2024 IL App (4th) 230414-U

NO. 4-23-0414

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
May 13, 2024
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
EURON MATTHEWS,	)	No. 17CF74
Defendant-Appellant.	)	
	)	Honorable
	)	Charles H.W. Burch,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Steigmann and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, holding:
(1) the trial court was revested with jurisdiction over the resentencing proceedings;
(2) the court did not consider improper aggravating factors during the resentencing hearing;
(3) the court did not improperly evaluate two challenged statutory factors in mitigation;
(4) the court's remarks at the resentencing hearing did not evince an improper predisposition to reimpose the maximum sentence; and
(5) the 15-year sentence imposed at resentencing was not excessive.

¶ 2 Defendant, Euron Matthews, appeals the trial court's order resentencing him to 15 years' imprisonment for the offense of aggravated discharge of a firearm. Defendant first argues that the court had jurisdiction to resentence him pursuant to the revestment doctrine even though more than 30 days had passed since the entry of the final judgment. Defendant also argues that,

upon resentencing, the court considered improper aggravating factors, its findings regarding statutory factors in mitigation "contradict[ed] the record and the law," the court was improperly predisposed to reordering the same maximum sentence as at the initial sentencing hearing, and the 15-year sentence was excessive. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In 2017, a jury found defendant guilty of being an armed habitual criminal (AHC) (720 ILCS 5/24-1.7(a) (West 2016)) and aggravated discharge of a firearm (*id.* § 24-1.2(a)(2)). The trial court imposed consecutive sentences of 22 years' imprisonment for AHC and 15 years' imprisonment for aggravated discharge of a firearm. On direct appeal, we affirmed the trial court's judgment. *People v. Matthews*, 2020 IL App (4th) 170782-U, ¶ 70 (*Matthews I*).

¶ 5 In 2021, defendant *pro se* filed a postconviction petition, alleging two claims of ineffective assistance of trial counsel. The trial court summarily dismissed the petition.

¶ 6 Defendant appealed, arguing the trial court erred by summarily dismissing his petition because he asserted an arguable claim of ineffective assistance of counsel. *People v. Matthews*, 2022 IL App (4th) 210752, ¶ 21 (*Matthews II*). Defendant also raised several issues on appeal that were not raised in the petition. First, defendant argued that his two prior convictions for unlawful use of a weapon (UUW) in Will County case Nos. 90-CF-1445 and 92-CF-3211 were void *ab initio* and should be vacated. *Id.* He further argued that his two prior convictions for unlawful use of a weapon by a felon (UUWF) in Will County case No. 92-CF-3211 and his AHC conviction in the instant case should be vacated because they were predicated on at least one of his void UUW convictions. *Id.* Defendant also argued that his 15-year sentence for aggravated discharge of a firearm in the instant case should be vacated and the matter

remanded for resentencing because the court erroneously considered his void UUW convictions in aggravation. *Id.*

¶ 7 In *Matthews II*, we vacated defendant's conviction for AHC in the instant case and his prior convictions for UUW and UUWF. *Id.* ¶ 69. We otherwise affirmed the judgment of the trial court summarily dismissing the postconviction petition. *Id.* We did not address the merits of defendant's argument that his sentence for aggravated discharge of a firearm should be vacated and the matter remanded for resentencing. *Id*. ¶¶ 53-59. We held that defendant was precluded from raising that claim for the first time on appeal from the dismissal of his postconviction petition because his conviction for aggravated discharge of a firearm was not a void judgment. *Id.*

¶ 8 In January 2023, after our mandate issued, defendant filed in the trial court a "Motion to Set Sentencing Hearing," asserting he was entitled to a new sentencing hearing on the charge of aggravated discharge of a firearm because four of his prior convictions had been vacated, and these convictions "would have been used in aggravation" at the initial sentencing hearing.

