2022 IL App (3d) 210342-U

Order filed November 15, 2022

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2022

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. PATRICK G. FOSTER, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of the 13th Judicial Circuit, La Salle County, Illinois, Appeal No. 3-21-0342 Circuit No. 17-CF-494 Honorable Cynthia M. Raccuglia, Judge, Presiding.

JUSTICE HAUPTMAN delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant did not receive ineffective assistance of counsel. The court erred by sentencing defendant to an extended-term sentence on a Class 3 felony.

¶ 2 Defendant, Patrick G. Foster, appeals his sentences. Defendant argues that counsel was ineffective for not asking the La Salle County circuit court to reconsider his sentence based upon recent changes to the sentencing statutes. He further argues that the court erred by sentencing him to an extended-term sentence on his Class 3 felony conviction when it is a less serious offense than his Class 2 felony conviction. We affirm as modified.

¶ 3 I. BACKGROUND

¶ 4 On May 15, 2018, defendant pled guilty to: (1) unlawful failure to register as a sex offender, a Class 2 felony (730 ILCS 150/6, 10(a) (West 2016)) for failing to report within three days of changing his address, having previously been convicted of a violation of the Sex Offender Registration Act, and (2) unlawful failure to register as a sex offender, a Class 3 felony (*id.*) for knowingly providing false material information by telling an officer his address had not changed. The plea did not include an agreement as to sentencing. In accepting the plea, the court noted that the Class 2 felony would be sentenced as a Class X felony due to defendant's criminal history such that defendant faced 6 to 30 years' imprisonment. It further noted that the sentencing range for the Class 3 felony was 2 to 5 years' imprisonment but if defendant was extended-term eligible, he faced 2 to 10 years' imprisonment.

¶ 5 The matter proceeded to a sentencing hearing on July 12, 2018. After hearing the parties' arguments, the court, in rendering its decision, stated that defendant's "attitude is the most serious aggravating factor in this case requiring that [he] go to prison longer than thirteen years because thirteen years hasn't made a difference." The court sentenced defendant to 14½ years' imprisonment for the Class 2 felony and 10 years' imprisonment for the Class 3 felony, to be served concurrently.

¶ 6 On July 27, 2018, defense counsel filed a motion to reconsider sentence arguing the court placed too much emphasis on defendant's criminal history and erred by failing to place more emphasis on the facts that defendant pled guilty, and the crimes were nonviolent. On September 6, 2018, the court held a hearing on the motion to reconsider sentence which it denied. Defendant appealed. On March 25, 2020, this court entered an order remanding the matter for a *de novo*

hearing on the postplea motion, including strict compliance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2017). *People v. Foster*, No. 3-18-0537 (2020) (unpublished minute order).

¶ 7 Following this court's remand, the circuit court held various status hearings and defendant was ultimately represented by different counsel. New counsel filed a motion to reconsider sentence and a compliant Rule 604(d) certificate on July 8, 2021. The motion again argued that the court placed too much emphasis on defendant's criminal history and erred by failing to place more emphasis on the facts that defendant pled guilty, and the crimes were nonviolent. The court heard and denied the motion on July 8, 2021. Defendant appeals.

¶ 8 II. ANALYSIS

¶ 9 A. Ineffective Assistance of Counsel

¶ 10 Defendant argues that his new posttrial counsel provided ineffective assistance by failing to argue in the motion to reconsider that there was a change in the sentencing statutes that became effective on July 1, 2021 (see Pub. Act 101-652, § 10-281 (eff. July 1, 2021) (amending 730 ILCS 5/5-4.5-95(b))). Under the changed statute defendant would not have been eligible for Class X sentencing, rather he would have been subject to the regular extended term of 7 to 14 years' imprisonment. He argues that counsel's performance was deficient because part of the purpose of a motion to reconsider sentence is to bring changes in the law to the court's attention and counsel failed to do so. Defendant argues he was prejudiced because although the statute was not retroactive and did not outright apply to him, it would show that the legislature had changed their view on the seriousness of the offense and that the court could have effectuated the spirit of the law and given him a lower sentence within the Class X range. After briefing was completed, this court allowed defendant's motion to cite additional authority—*People v. Spears*, 2022 IL App (2d) 210583—which defendant argues supports his position. *Spears* held, in similar

circumstances, that the circuit court, in deciding the defendant's motion to reconsider sentence should have considered the change in the sentencing statute because it applied to the defendant's case as the case was still pending due to the motion to reconsider. See *id.* ¶ 29.

