2019 IL App (4th) 170084

NO. 4-17-0084

FILED
May 16, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
EMILIO SOLIS,	)	No. 15CF583
Defendant-Appellant.	)	
	)	Honorable
	)	Nancy S. Fahey,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court, with opinion.
Presiding Justice Holder White and Justice Cavanagh concurred in the judgment and opinion.

OPINION

¶ 1 In September 2015, the State charged defendant, Emilio Solis, by information with one count of methamphetamine possession (720 ILCS 646/60(b)(3) (West 2014)) and one count of methamphetamine delivery (720 ILCS 646/55(a)(2)(C) (West 2014)). After a September 2016 trial, a jury found defendant guilty of both charges. Defendant filed a timely motion for a judgment notwithstanding the verdict or a new trial. At a November 2016 hearing, the Vermilion County circuit court sentenced defendant to 10 years' imprisonment for methamphetamine possession and 18 years' imprisonment for methamphetamine delivery but found the methamphetamine possession charge merged with the methamphetamine delivery charge. Defendant filed a motion to reconsider his sentence. After a January 2018 hearing, the court denied both defendant's posttrial motion and motion to reconsider his sentence.

¶ 2 Defendant appeals, arguing the circuit court erred by (1) denying him day-for-day credit against his sentence, (2) denying him a fair sentencing hearing, and (3) awarding him monetary credit against his fines. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The charges in this case pertained to defendant's actions on September 23, 2015, and asserted defendant possessed or delivered more than 15 grams but less than 100 grams of methamphetamine.

¶ 5 The evidence at defendant's September 2016 jury trial showed a confidential informant notified the Vermilion County Metropolitan Enforcement Group, a special police task force working on drug cases in the Vermilion County area, he could buy crystal methamphetamine from defendant. The police officers with the task force had the confidential informant set up a controlled buy of methamphetamine from defendant. The informant testified defendant agreed to get him an ounce of methamphetamine for $1250, which the police provided to the informant. The police officers observed the informant pick up defendant and drive to Walmart and then Casey's General Store. The informant gave defendant the $1250 at the Casey's General Store when they arrived. Eventually, defendant received a call and then drove the informant's car from Casey's General Store without the informant.

¶ 6 Defendant went to another location where he met with his codefendant, J Yunior Sanchez-Perez. Sanchez-Perez left the meeting in his car and went to his home, while defendant remained at the location. Sanchez-Perez returned to defendant's location. After a few minutes, Sanchez-Perez pulled away in his car, and defendant left in the informant's car. Defendant then drove back to the Casey's General Store, where the informant had been waiting somewhere between 30 and 60 minutes. The informant got into the passenger side of the informant's car, and

defendant drove away. Defendant stopped in an old shopping mall. The informant and defendant switched seats, and defendant handed the informant a bag, which the informant put in his pocket. The informant drove away with defendant in the vehicle.

¶ 7 The police later stopped the informant's car and recovered 33 grams of methamphetamine from the informant's person. The police also found $42 on defendant's person, of which $40 was the money the officers gave the informant for the drug buy.

¶ 8 At the conclusion of the trial, the jury found defendant guilty of both charges. Defendant filed a timely motion for a judgment notwithstanding the verdict or a new trial.

¶ 9 On November 26, 2016, the circuit court held defendant's sentencing hearing. Both the prosecutor and defense counsel noted defendant's significant criminal history. Defense counsel contended the factors in mitigation were defendant's actions did not cause or threaten physical harm to another and defendant had mental impairments. Additionally, defense counsel disagreed with the prosecutor that defendant must serve his sentence at 75%. Defense counsel contended defendant should receive day-for-day sentencing credit.

¶ 10 The circuit court disagreed with defense counsel's contention defendant's conduct did not cause injury to another person, noting the drug itself causes injury to other people. The court next noted defendant had been involved in criminal activity with drugs for years and knew it was wrong. It then said the following:

> "So when I look at the factors in mitigation, I do not find any factors in mitigation that pertain to this case. When I look at factors in aggravation, I find that your conduct caused or threatened serious harm, that you received compensation for committing the offense, that you have a prior delinquency or criminal activity, and that the sentence is necessary to deter others from

committing the same crime."

The court further stated that, due to the nature and circumstances of the offense and defendant's history and character, defendant should not receive probation on the methamphetamine possession charge and noted probation was not an option for the methamphetamine delivery charge. The court then sentenced defendant to prison terms of 10 years for methamphetamine possession and 18 years for methamphetamine delivery. However, it found the methamphetamine possession charge merged with the methamphetamine delivery charge. Additionally, the court agreed with the State the methamphetamine delivery sentence should be served at 75%.