¶ 9 On January 26, 2023, the parties appeared for a hearing on defendant's motion. The trial court indicated it had read the appellate court's opinion in *Matthews II*. The court asked: "So if I'm reading this correctly, this is on remand for resentencing. Is that everyone's understanding?" Defense counsel said, "Yes." The State did not respond. The court indicated it would set the matter for a new sentencing hearing and stated it believed an updated presentence investigation report (PSI) would be necessary. The State indicated that it did not believe a new PSI was needed because there would not be any additional information other than striking the

convictions that had been vacated by the appellate court in *Matthews II*. The trial court indicated it believed the law required a new PSI, and the Stated replied, "That's fine."

¶ 10 An updated PSI was prepared. The PSI indicated defendant had prior felony convictions for unlawful sale of a firearm, unlawful possession of a controlled substance, criminal damage to property, unlawful possession of a weapon by a felon, distributing a controlled substance, and possession of a controlled substance. The PSI stated defendant had graduated from high school, reported being certified as an automotive collision technician prior to his incarceration, and was currently taking classes to become a certified paralegal.

¶ 11 The updated PSI stated defendant reported having knee pain due to a 2013 injury and had frequent headaches due to an injury he received during a previous period of incarceration. Defendant also reported that he had an ongoing heart condition with no final diagnosis. He stated he had testing done at a hospital following an abnormal electrocardiogram (EKG), but he was still waiting to have a magnetic resonance imaging scan (MRI). Defendant also indicated he had suffered panic attacks while incarcerated. He had been prescribed multiple medications, but he stated the medications did not help and had a variety of negative side effects.

¶ 12 Defense counsel submitted several health-related documents. An October 2022 document from Wexford Health indicated defendant had been granted "[a]uthorization for cardiology" due to multiple abnormal EKGs, an abnormal stress test, and complaints of shortness of breath, fatigue, and intermittent chest pain. A mental health progress note from 2020 indicated defendant had been diagnosed with "[post-traumatic stress disorder (PTSD)] with anxiety." A radiology report from January 2021 indicated defendant had "[m]ild tricompartmental osteoarthritis of both knee joints."

¶ 13 On April 10, 2023, defendant filed a sentencing memorandum arguing, *inter alia*, that the following statutory factors in mitigation applied: (1) his imprisonment would endanger his medical condition (730 ILCS 5/5-5-3.1(a)(12) (West 2022)), (2) he would be a caretaker for ill, disabled, or elderly relatives (*id.* § 5-5.3.1(a)(19)), and (3) his imprisonment would entail excessive hardship to his dependents (730 ILCS 5/5-5-3.1(a)(11) (West 2016)).

¶ 14 On April 20, 2023, the trial court held a resentencing hearing. The court noted that it had received and reviewed the updated PSI. The State indicated it believed defendant would assert that, contrary to the criminal history stated in the updated PSI, he had never been convicted of criminal damage to property in Will County case No. 94-CF-2443. The State indicated, however, that records it had reviewed from the National Crime Information Center reflected defendant had been convicted of criminal damage to property in case No. 94-CF-2443. The State asserted that the appellate court had previously vacated defendant's convictions for two counts of UUWF in case No. 94-CF-2443, but it was not aware of any finding vacating the conviction for criminal damage to property.

¶ 15 Defense counsel stated he did not have any information contradicting the records that reflected defendant had been convicted of criminal damage to property. The trial court asked defense counsel if he understood the court would use the criminal damage to property conviction for sentencing purposes, and counsel stated he had no basis to dispute the existence of the conviction. The court asked defense counsel if he was requesting a continuance to investigate the matter, and counsel stated he was not.

¶ 16 Defense counsel submitted several letters in mitigation from defendant's friends and family members, describing the positive impact defendant had on their lives and requesting leniency.

¶ 17 The State argued the trial court should impose the maximum sentence of 15 years' imprisonment. In so arguing, the prosecutor stated, "If I remember correctly from looking at the previous sentencing order, I think that might have even been what you gave him on this charge or this count." The State discussed the circumstances of the offense. Regarding deterrence, the prosecutor stated:

> "And I realize the normal deterrent argument that I might make at this point in terms of sending a message to the community and other members of the community, maybe it doesn't have the same effect today that it would back then because it's been several years since this case has happened, and I don't know how many people out there on the streets actually remember this. But regardless of what deterrent effect that might have, the message has to be sent in general that this is not acceptable not only in this community, but in any community, and for somebody to do what [defendant] did it deserves harsh punishment."

