

NOTICE

Decision filed 03/25/15. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2015 IL App (5th) 130106-U

NO. 5-13-0106

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Williamson County.
)	
v.)	No. 07-CF-570
)	
BARBARA GARNER,)	Honorable
)	John Speroni,
Defendant-Appellant.)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Presiding Justice Cates and Justice Moore concurred in the judgment.

ORDER

¶ 1 *Held:* No errors occurred during the defendant's sentencing hearing that affected the fairness of the sentencing hearing or challenged the integrity of the judicial process. Accordingly, the defendant has not established a basis for reversing the sentence under the plain error rule.

¶ 2 The defendant, Barbara Garner, pled guilty to possession of methamphetamine. The circuit court initially sentenced the defendant to 30 months of probation. The defendant violated the terms of her probation by committing retail theft, and the court granted the State's request to revoke her probation. Upon revoking the defendant's probation, the circuit court sentenced the defendant to five years in the Illinois Department of Corrections. On appeal, the defendant requests that we reverse the circuit

court's sentence and remand for a new sentencing hearing because the court incorrectly found that there were no mitigating factors and that she was not likely to comply with the terms of probation. For the following reasons, we affirm the defendant's sentence.

¶ 3

BACKGROUND

¶ 4 The defendant's conviction of possession of methamphetamine stems from a traffic accident that resulted in her arrest for driving under the influence of drugs. During a search incident to her arrest, a police officer with the Marion police department found a spoon that contained methamphetamine residue in a purse inside the defendant's vehicle. This spoon resulted in the separate charge of possession of methamphetamine, which is the subject matter of the present appeal.¹

¶ 5 On May 26, 2010, the parties appeared in court, and the defendant entered into an open plea of guilty to the possession of methamphetamine charge. In exchange for the plea, the State agreed not to seek an extended term sentence and to cap its sentence recommendation at five years in the Department of Corrections. At the sentencing hearing, the State agreed to recommend 30 months of probation with several conditions, including that the defendant not violate any criminal statute during her probation. The court agreed with the State's recommendation and sentenced the defendant to 30 months of probation.

¹The record reflects that in a separate proceeding, after a stipulated bench trial, the circuit court found the defendant not guilty of driving under the influence of drugs.

¶ 6 Before the defendant completed the period of probation, the State charged her with the offense of retail theft and filed a petition to revoke her probation. The State alleged that on May 28, 2012, the defendant committed retail theft by stealing Energizer batteries from the Kroger located in Marion, Illinois. On November 29, 2012, the parties appeared in court, and the defendant entered into an open admission to the allegations set forth in the State's petition to revoke her probation. At that time, the court advised her that she was eligible for an extended term sentence of up to 10 years' imprisonment.

¶ 7 On January 31, 2013, the circuit court conducted the sentencing hearing. At the hearing, the defendant testified that she had been tested for drug use for the past 18 months and had not had a positive test during that time. She stated that the batteries that she stole were not the type of batteries that are used in the manufacture of methamphetamine. When asked why she took the batteries, she testified that she did not know, that it was an irresponsible and selfish act, and that she was very impulsive. She emphasized, however, that she was not doing drugs or trying to get drugs at the time and that she had completed drug counseling while on probation. She admitted that she had been given probation in the past that she had not successfully completed.

¶ 8 After considering the testimony presented at the sentencing hearing, arguments of counsel, and the presentencing report, the circuit court sentenced the defendant to five years in the Department of Corrections. The court stated that, in determining the proper sentence, it found that there were no mitigating factors. The court further stated:

"[O]ne of the mitigating factors is whether a defendant is particularly likely to comply with the terms of probation. The exact opposite is true here. She's

never complied with probation. She's always failed at it. I cannot find that the character and attitudes of the defendant indicate that she would be unlikely to commit another crime. She's been committing crimes her whole life."

¶ 9 The court stated that it believed there was "absolutely no realistic chance" that the defendant would successfully complete probation because she had never done so in the past. The defendant filed a motion to reconsider the sentence, which the circuit court denied. The defendant now appeals her sentence.

¶ 10 ANALYSIS

¶ 11 On appeal, the defendant argues that the circuit court improperly found that no mitigating factors existed. Section 5-5-3.1(a) of the Unified Code of Corrections (730 ILCS 5/5-5-3.1(a) (West 2012)) sets out statutory mitigating factors that a sentencing court must consider. The defendant notes that those mitigating factors include that "[t]he defendant's criminal conduct neither caused nor threatened serious physical harm to another" and that "[t]he defendant did not contemplate that [her] criminal conduct would cause or threaten serious physical harm to another." The statute provides that these grounds "shall be accorded weight in favor of withholding or minimizing a sentence of imprisonment." 730 ILCS 5/5-5-3.1(a) (West 2012).

¶ 12 The defendant argues that her possession of methamphetamine did not cause or threaten serious physical harm to another and that she did not contemplate that her possession of methamphetamine would cause or threaten serious physical harm to another. Therefore, she argues that, as a matter of law, the circuit court should have

weighed these two mitigating factors in her favor. The circuit court, however, found that no mitigating factors existed in her favor.