¶ 11 "To establish a claim of ineffective assistance of counsel, a defendant must prove both deficient performance and prejudice." *People v. Smith*, 195 Ill. 2d 179, 187-88 (2000). "Counsel's performance is measured by an objective standard of competence under prevailing professional norms." *Id.* at 188. "[T]he effectiveness of *** counsel must be assessed against an objective standard of reasonableness from the perspective of the time of the alleged error and without hindsight." *People v. Reed*, 2014 IL App (1st) 122610, ¶ 66. To establish prejudice, a defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" or " 'that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair.' " *People v. Manning*, 241 Ill. 2d 319, 326-27 (2011) (quoting *People v. Jackson*, 205 Ill. 2d 247, 259 (2001)).

¶ 12 "When ruling on a motion to reconsider a sentence, the trial court should limit itself to determining whether the initial sentence was correct; it should not be placed in the position of essentially conducting a completely new sentencing hearing based on evidence that did not exist when defendant was originally sentenced." *People v. Vernon*, 285 Ill. App. 3d 302, 304 (1996). "The purpose of a motion to reconsider sentence is not to conduct a new sentencing hearing, but rather to bring to the circuit court's attention changes in the law, errors in the court's previous application of existing law, and newly discovered evidence that was not available at the time of the hearing." *People v. Burnett*, 237 Ill. 2d 381, 387 (2010).

¶ 13 Here, appellate counsel admitted in briefing that the change in statute did not apply to defendant, stating "Despite the change in the statute, [defendant] was still required to be sentenced as a Class X offender because he pleaded guilty and was sentenced when the previous statute was still in effect." This is supported by supreme court case law. Specifically, as cited in defendant's opening brief, in *People v. Lisle*, 390 Ill. 327, 328 (1945), the supreme court stated that a change in the sentencing law "could only apply to those classes of cases in which a new law had become effective prior to the date of the actual sentence." The fact that *Spears* went against this precedent does not render counsel's performance deficient for not arguing the change in law in the motion to reconsider sentence. See, *e.g. People v. Chatman*, 357 Ill. App. 3d 695, 700 (2005) ("We cannot conclude that counsel's failure to invoke a ruling that had not occurred was objectively unreasonable or resulted in prejudice to defendant."). Additionally, although defendant argues that counsel should have nonetheless apprised the court of the change in law and argued for a reduced sentence in conformance with the spirit of the changed law, nothing in the record suggests that the court would have done so. The circuit court specifically noted it was going to sentence defendant to more than 13 years' imprisonment, as a previous sentence that length had not deterred defendant from committing additional crimes. Additionally, with the change in the statute, as argued by defendant, he would still have been eligible for up to 14 years' imprisonment and the court only sentenced him to half a year more than that. Thus, counsel's performance in not requesting a reduced sentence based upon the spirit of the law would not be objectively unreasonable as it was unlikely to succeed under the circumstances of this case. Counsel chose a reasonable path of pointing out specific issues counsel believed the court either focused on too much or not enough.

¶ 14 Even if we assume counsel's performance was deficient, we find that defendant did not suffer prejudice due to counsel's failure to argue for a more lenient sentence based upon the changed law. First, contrary to the ruling in *Spears* (see *People v. McKee*, 2017 IL App (3d) 140881, ¶ 33 (noting "that we are not bound by the decisions of other districts of the appellate court")), defendant was not entitled to have the new statute applied to his sentence through his motion to reconsider. Our supreme court has stated that a change in the sentencing law "could only apply to those classes of cases in which a new law had become effective prior to the date of the actual sentence." *Lisle*, 390 Ill. at 328; see also *People v. Hunter*, 2017 IL 121306, ¶ 54 ("In *People v. Hansen*, 28 Ill. 2d 322, 340-41 (1963), we held that the defendant was not entitled to be resentenced under the new criminal code, which went into effect just 13 days after he was sentenced, because, under section 4, 'a punishment mitigated by a new law is applicable only to judgments after the new law takes effect.' ").