¶ 18 Defense counsel argued that a sentence of seven years' imprisonment would be appropriate. Counsel argued a maximum sentence was no longer appropriate because the trial court had initially considered prior convictions that had since been vacated, and several mitigating factors were present. Counsel argued that defendant's continued imprisonment would endanger his medical condition, he would have support from family and friends if he were released, and defendant's elderly mother was ailing and that his parents wanted "to have their son returned to help them."

¶ 19 Defendant made a statement in allocution. He stated that he believed he deserved a "chance at life." He stated that his mother had been sick and he "would be there if [he] was out." He indicated he wanted to spend his life supporting his family and doing positive things.

¶ 20 The trial court stated it had considered, *inter alia*, the updated PSI and its attachments, the character reference letters, the medical documents submitted in court, the arguments of the parties, defendant's statement in allocution, and the relevant factors in aggravation and mitigation. The court stated it had considered defense counsel's "suggestion that the defendant's imprisonment ha[d] the potential to pose a hardship on dependents." The court noted defendant's adult children and his mother were not his legal dependents, though it acknowledged there was a "human cost" to defendant's incarceration. The court found, in mitigation, that defendant had a support system of people who cared about him. The court noted defendant was 51 years old, and evidence had been presented concerning his health issues, including heart problems. The court stated:

> "It would appear that those, at least from what I have received here in terms of medical attention he has received, I am convinced that he has received treatment or will receive treatment to address those issues and those conditions. So I am not necessarily convinced that a term of imprisonment would put him at any undue risk, but I do recognize that he does have those health conditions and do give them consideration for purposes of today."

¶ 21 The trial court found defendant's criminal history to be the most significant factor in aggravation. The court stated the updated PSI reflected defendant had six prior felony convictions, for which he had received sentences ranging from 2 to 15 years' imprisonment. The court stated it appeared defendant had been in "some phase of the criminal court system or the penal system for the majority of his adult life." The court noted that it appeared defendant would have been on parole in connection with a Missouri drug conviction at the time of the offense in

the instant case. The court stated that, generally, it had "a philosophy that the more criminal history that an individual accumulates in their life the more severe the consequences should be."

¶ 22 The trial court also discussed the circumstances surrounding the offense, noting that defendant was depicted on a video "laying [*sic*] in wait by a residence in a residential area and firing multiple shots into a passing car, which did wreck." The court found that a lengthy sentence of imprisonment was necessary to deter others and protect the public.

¶ 23 The trial court resentenced defendant to 15 years' imprisonment for aggravated discharge of a firearm. The court acknowledged that it was the maximum sentence but found it was appropriate for the reasons it had previously discussed. The court noted that the 15-year sentence it was imposing was equal to a prior sentence defendant had received in another case, which was consistent with the court's "logic and reasoning that *** the more criminal history you have the more severe the consequences."

¶ 24 Defendant filed a motion to reconsider his sentence, arguing the 15-year sentence was an abuse of discretion and the trial court failed to adequately consider the mitigating evidence presented by the defense. The court denied the motion, and this appeal followed.

¶ 25 II. ANALYSIS

¶ 26 On appeal, defendant first argues that the trial court had jurisdiction to resentence him pursuant to the revestment doctrine even though more than 30 days had passed since the entry of the final judgment, and the appellate court's order in his prior appeal had not remanded the matter for resentencing. Defendant also asserts several claims of error regarding the resentencing hearing, arguing the court considered improper aggravating factors, its findings regarding statutory factors in mitigation "contradict[ed] the record and the law," the court was

improperly predisposed to reordering the same maximum sentence as was imposed at the initial sentencing hearing, and the 15-year sentence was excessive.

