from DOC's website, which describes defendant as a white male born November 26, 1954.

¶ 23 Both defendant and the State maintain defendant has forfeited this argument on appeal. However, defendant actually waived this argument on appeal.

¶ 24 "The common law doctrine of waiver bars a claim that could have been presented previously." *People v. Phipps*, 238 Ill. 2d 54, 62, 933 N.E.2d 1186, 1191 (2010). Waiver is distinct from forfeiture. *Id.* Forfeiture applies to issues that could have been raised but were not, while waiver is the voluntary relinquishment of a known right. *Id.* As noted by the supreme court in *People v. Blair*, 215 Ill. 2d 427, 444 n.2, 831 N.E.2d 604, 615 n.2 (2005), " 'Whereas forfeiture is the failure to make the timely assertion of the right, waiver is the "intentional relinquishment or abandonment of a known right." ' " (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). In determining whether a legal claim has been waived, courts examine the particular facts and circumstances of the case and construe waiver principles liberally in favor of the defendant. *Phipps*, 238 Ill. 2d at 62, 933 N.E.2d at 1191. The distinction between forfeiture and waiver is an important one, because if defendant has waived the issue, we need not review his claim for plain error. *People v. Scott*, 2015 IL App (4th) 130222, ¶ 21, ___ N.E.3d ___. Plain-error analysis applies to cases involving procedural default, not affirmative acquiescence. *People v. Bowens*, 407 Ill. App. 3d 1094, 1101, 943 N.E.2d 1249, 1258 (2011).

¶ 25 Illinois Supreme Court Rule 605(a)(3) (eff. Oct. 1, 2001) requires the trial court to admonish a defendant, before he can appeal his sentence or any aspect of the sentencing hearing,

within 30 days of the imposition of sentence he must file a written motion in the trial court asking the court to reconsider the sentence imposed or consider any challenges to the sentencing hearing. In that motion, a defendant must set forth all issues or claims of error regarding the sentence or the sentencing hearing and any issue or claim of error regarding the sentence imposed. Any aspect of the sentencing hearing not raised in the written motion shall be deemed waived. Ill. S. Ct. R. 605(a)(3) (eff. Oct. 1, 2001).

¶ 26 Further, section 5-4.5-50(d) of the Unified Code of Corrections (730 ILCS 5/5-4.5-50(d) (West 2010)) provides, in pertinent part, "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." "It is well settled that, to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required." *People v. Hillier*, 237 Ill. 2d 539, 544, 931 N.E.2d 1184, 1187 (2010). One purpose of this rule is to allow the trial court "an opportunity to review a defendant's claim of sentencing error and save the delay and expense inherent in appeal if the claim is meritorious." *People v. Heider*, 231 Ill. 2d 1, 18, 896 N.E.2d 239, 249 (2008).

¶ 27 In the case *sub judice*, at the sentencing hearing, defendant denied he was the person who committed the 1990 DeKalb County, Georgia, offense. After sentencing defendant, the trial court explicitly and repeatedly advised defendant he had to file a motion to reconsider his sentence in order to preserve any issues he had with the sentence or sentencing proceedings for appeal. When asked if he understood, defendant responded, "I'll make one up tonight." Defendant filed a motion to reconsider his sentence, in which he raised, among others, the issue of the DeKalb County, Georgia, conviction. However, defendant elected to strike his motion to

reconsider his sentence despite the court's multiple, careful admonishments about how to preserve sentencing issues for appeal. Defendant maintains he forfeited this issue by striking his motion to reconsider his sentence. However, he asks this court to relax the forfeiture rule because his failure to file the postsentencing motion was due to his "apparent haste and confusion over the proper procedure for preserving issues for appeal."

¶ 28 *Pro se* litigants, such as defendant in this case, are not entitled to more lenient treatment than attorneys. "[W]here a defendant elects to proceed *pro se*, he is responsible for his representation and is held to the same standards as an attorney." *People v. Richardson*, 2011 IL App (4th) 100358, ¶ 12, 961 N.E.2d 923. Illinois courts have strictly adhered to this principle, noting a "*pro se* litigant must comply with the rules of procedure required of attorneys, and a court will not apply a more lenient standard to *pro se* litigants." *People v. Fowler*, 222 Ill. App. 3d 157, 163, 583 N.E.2d 686, 691 (1991).

¶ 29 Defendant's claim of "haste and confusion over the proper procedure for preserving issues for appeal" is not well taken. The trial court complied with the required admonishments regarding preservation of sentencing issues for appeal. The court painstakingly explained the need for defendant to file a motion to reconsider his sentence if defendant wanted to challenge his sentence on appeal. Defendant demonstrated his understanding of the admonishments by filing a timely motion to reconsider. Thereafter, defendant chose to strike his motion to reconsider, the very motion he was told he needed to file in order to preserve a sentencing issue for appeal. Defendant has, therefore, waived, not forfeited, this issue for appeal.

¶ 30 Defendant urges this court to consider the issue under the plain-error doctrine. However, as discussed above, plain-error review does not apply to waiver. Defendant knowingly

gave up the right to appeal his sentencing issue by affirmatively and intentionally striking the requisite written motion to reconsider his sentence, which would have preserved the issue for appeal. By waiving any sentencing error, he has relinquished any opportunity for plain-error review.

¶ 31 III. CONCLUSION

¶ 32 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. 55 ILCS 5/4-2002 (West 2012).

¶ 33 Affirmed.