¶ 15 Additionally, section 4 of the Statute on Statutes (5 ILCS 70/4 (West 2020)), upon which the *Spears* court relied, states that "[i]f any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be applied to any judgment *pronounced after the new law takes effect*." (Emphasis added.) Here, judgment was pronounced on July 12, 2018, when the court entered the sentence. As argued by defendant, the change in the sentencing law did not become effective until July 1, 2021, three years after defendant's judgment was pronounced. The fact that defendant could ask the court to reconsider his sentence does not change the fact that the judgment had been pronounced.

¶ 16 Further, "[w]hen ruling on a motion to reconsider a sentence, the trial court should limit itself to determining whether the initial sentence was correct." *Vernon*, 285 Ill. App. 3d at 304. Therefore, unless a change in the sentencing law is retroactive, it should not affect a decision on

a motion to reconsider because it would have no bearing on whether the initial sentence was correct. Notably, in *People v. Harris*, 2018 IL App (3d) 170365, ¶ 20, with regard to a motion to reconsider sentence that was heard approximately 20 years after the defendant was sentenced, this court noted the above principle and then stated that the circuit court "could not conduct a new sentencing hearing with the full benefit of two decades worth of hindsight" but was instead "required to review [the original sentencing] decision based on the circumstances available" for consideration at the time of the original sentence. Based on the foregoing analysis, we conclude that the circuit court here would not have been able to conduct a new sentencing hearing pursuant to the change in law that took effect three years after defendant's sentence was pronounced but instead was required to review the sentence based on the law in effect at the time defendant was sentenced. Therefore, defendant suffered no prejudice by counsel's failure to argue for reconsideration based upon the changed law.

¶ 17 We also reject defendant's original argument that he was prejudiced by the failure to argue the change in law even though it did not retroactively apply to him. As noted above, there is nothing in the record to indicate that the court would have been inclined to reduce defendant's sentence unless it was required to do so. To the contrary, the court was clear that it believed a sentence harsher than one of defendant's previous sentences of 13 years was necessary in this matter. Furthermore, his sentence was only 1½ years longer than that previous sentence. Thus, defendant has not shown a reasonable probability that the outcome of his motion to reconsider sentence would have been different had counsel argued the change in law.

¶ 18 Because defendant failed to show deficient performance and prejudice his claim of ineffective assistance of counsel fails.

¶ 19 B. Extended-Term Sentencing

¶ 20 Defendant argues that the court improperly sentenced him to an extended term on the Class 3 felony because the extended term could only be imposed on the most serious class of offense, which was the Class 2 felony. Defendant acknowledges he forfeited this issue but argues it is reviewable as second-prong plain error. The State concedes second-prong plain error occurred. See *People v. Bell*, 196 Ill. 2d 343, 355 (2001) (providing that when a defendant's offenses are part of a related course of conduct "an extended-term sentence may be imposed only on those offenses within the most serious class"); *People v. Wilkins*, 343 Ill. App. 3d 147, 149 (2003) (providing that courts have regularly reviewed claims that an extended-term sentence was not authorized by law under the second prong of the plain error doctrine). Defendant requests, and the State agrees, that his sentence on the Class 3 felony be reduced to the maximum nonextended term of five years' imprisonment. See 730 ILCS 5/5-4.5-40(a) (West 2018) (nonextended sentencing range for a Class 3 felony is two to five years' imprisonment). Accordingly, we accept the State's concession, and we reduce defendant's Class 3 felony unlawful failure to register as a sex offender sentence to five years' imprisonment. See Ill. S. Ct. R. 615(b)(4).

¶ 21 III. CONCLUSION

¶ 22 The judgment of the circuit court of La Salle County is affirmed as modified.

¶ 23 Affirmed as modified.