¶ 27 A. Jurisdiction

¶ 28 We first consider whether the trial court had jurisdiction over the resentencing proceedings. "The jurisdiction of trial courts to reconsider and modify their judgments is not indefinite. Normally, the authority of a trial court to alter a sentence terminates after 30 days." *People v. Flowers*, 208 Ill. 2d 291, 303 (2003). Here, at the time defendant moved for resentencing, more than five years had passed since the original sentencing judgment was entered. Accordingly, the trial court's authority to modify the sentence had long since lapsed. Also, contrary to the trial court's apparent belief, this court did not remand the matter for resentencing on the charge of aggravated discharge of a firearm in *Matthews II*. See *Matthews II*, 2022 IL App (4th) 210752, ¶¶ 53-59. Thus, our mandate in that case did not provide the trial court with the authority to conduct a new sentencing hearing.

¶ 29 Defendant contends the trial court nonetheless had jurisdiction pursuant to the revestment doctrine. The revestment doctrine provides a narrow exception to the general principle that the trial court loses jurisdiction to review or modify its judgments after 30 days. *People v. Kaeding*, 98 Ill. 2d 237, 240 (1983).

> "[F]or the revestment doctrine to apply, *both* parties must: (1) actively participate in the proceedings; (2) fail to object to the untimeliness of the late filing; *and* (3) assert positions that make the proceedings inconsistent with the merits of the prior judgment and support the setting aside of at least part of that judgment." (Emphases in original.) *People v. Bailey*, 2014 IL 115459, ¶ 25.

¶ 30 Defendant and the State agree that both parties actively participated in the resentencing proceedings and failed to make timeliness objections. Defendant argues that both parties asserted positions that were inconsistent with the merits of the prior judgment and supported setting aside at least part of that judgment. Specifically, defendant asserts that he requested resentencing, and the State agreed to proceed to a resentencing hearing where the initial sentence would be set aside, sentencing would be reopened, and a new sentence would be imposed. The State argues that it never took a position contrary to the original judgment because the prosecutor "advocated for the imposition of the original 15-year sentence" at the resentencing hearing.

¶ 31 We find our supreme court's decision in *Bailey*, 2014 IL 115459, to be instructive. The *Bailey* court held that in order satisfy the prong of the revestment doctrine requiring both parties to participate in "proceedings inconsistent with the merits of the prior judgment," both parties had to "assert positions that make the proceedings inconsistent with the merits of the prior judgment and support the setting aside of at least part of that judgment." *Id.* ¶ 25. The *Bailey* court rejected the position that a party's active participation in the proceedings without making a timeliness objection was enough to render the proceedings inconsistent with the merits of the prior judgment. *Id.* ¶¶ 19-25. In so holding, the *Bailey* court discussed several prior supreme court decisions addressing the revestment doctrine. *Id.* ¶¶ 20-25. The court noted that, in its prior decisions, it had applied the revestment doctrine where both parties had sought to modify or overturn the prior judgment, specifically referencing *People v. Kaeding*, 98 Ill. 2d 237 (1983), and *People v. Bannister*, 236 Ill. 2d 1 (2009). *Bailey*, 2014 IL 115459, ¶ 25. In both *Kaeding* and *Bannister*, both parties sought to modify or alter the substance of the prior judgments. See *Kaeding*, 98 Ill. 2d at 240; *Bannister*, 236 Ill. 2d at 6, 10.

¶ 32 The *Bailey* court noted, however, that the supreme court had not applied the revestment doctrine in prior cases where one party "opposed any setting aside of the prior judgment," like in *Sears v. Sears*, 85 Ill. 2d 253 (1981), and *Archer Daniels Midland Co. v. Barth*, 103 Ill. 2d 536 (1984). *Bailey*, 2014 IL 115459 ¶¶ 20-25. In *Sears*, the court found the revestment doctrine was inapplicable because the hearing on the appellant's untimely motion to reopen the prior judgment did not concern the merits of the prior judgment but rather was a contested hearing on the issue of whether the prior judgment should be set aside. *Sears*, 85 Ill. 2d at 260. The *Sears* court noted that "the participants did not ignore the [prior] judgment and start to retry the case, thereby implying by their conduct their consent to having the judgment set aside." *Id.* The court stated that, during the proceedings on the untimely motion, "[t]he old judgment was never touched, and no new one was entered." *Id.* Similarly, in *Archer Daniels Midland*, the court held that the conduct of the parties in the postjudgment proceedings was not inconsistent with the court's prior judgment because the "[p]laintiff did not waive or ignore the judgment and attempt to retry the case, and nothing in its conduct implied any hint of willingness to having the judgment set aside." *Archer Daniels Midland*, 103 Ill. 2d at 540.