¶ 11 Defendant filed a timely motion to reconsider his sentence, asserting the circuit court erred by (1) ordering defendant to serve his methamphetamine delivery sentence at 75%, (2) failing to give appropriate weight to the mitigating factor of excessive hardship on the family, (3) finding no mitigation factors favored minimizing the term of imprisonment, and (4) finding the aggravating factor of defendant's conduct caused or threatened harm applied in this case where only societal harm existed which was part of the offense. After a January 27, 2017, hearing, the circuit court denied both defendant's motion to reconsider and his motion of a new trial.

¶ 12 On January 30, 2017, defendant filed a timely notice of appeal that listed the appealed judgment date of January 30, 2017. On February 21, 2017, defendant filed a timely amended notice of appeal, listing the appealed date of January 27, 2017, and the appealed judgment as defendant's conviction, sentence, and denial of the motion to reconsider sentence. See Ill. S. Ct. R. 606(d) (eff. Dec. 11, 2014); R. 303(b)(5) (eff. Jan. 1, 2015). Thus, we have jurisdiction under Illinois Supreme Court Rule 603 (eff. Feb. 6, 2013).

¶ 13 II. ANALYSIS

¶ 14 A. Day-For-Day Sentencing Credit

¶ 15 Defendant first asserts the circuit court erred by ordering him to serve his sentence for methamphetamine delivery of more than 15 grams but less than 100 grams at 75%, instead of him being entitled to day-for-day sentencing credit. The State concedes the error. We agree with the parties.

¶ 16 In this case, the circuit court ordered defendant to serve his prison term at 75% under section 3-6-3(a)(2)(v) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/3-6-3(a)(2)(v) (West 2014)), which provides the following:

> "[A] person serving a sentence for gunrunning, narcotics racketeering, controlled substance trafficking, methamphetamine trafficking, drug-induced homicide, aggravated methamphetamine-related child endangerment, money laundering pursuant to clause (c) (4) or (5) of Section 29B-1 of the Criminal Code of 1961 or the Criminal Code of 2012, or a Class X felony conviction for delivery of a controlled substance, possession of a controlled substance with intent to manufacture or deliver, calculated criminal drug conspiracy, criminal drug conspiracy, street gang criminal drug conspiracy, participation in methamphetamine manufacturing, aggravated participation in methamphetamine manufacturing, delivery of methamphetamine, possession with intent to deliver methamphetamine, aggravated delivery of methamphetamine, aggravated possession with intent to deliver methamphetamine, methamphetamine conspiracy *when the substance containing the controlled substance or methamphetamine is 100 grams or more* shall receive no more than 7.5 days sentence credit for each

month of his or her sentence of imprisonment[.]" (Emphasis added.)

Defendant contends the "when the substance containing the controlled substance or methamphetamine is 100 grams or more" provision applies to all the drug offenses listed after the "or a Class X felony conviction for" language, which would include methamphetamine delivery. The State agrees with defendant's interpretation of the language and concedes section 3-6-3(a)(2)(v) of the Unified Code does not apply to defendant's conviction, which was for methamphetamine delivery of less than 100 grams. It also notes the legislative history supports the parties' interpretation.

¶ 17 The fundamental rule of statutory construction requires courts to ascertain and give effect to the legislature's intent. *People v. Bradford*, 2016 IL 118674, ¶ 15, 50 N.E.3d 1112. The statutory language, given its plain and ordinary meaning, best indicates the legislature's intent. *Bradford*, 2016 IL 118674, ¶ 15. When the statutory language is clear and unambiguous, a court must give effect to the statute's plain meaning without resorting to extrinsic statutory construction aids. *Bradford*, 2016 IL 118674, ¶ 15. Courts must construe the statute's words and phrases in light of other relevant provisions and not in isolation. *Bradford*, 2016 IL 118674, ¶ 15. Moreover, "[e]ach word, clause, and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous." *Murphy-Hylton v. Lieberman Management Services, Inc.*, 2016 IL 120394, ¶ 25, 72 N.E.3d 323. Additionally, they "may consider the reason for the law, the problems to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another." *Bradford*, 2016 IL 118674, ¶ 15.