¶ 13 The State notes that the defendant failed to raise this contention in her motion to reconsider her sentence and concludes that the defendant, therefore, has waived this argument. Under section 5-4.5-50(d) of the Unified Code of Corrections, a defendant must file a written motion with the trial court to challenge either the correctness of a sentence or an aspect of the sentencing hearing. 730 ILCS 5/5-4.5-50(d) (West 2012). To preserve sentencing issues for review on appeal, the issues must be raised in a defendant's motion to reconsider the sentence filed with the trial court. *People v. Reed*, 177 Ill. 2d 389, 393, 686 N.E.2d 584, 586 (1997). Any issues not raised before the trial court are forfeited. *People v. Rathbone*, 345 Ill. App. 3d 305, 310, 802 N.E.2d 333, 337 (2003).

¶ 14 In the present case, the defendant filed a motion to reconsider her sentence with the circuit court. However, in her motion, the defendant only argued that her sentence was excessive and was an abuse of discretion. The defendant did not argue that the circuit court failed to consider any specific statutory mitigating factors.

¶ 15 In response to the State's waiver argument, the defendant asks us to review her argument under the plain error rule. "[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and

challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007). Under either prong, the defendant has the burden of persuasion, and if she fails to meet that burden, the procedural default will be applied. *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184, 1187-88 (2010).

¶ 16 In the present case, we cannot reverse the circuit court's sentence under the standards of the plain error rule. The plain error rule is not a general saving clause for alleged errors, but is designed to redress serious injustices. *People v. Olson*, 241 Ill. App. 3d 488, 492-93, 608 N.E.2d 913, 917 (1993). "[I]t is construed as a narrow and limited exception to the typical forfeiture rule applicable to unpreserved claims." *People v. Johnson*, 238 Ill. 2d 478, 484-85, 939 N.E.2d 475, 479-80 (2010).

¶ 17 The supreme court has recently held that in order to obtain relief under the second prong of the plain error rule, the defendant must demonstrate not only that a clear or obvious error occurred, but that the error was a structural error. *People v. Eppinger*, 2013 IL 114121, ¶ 19, 984 N.E.2d 475. A structural error is a systemic error that serves to erode the integrity of the judicial process and undermine the fairness of the defendant's trial. *People v. Thompson*, 238 Ill. 2d 598, 613-14, 939 N.E.2d 403, 413 (2010).

¶ 18 Our review of all of the sentencing judge's comments in their entirety in light of the record of the sentencing hearing does not reveal any errors so fundamental or serious as to rise to the level of plain error. The record shows that at the sentencing hearing, the court heard testimony from both the defendant and her daughter with respect to her drug rehabilitation efforts as well as arguments from her attorney. The court did not make its

sentencing determination the same day of the hearing, but continued the sentencing hearing to the following day so that it could have an opportunity to consider the testimony and arguments in light of the presentencing report.

¶ 19 When the court reconvened the following day, it articulated a detailed basis for its decision with respect to the defendant's sentence. The circuit court noted that the presentencing report showed that the defendant has had numerous criminal charges in her past, along with multiple opportunities to comply with probation and parole in conjunction with those charges, but has never been able to comply. The court considered the defendant's "significant criminal history" and stated that she had been given "every opportunity" to straighten out. The court stated that it had never "seen anybody have as many opportunities" to straighten out as the defendant has received. The court stated that it was going to give her credit in sentencing for her successful completion of drug rehabilitation and her maintained sobriety, but the court ultimately concluded that there was not a realistic chance that she could successfully complete probation given her past failures.

¶ 20 The presentencing report that the trial court considered supports its observations with respect to the defendant's criminal history. It shows that the defendant's juvenile and adult criminal record includes charges and convictions for numerous criminal activities, including criminal damage to property, burglary, multiple convictions for retail theft, unlawful possession of controlled substance, criminal drug conspiracy, and obstructing justice. The presentencing report supports the circuit court's observation that the defendant has been given numerous opportunities to straighten out her life, has never

been able to successfully complete probation, and was unlikely to be able to do so at the time of sentencing. Under these facts, the evidence presented at the sentencing hearing was not closely balanced, and the circuit court's sentence of five years' imprisonment was not a clear or obvious structural error.

¶ 21 On appeal, the defendant concedes that she has an extensive history of drug-related offenses, but argues that the court failed to consider her more promising recent history as a mitigating factor, including her successful completion of a drug rehabilitation program. Although the trial court stated that there were no mitigating factors, the record shows that the court did give the defendant credit during sentencing for completing the drug rehabilitation program and maintaining her sobriety and weighed that evidence in her favor. The court specifically noted those factors as being favorable to the defendant. In reviewing the circuit court's sentence, we must focus on the entire record as a whole, not on a few words or statements. *People v. Ward*, 113 Ill. 2d 516, 526-27, 499 N.E.2d 422, 426 (1986).

¶ 22 Nothing in the record evidences a serious injustice incurred during the sentencing. Evidence relevant to the defendant's sentencing was not closely balanced and, in light of the entire record of the sentencing hearing, the defendant's claimed errors were not so fundamental or of such magnitude that they affected the fairness of the sentencing hearing or challenged the integrity of the judicial process. Accordingly, the defendant has not established any plain error that would justify reversing her sentence and remanding for a new sentencing hearing.

¶ 23

CONCLUSION

¶ 24 For the foregoing reasons, we affirm the defendant's sentence.

¶ 25 Affirmed.