¶ 33 We find, in the instant case, the State asserted a position inconsistent with maintaining the prior sentencing judgment. By participating without objection in a new sentencing hearing, the State took a position that supported the setting aside of the prior judgment. It is true that, unlike in *Kaeding* and *Bannister*, the State did not seek to modify the substance of the prior judgment, as it argued at the resentencing hearing that a 15-year sentence of imprisonment was still the appropriate sentence. However, at no point did the State defend the merits of the prior judgment by arguing that resentencing was improper in the first place, or that the original 15-year sentence should remain in effect. Instead, the State participated without

objection in a new sentencing hearing at which new evidence was presented and argued. By doing so, the State effectively "attempt[ed] to retry" the sentencing portion of the case and "thereby impl[ied] by [its] conduct [its] consent to having the judgment set aside." *Sears*, 85 Ill. 2d at 260. Therefore, we find the trial court was revested with jurisdiction for purposes of resentencing defendant.

¶ 34 B. Improper Aggravating Factors

¶ 35 Having found the trial court had jurisdiction over the resentencing proceedings, we now consider defendant's argument that the court considered improper aggravating factors at the resentencing hearing. Specifically, defendant argues the court improperly considered in aggravation his prior conviction for criminal damage to property, the need for deterrence, and the judge's personal sentencing policy.

¶ 36 1. *Criminal Damage to Property Conviction*

¶ 37 We first address defendant's argument that the trial court erred by considering in aggravation the prior conviction for criminal damage to property in case No. 94-CF-2443 identified in the updated PSI. Defendant asserts that this conviction "did not exist." Defendant notes that, at the trial in the instant case, a certified copy of conviction from case No. 94-CF-2443 was admitted into evidence, and it showed defendant was convicted of two counts of UUWF in that case but did not indicate he was also convicted of criminal damage to property.

¶ 38 Defendant acknowledges he forfeited this argument by failing to raise it in the trial court. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) ("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."). However, defendant argues that we may address it under either prong of the plain error doctrine. Alternatively, defendant argues his sentencing counsel

was ineffective for failing to ensure that his criminal history was presented accurately at the resentencing hearing.

¶ 39 "The plain-error rule bypasses normal forfeiture principles and permits reviewing courts to consider unpreserved error in specific circumstances." *People v. Averett*, 237 Ill. 2d 1, 18 (2010). "However, the plain-error doctrine applies only to cases involving forfeiture, not affirmative acquiescence, or waiver." *People v. Baker*, 2022 IL App (4th) 210713, ¶ 61. "When defense counsel affirmatively acquiesces to actions taken by the trial court, any potential claim of error on appeal is waived, and a defendant's only available challenge is to claim he received ineffective assistance of counsel." *People v. McGuire*, 2017 IL App (4th) 150695, ¶ 29.

¶ 40 We find the plain error doctrine to be inapplicable here, as defense counsel affirmatively acquiesced to the trial court's consideration of the prior conviction for criminal damage to property reflected in the updated PSI. Counsel stated he had no information contradicting the existence of the conviction, declined to have the matter continued to investigate the existence of the conviction, and indicated he understood the court would be considering it. Also, the updated PSI indicated defendant had agreed that the criminal history set forth therein appeared accurate. Under these circumstances, we find defendant waived rather than forfeited his claim that the court improperly considered his prior conviction for criminal damage to property, and the plain error doctrine is unavailable to him.