¶ 18 We agree with the parties the "when the substance containing the controlled substance or methamphetamine is 100 grams or more" language applies to all of the offenses listed after "or a Class X felony conviction for" language. To hold otherwise would render "the

controlled substance" language meaningless as the last listed offense, methamphetamine conspiracy, involves only methamphetamine. Thus, that offense standing alone would not require "the controlled substance" language. The entire list of offenses at issue includes those specific to methamphetamine, as well as other offenses that apply to any controlled substance. Accordingly, under the plain language of section 3-6-3(a)(2)(v) of the Unified Code, the 75% truth-in-sentencing statute only applies to the offense of methamphetamine delivery when the offense involves more than 100 grams of methamphetamine. Since the plain language of the statute is not ambiguous, we do not examine the legislative history. See *Bradford*, 2016 IL 118674, ¶ 15.

¶ 19 In defendant's case, the amount of methamphetamine was less than 100 grams. Thus, defendant was not subject to the 75% truth-in-sentencing statute. Therefore, on remand, the circuit court should amend the sentencing judgment to reflect defendant is entitled to day-for-day sentencing credit for his methamphetamine delivery conviction. See 730 ILCS 5/3-6-3(a)(2.1) (West 2014).

¶ 20 B. Sentencing Factors

¶ 21 Defendant next contends the circuit court improperly considered at sentencing the fact the offense threatened serious harm and defendant received compensation from the offense because those factors are inherent in the offense. He also asserts the court erred by finding no mitigating factors applied. The State disagrees.

¶ 22 1. *Mitigating Factors*

¶ 23 A circuit court has wide latitude in both determining and weighing factors in mitigation and aggravation when exercising its discretion and imposing sentence, and this court gives the circuit court's ruling great weight and deference. *People v. Madura*, 257 Ill. App. 3d 735, 740, 629 N.E.2d 224, 228 (1994). When the imposed sentence falls within the statutory

sentencing range, as in this case, this court will not disturb it unless its imposition constitutes an abuse of discretion. *Madura*, 257 Ill. App. 3d at 740.

¶ 24 Section 5-5-3.1(a) of the Unified Code (730 ILCS 5/5-5-3.1(a) (West 2014)) lists factors for which the circuit court accords "weight in favor of withholding or minimizing a sentence of imprisonment." Defendant argues the circuit court should have found the following three mitigating factors applied in his case: (1) his mental capabilities were a substantial ground tending to excuse or justify his criminal conduct (730 ILCS 5/5-5-3.1(a)(4) (West 2014)), (2) his imprisonment would entail excessive hardship on his family (730 ILCS 5/5-5-3.1(a)(11) (West 2014)), and (3) his imprisonment would endanger his medical condition (730 ILCS 5/5-5-3.1(a)(12) (West 2014)). However, defendant only presented evidence of the first aforementioned mitigating factor. The presentence investigation report alone did not establish defendant's imprisonment would in fact endanger his medical condition or place a hardship on defendant's son, who lives with his mother and for which no child-support order was in place. As to the first alleged mitigating factor, the court considered the evidence related to defendant's mental ability and found the statutory mitigating factor did not apply because defendant knew right from wrong. The court's conclusion was supported by the evidence. Thus, we find the court did not err by finding no mitigating factors applied in defendant's case.

¶ 25 2. *Improper Aggravating Factors*

¶ 26 Whether the circuit court relied on an improper factor in imposing the defendant's sentence presents a question of law, which we review *de novo*. *People v. Williams*, 2018 IL App (4th) 150759, ¶ 18, 99 N.E.3d 590. This court has recognized a strong presumption exists the circuit court based its sentencing determination on proper legal reasoning. *Williams*, 2018 IL App (4th) 150759, ¶ 18. In reviewing the circuit court's sentencing, we consider the record as a

whole, rather than focusing on a few words or statements by the circuit court. *Williams*, 2018 IL App (4th) 150759, ¶ 18. The defendant bears the burden of affirmatively establishing his or her sentence was based on improper considerations. *Williams*, 2018 IL App (4th) 150759, ¶ 18.

¶ 27 Section 5-5-3.2(a) of the Unified Code (730 ILCS 5/5-5-3.2(a) (West 2014)) lists factors the circuit court may consider as reasons to impose a more severe sentence. However, a circuit court cannot consider a factor inherent in the offense as an aggravating factor at sentencing. *People v. Palmer-Smith*, 2015 IL App (4th) 130451, ¶ 29, 29 N.E.3d 95. In this case, the circuit court expressly stated it found the following four aggravating factors applied in defendant's case: (1) "the defendant's conduct caused or threatened serious harm," (2) "the defendant received compensation for committing the offense," (3) "the defendant has a history of prior delinquency or criminal activity," and (4) "the sentence is necessary to deter others from committing the same crime." 730 ILCS 5/5-5-3.2(a)(1), (a)(2), (a)(3), (a)(7) (West 2014)).

