

No. 1-24-1841

NOTICE: This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 22 CR 11556
	)	
MARNELL FULTON,	)	Honorable
	)	James Bryan Novy,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LYLE delivered the judgment of the court.
Justices Ocasio and Quish concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not consider an improper factor during sentencing.

¶ 2 In September 2022, the State charged the defendant-appellant, Marnell Fulton, under the armed habitual criminal statute. Mr. Fulton proceeded to a jury trial, where he proceeded *pro se*. Subsequently, the jury found him guilty. After reciting the factors it considered in aggravation, the circuit court sentenced him to 12 years' imprisonment for the armed habitual criminal conviction. On appeal, Mr. Fulton argues the circuit court improperly considered his juvenile arrests as

aggravating factors. For the reasons that follow, we affirm the judgment of the circuit court of Cook County.

¶ 3

BACKGROUND

¶ 4 On September 20, 2022, police officers entered Mr. Fulton's apartment as part of a parole compliance check. Mr. Fulton's uncle consented to the search of the apartment. During the search, one of the police officers found a loaded firearm between the mattress and box spring in the bedroom, where Mr. Fulton slept and kept his clothes. The police officers arrested Mr. Fulton, and the State charged him under the armed habitual criminal statute.

¶ 5 Mr. Fulton elected to have a jury trial and proceed *pro se*. At the conclusion of the trial, the jury found him guilty. For the sentencing hearing, Mr. Fulton requested that a public defender represent him, which the trial court granted.

¶ 6 The trial court ordered a presentence investigative report (PSI). The PSI detailed Mr. Fulton's arrests and convictions. According to the PSI, prior to his conviction in the instant matter, Mr. Fulton was convicted of two juvenile cases—a 2009 possession of a controlled substance and a 2008 possession of controlled substance with intent to manufacture or deliver. As an adult, Mr. Fulton was convicted for a 2009 possession of cannabis case, a 2010 possession of schedule I and II narcotic case, a 2010 possession of schedule I and II narcotic case, a 2012 possession of a controlled substance case, a 2013 domestic battery case, and a 2014 home invasion case. Other than those convictions, the PSI listed arrests where the probation officer was unable to find corresponding cases. Mr. Fulton was arrested twice in 2005, three times in 2007, three times in 2008, and twice in 2010.

¶ 7 During the sentencing hearing on September 5, 2024, Mr. Fulton presented mitigation evidence about his familial upbringing and work history, asking for the minimum sentence of six years. The State, in aggravation, presented that Mr. Fulton was on parole at the time of the offense and has a 2014 conviction for home invasion and drug charges. Mr. Fulton gave a statement, wherein he complained that he had to serve the sentence at 85% and questioned how he was an armed habitual. He stated “they using drug cases to make me armed habitual. I have never been armed. Like, it blows my mind. * * * And my drug cases make me armed habitual, and I have never been armed.” He continued that he has “never been armed” in his life and that “[d]rug cases made me armed habitual.”

¶ 8 The trial court stated it considered the PSI, the evidence presented at trial, the statement in allocution, the arguments by each side, and all statutory and nonstatutory factors in mitigation and aggravation. The court then discussed factors it found in aggravation stating:

“And I would say that would be Factor Number 3, the [Mr. Fulton’s] history of prior delinquency or criminal activity.

And I will note from the—just as an overview, Mr. Fulton’s criminal history is that Mr. Fulton has been arrested and/or charged with a crime every year from 2005 as a juvenile; two in ’05, one in ’06, 3 in ’07, 4 in ’08, one in ’09. It looks like two in 2010 as a juvenile.

And as an adult, I have two in 2010, two in 2011, I think one in 2012, two in 2013, one in 2014, one in 2015, Then he on—in custody until 2021. He got out on parole, and he was on parole for less than a year when he picked up this case.

Just so you understand, Mr. Fulton, when I talk about the armed habitual, it's focusing more on the habitual criminal which is everything that I outlined in this last statement. I know you weren't convicted earlier. A lot of these things were juvenile. I'm not finding the drug cases from 2010 as part of the aggravation.

But it's just that you're on this path, and it's a dangerous path. And while I agree with your statement that you haven't been playing with guns, necessarily, you haven't been charged with that. You've worked your way up into situations where these are very dangerous things.

Having a gun as a convicted felon, I appreciate your attorney's argument that it's basically a possession, but this is a gun that's found in a bed room [sic] where there is a bassinet in there. So arguably, there is a child staying in that room which you were found to be in possession of as well. That's dangerous. In and of itself, that's dangerous.

So I do find that—your criminal history in aggravation, I do find that, unfortunately, the best way to describe it is you seem to be a—since you've become a juvenile throughout your adult years, you have committed crime after crime after crime and that's very concerning to this Court.”

¶ 9 On September 5, 2024, the trial court sentenced Mr. Fulton to 12 years' imprisonment. Mr. Fulton made oral motions for a new trial and to reconsider the sentence, which were both denied. On that same date, Mr. Fulton filed a written notice of appeal.