¶ 41 We proceed to consider defendant's claim that defense counsel provided ineffective assistance by failing to challenge the existence of the conviction. "To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Domagala*, 2013 IL 113688, ¶ 36. That is, "a defendant must show that counsel's performance

was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

¶ 42 Defendant argues that defense counsel incorrectly stated at the resentencing hearing that he had nothing to contradict the updated PSI as to the existence of defendant's prior conviction for criminal damage to property in case No. 94-CF-2443. Defendant asserts that, in our prior opinion in *Matthews II*, which defense counsel repeatedly referred to, we specified that case No. 94-CF-2443 involved UUWF convictions rather than a criminal damage to property conviction. See *Matthews II*, 2022 IL App (4th) 210752, ¶¶ 38-43. Defendant argues there is a reasonable probability that the sentence would have been less severe if the trial court had not considered the criminal damage to property conviction.

¶ 43 In support of his ineffective assistance of counsel argument, defendant cites *People v. Hearring*, 2022 IL App (1st) 192064. At the sentencing hearing in *Hearring*, the trial court considered two prior convictions at sentencing that were subsequently vacated as void and also incorrectly stated the number of the defendant's prior convictions. *Id.* ¶ 32. Specifically, the court stated the defendant had nine prior felony convictions when, without the two void convictions, he actually only had five prior felony convictions. *Id.* The *Hearring* court held that defense counsel performed deficiently by failing to ascertain the correct number of prior felony convictions, move to vacate the void prior convictions, and correct the State and court's erroneous statements that the defendant had nine prior felony convictions. *Id.* ¶ 41. The *Hearring* court also found there was a reasonable probability that the result of the sentencing hearing would have been different if the court had an accurate criminal history. *Id.*

¶ 44 Here, we find defendant has not shown he was prejudiced by defense counsel's failure to object to the trial court's consideration of his prior conviction for criminal damage to property or by failing to request a continuance to investigate it. First, there is nothing in the record establishing that the updated PSI was incorrect in stating defendant was convicted of criminal damage to property in case No. 94-CF-2443. The certified statement of conviction for case No. 94-CF-2443 admitted during the trial in the instant case was prepared in 2017, apparently for the purpose of showing defendant's convictions for UUWF in that case, as one of these UUWF convictions was a predicate felony for the AHC charge in the instant case. The certified statement of conviction did not indicate that it contained a complete list of defendant's convictions in case No. 94-CF-2443, and evidence of a criminal damage to property conviction in that case would have been irrelevant and inadmissible in the State's case-in-chief at trial. See 720 ILCS 5/24-1.7 (West 2016); Ill. R. Evid. 402 (eff. Jan. 1, 2011). Accordingly, we cannot say this certified statement of conviction disproved the existence of a criminal damage to property conviction in case No. 94-CF-2443.

¶ 45 Also, while our opinion in *Matthews II* stated that defendant was convicted of two counts of UUWF in case No. 94-CF-2443, we did not state that defendant had no other convictions under that case number. See *Matthews II*, 2022 IL App (4th) 210752, ¶¶ 39-40. There was no reason for this court in *Matthews II* to discuss any convictions other than defendant's challenged UUWF convictions, so we cannot say that counsel should have inferred that no other convictions existed in case No. 94-CF-2443 from the lack of discussion of other convictions in *Matthews II*.

¶ 46 Defendant also requests for the first time in his reply brief that we take judicial notice of documents from case No. 94-CF-2443—including an information, transcript, and

mittimus—of which we took judicial notice during the proceedings in his prior appeal. Defendant argues these documents show he was charged and convicted only of two counts of UUWF in case No. 94-CF-2443. We decline to consider these documents in this case, as we find defendant forfeited this point by failing to assert it in his initial brief. See Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020) ("Points not argued [in the appellant's brief] are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."). By failing to request that we take judicial notice of these documents in the initial brief, defendant deprived the State of an opportunity to assert any argument it might have had against this court taking judicial notice of the documents or concerning the effect of the documents on defendant's claim of ineffective assistance of trial counsel. See *Holliday v. Shepherd*, 269 Ill. 429, 436 (1915) ("[Q]uestions not raised by appellants in the original brief cannot be raised in the reply brief. A contrary practice would permit appellants to argue questions in their reply briefs as to which counsel for appellees would have no opportunity to reply.").