¶ 28 As to the threat of serious harm factor, we note defendant raised this issue in the circuit court, and thus it is not forfeited. Since it is well recognized drugs and drug-related crimes cause great harm to society, the record must demonstrate the defendant's conduct resulted in a greater propensity to cause harm than that which is merely inherent in the offense itself. *People v. McCain*, 248 Ill. App. 3d 844, 852, 617 N.E.2d 1294, 1300 (1993). However, in this case, defense counsel asserted the first two statutory mitigating factors applied, which are (1) "[t]he defendant's criminal conduct neither caused nor threatened serious physical harm to another" and (2) "[t]he defendant did not contemplate that his criminal conduct would cause or threaten serious physical harm to another." 730 ILCS 5/5-5-3.1(a)(1), (a)(2) (West 2014)). Thus, the court's finding was in response to defense counsel's argument and was essentially an emphasis the first two mitigating factors were inapplicable.

¶ 29 Regarding the compensation factor, defendant failed to raise it in the circuit court and seeks review under the plain error doctrine (see Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)). Sentencing errors raised for the first time on appeal are reviewable as plain error if (1) the evidence at the sentencing hearing was so closely balanced that the error alone threatened to tip the scales of justice against the defendant or (2) the error was sufficiently grave that it deprived the defendant of a fair sentencing hearing. *People v. Scott*, 2015 IL App (4th) 130222, ¶ 41, 25 N.E.3d 1257. "Under both prongs of the plain-error doctrine, the defendant has the burden of persuasion." *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184, 1187 (2010).

¶ 30 "[C]ompensation is an implicit factor in most drug transactions," and generally courts may not consider it as an aggravating factor. *McCain*, 248 Ill. App. 3d at 851. However, in this case, the circumstantial evidence indicates defendant was the middleman. Defendant told the informant he could get methamphetamine for him. Defendant received the $1250 from the informant and then obtained the methamphetamine from Sanchez-Perez. When the police stopped the informant's car, defendant had only $40 of the $1250 on his person. Thus, the evidence indicates defendant did not receive the proceeds of the sale but rather was just compensated for delivering the drugs to the informant. We therefore agree with the State defendant was compensated for his role in the offense outside of what is inherent in the offense. Accordingly, we find the circuit court did not err by considering compensation as an aggravating factor under the circumstances of this case.

¶ 31 Moreover, even if the court erred by considering compensation as an aggravating factor, defendant fails to establish plain error. Defendant's first prong argument is based on his contention the circuit court overlooked several mitigating factors. However, we have already found the court's finding of no mitigating factors applied in defendant's case was not improper.

Moreover, a review of the evidence at defendant's sentencing hearing does not show the mitigating and aggravating evidence was closely balanced as alleged by defendant. Thus, defendant has failed to satisfy the first prong of the plain error doctrine.

¶ 32 As to the second prong, defendant simply rests on the fact the court considered compensation as an aggravating factor which was inherent in the offense. However, remand is not automatically warranted when a circuit court has considered an improper sentencing factor. *Scott*, 2015 IL App (4th) 130222, ¶ 53. Since defendant fails to argue how he was specifically denied a fair sentencing hearing, we find defendant also failed to satisfy the second prong of the plain error doctrine.

¶ 33 Additionally, we note that, even if the circuit court improperly noted the threat of serious harm as an aggravating factor as well, defendant did not establish plain error. Defendant again relies on the mere fact the court mentioned the factor when listing all of the aggravating factors to establish plain error under the second prong.

¶ 34 C. *Per Diem* Credit

¶ 35 Defendant last asserts he should be awarded the $5-per-day credit under section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2014)) against his fines in this case. The State concedes defendant is entitled to the credit. However, since the parties filed their briefs in this case, the supreme court has issued new rules. Illinois Supreme Court Rule 472(a)(2) (eff. Mar. 1, 2019) provides the circuit court retains jurisdiction to correct errors in the application of the *per diem* credit against fines at any time following judgment, including during the pendency of an appeal. Thus, we decline to address this issue on appeal.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we affirm the Vermilion County circuit court's judgment, except we vacate that portion of the court's sentencing judgment requiring defendant to serve his methamphetamine delivery sentence at 75%. We remand the cause for the entry of an amended sentencing judgment consistent with this opinion. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 38 Affirmed in part and vacated in part; cause remanded with directions.