¶ 10 ANALYSIS

¶ 11 We note that we have jurisdiction to consider this matter, as Mr. Fulton filed a timely notice of appeal. See Ill. S. Ct. R. 606 (eff. Mar. 15, 2024).

¶ 12 Mr. Fulton argues that the trial court erred by considering improper factors when it used his arrests, where he was not subsequently convicted, for aggravation. He acknowledges that he did not object to the alleged sentencing error at the time or preserve this issue for appeal, so he asks this court to review the issue under the plain error doctrine. See *Bush*, 2023 IL 128747, ¶ 56 (an issue must be raised in a motion or objection, and again in a posttrial motion, to be preserved).

¶ 13 An exception to the forfeiture rule exists in situations where the alleged error rises to the level of plain error. *People v. Roman*, 2013 IL App (1st) 102853, ¶ 19. Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967) provides that “substantial or what have become known as plain errors may be noticed although they were not brought to the attention of the trial court.” (Internal quotation marks omitted.) *People v. Sebby*, 2017 IL 119445, ¶ 48. Under the plain error doctrine, a reviewing court may consider forfeited errors if the evidence was closely balanced or “the error was so egregious that [the] defendant was deprived of a substantial right and thus a fair trial.” *Roman*, 2013 IL App (1st) 102853, ¶ 19. First, a defendant must prove there was a clear or obvious error. *Roman*, 2013 IL App (1st) 102853, ¶ 19. The burden of persuasion rests with the defendant, and the first step is to determine whether any error occurred. *Roman*, 2013 IL App (1st) 102853, ¶ 19. “Great deference is given to the trial court’s sentencing decision because the trial court is in a better position than the reviewing court to determine the appropriate sentence.” *People v. Reed*, 376 Ill. App. 3d 121, 127 (2007). “Generally, sentencing decisions are a matter entirely within the discretion of the circuit court which reviewing courts will not disturb absent an abuse of that discretion.” *People v. Robinson*, 383 Ill. App. 3d 1065, 1071 (2008). “An abuse of discretion

will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Hall*, 195 Ill. 2d 1, 20 (2000).

¶ 14 "Bare arrests and pending charges may not be utilized in aggravation of a sentence." *People v. Johnson*, 347 Ill. App. 3d 570, 575 (2004). However, "[c]riminal conduct unrelated to the offense of which a defendant has been convicted *** may be considered at sentencing." *Johnson*, 347 Ill. App. 3d at 575. "To obtain a remand for resentencing, therefore, defendant must show more than the mere mentioning of an improper fact." *Reed*, 376 Ill. App. 3d at 128. "An isolated remark made in passing, even though improper, does not necessarily require that defendant be resentenced." *Reed*, 376 Ill. App. 3d at 128.

¶ 15 In this case, when reviewing the entirety of the sentencing hearing, we note that Mr. Fulton had complaints and comments about being categorized and sentenced as an armed habitual criminal. The trial court tried to explain the rationale behind the statute, stating that Mr. Fulton was on a "dangerous path." The court mentioned Mr. Fulton's arrests, acknowledging that he was not convicted, a "lot of [those] things were juvenile," and it was not considering the 2010 drug cases in aggravation. The court also addressed Mr. Fulton's other concern, in which he stated none of his previous cases involved firearms and he was being considered an armed habitual criminal based on drug convictions. The court stated Mr. Fulton "worked [his] way up into situations where these are very dangerous things." At the time of Mr. Fulton's arrest and trial, The armed habitual statute stated "[a] person commits the offense of being an armed habitual" if he is in possession of a firearm after having been convicted two or more times of a forcible felony, unlawful use of a weapon, or "any violation of the Illinois Controlled Substances Act." 720 ILCS 5/24-1.7(a) (West

2024). The statute shows that the legislature sought not just to make it illegal for the defendants with violent histories to own a firearm but also individuals who have been convicted of certain drug offenses.

¶ 16 While the trial court mentioned the arrests, which Mr. Fulton states is the improper factor that the trial court considered, it was in the context of the court's attempt to explain the matters it was not considering in aggravation. There is no indication in the record that the trial court considered the arrests when imposing its sentence nor is there any other mention of the arrests to indicate that this was more than a "mere mention." The court's range of sentencing options spanned from 6 years to 30 years of imprisonment, and it sentenced Mr. Fulton to the lower end of the range, 12 years. As stated, a mere mention of an improper factor is not enough, there must be a showing that the court improperly considered that factor. See *Reed*, 376 Ill. App. 3d at 128. "[T]here is a strong presumption that the trial court's sentence was based on proper legal reasoning, and a reviewing court should consider the record as a whole rather than a few isolated statements." *People v. Musgrave*, 2019 IL App (4th) 170106, ¶ 55. With that presumption in mind, we do not find error given the court's isolated statements regarding Mr. Fulton's arrests. See *Reed*, 376 Ill. App. 3d at 128. Since we find no error, we cannot find plain error. *Roman*, 2013 IL App (1st) 102853, ¶ 19.

¶ 17

CONCLUSION

¶ 18 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 19 Affirmed.