¶ 47 Moreover, even if we were to accept defendant's argument that this conviction did not exist, defendant has not shown that a reasonable probability exists that the sentence would have been lower if the trial court had not considered the criminal damage to property conviction. While the court found defendant's criminal history to be the most significant aggravating factor in this case, it never singled out defendant's criminal damage to property conviction as having particular significance. In addition to the criminal damage to property conviction, defendant had five other prior felony convictions, including one for which he received a sentence of 15 years' imprisonment. Even without the criminal damage to property conviction and accompanying four-year sentence of imprisonment noted in the updated PSI, the court's finding that defendant had been in "some phase of the criminal court system or the penal

system for the majority of his adult life" would still be accurate. Accordingly, we find this case is distinguishable from *Hearring*, 2022 IL App (1st) 192064, ¶ 41, where the defendant had only five prior felony convictions and the court erroneously believed he had nine.

¶ 48 2. *Deterrence*

¶ 49 Defendant argues the trial court erred by finding the need for deterrence to be an applicable aggravating factor. Defendant asserts the court's finding was "contrary to the State's recognition the sentence would have no deterrent effect here." Defendant contends the State presented no evidence that the sentence would have a deterrent effect, noting there was no indication that any community members other than defendant's parents were present at the resentencing hearing and that there was no evidence defendant's new sentence was publicized.

¶ 50 Defendant recognizes he forfeited this argument by failing to raise it in the trial court. See *Hillier*, 237 Ill. 2d at 544. However, defendant argues that we may address it under either prong of the plain error doctrine. Alternatively, defendant argues his counsel was ineffective for failing to preserve the issue.

¶ 51 In the sentencing context, to obtain relief under the plain error doctrine, a defendant must show a clear or obvious error occurred and "(1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *Id.* at 545. "The first step of plain-error review is determining whether any error occurred." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 52 "It is well settled that the trial court has broad discretionary powers in imposing a sentence [citation], and the trial court's sentencing decision is entitled to great deference." *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). When sentencing a defendant, the court must consider statutory factors in aggravation (see 730 ILCS 5/5-5-3.2(a) (West 2022)) and may also

consider nonstatutory factors in aggravation as long as the evidence considered is relevant and reliable (see *People v. Joe*, 207 Ill. App. 3d 1079, 1086 (1991)). However, the court may not consider improper aggravating factors. *People v. Reed*, 376 Ill. App. 3d 121, 128 (2007). "[T]he question of whether a court relied on an improper factor in imposing a sentence ultimately presents a question of law to be reviewed *de novo*." *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8.

¶ 53 We find no error occurred with respect to the trial court's finding that a lengthy sentence was necessary to deter others from committing the same crime. The need to deter others is a statutory factor in aggravation (see 730 ILCS 5/5-5-3.2(a)(7) (West 2022)), and the court was within its discretion in finding it applicable in this case based on the nature and circumstances of the offense. Specifically, the trial evidence showed defendant fired a gun at a moving, occupied vehicle in a residential neighborhood, causing it to flip over and posing a danger not only to the driver but any others who might have been in the vicinity. Contrary to defendant's argument on appeal, the State did not "recogni[ze] the sentence would have no deterrent effect here," but rather speculated it may have less of a deterrent effect than normal since the offense had happened approximately seven years earlier. The court was not required to accept the State's argument in this regard.

¶ 54 We reject defendant's argument that the State was required to present evidence the sentence would be publicized or otherwise communicated to members of the community in order for the court to find the need for deterrence to be an applicable statutory factor in aggravation. Defendant cites no authority for the proposition that such evidence was necessary, and we are aware of none. See *People v. Cameron*, 189 Ill. App. 3d 998, 1010 (1989) ("[A] court

may logically give reasonable consideration to the need for deterrence as a factor in the imposition of a sentence.").

¶ 55 Defendant also cites an academic article for the proposition that social science researchers have concluded that long prison sentences cannot be justified on the basis of deterrence. The State argues that we should not consider this article because it was not presented to the trial court at the resentencing hearing, and defendant's argument constitutes an attempt to bring information outside the record before the appellate court. See *People v. Klein*, 2022 IL App (4th) 200599, ¶¶ 47-60 (holding that the defendant improperly cited in his appellate brief a social science study, which was not presented at sentencing, for the proposition that incarceration does not have a significant deterrent effect on drug use). We agree with the State and do not now consider defendant's citation to this article, as it was not presented at sentencing. Moreover, our legislature has determined that the need for deterrence may be properly considered by a court as a basis for imposing a longer a sentence (730 ILCS 5/5-5-3.2(a)(7) (West 2022)), and, accordingly, the court in this case did not err in considering it for this purpose.

¶ 56 We conclude defendant has not established that error occurred when the trial court considered the need for deterrence as an aggravating factor, and, accordingly, he is not entitled to relief under either prong of the plain error doctrine or on a theory of ineffective assistance of counsel. See *People v. Hood*, 2016 IL 118581, ¶ 18 ("[W]ithout error, there can be no plain error." (Internal quotation marks omitted.)); *People v. Hensley*, 2014 IL App (1st) 120802, ¶ 47 ("[T]he failure of a defendant to show that error occurred at all defeats both an ineffective assistance claim and a claim of error under either prong of the plain error doctrine.").

¶ 57 3. *Trial Court's "Personal Sentencing Policy"*

¶ 58 Defendant argues the trial court improperly sentenced him to 15 years' imprisonment based on the judge's "personal sentencing policy" of, in defendant's words, "focusing on criminal history as the most important sentencing factor," rather than considering the particular circumstances of defendant's case. Defendant notes that the court stated it "generally [had] a philosophy that the more criminal history that an individual accumulates in their life the more severe the consequences should be" and that defendant's criminal history was "the most significant factor in aggravation for the Court's consideration." Defendant also notes the following comment the court made at the hearing on his motion to reconsider his sentence:

> "[W]hat I found to be perhaps the most serious and compelling, is the extensive criminal history on the part of [defendant] that did include prior—a 15-year Department of Corrections sentence out of the state of Missouri, in addition to others that were noted on the record and that were reflected in the PSI."

¶ 59 Defendant acknowledges that he failed to preserve this issue by raising it in the trial court. However, he argues that the doctrine of forfeiture should be relaxed because the trial judge's conduct is at issue. See *Thompson*, 238 Ill. 2d at 612. He alternatively argues that the first prong of the plain error doctrine applies and that his counsel was ineffective for failing to preserve the issue.

¶ 60 In support of his argument that the trial court's alleged "personal policy" constituted an improper factor in aggravation, defendant cites *People v. Bolyard*, 61 Ill. 2d 583 (1975), *People v. Wilson*, 47 Ill. App. 3d 220 (1977), and *People v. Clemons*, 175 Ill. App. 3d 7 (1988). In *Bolyard*, the trial judge denied the defendant's request for probation, remarking that he personally subscribed to a policy of not granting probation for any offenses involving sexual violence. *Bolyard*, 61 Ill. 2d at 585. The supreme court held it was improper for the trial court to

deny the defendant probation because the defendant fell within a class of offenders disfavored by the trial judge rather than applying the statutory factors the court was required to consider in determining whether to impose a sentence of probation. *Id.* at 586-87.

¶ 61 Similarly, in *Wilson*, the court held that the trial judge arbitrarily exercised his discretion by denying the defendant probation based on a personal policy that "would make it virtually certain that no offender would be granted probation" for the offense of unlawful delivery of a controlled substance. *Wilson*, 47 Ill. App. 3d at 222. The *Wilson* court found that the trial judge failed to consider the relevant statutory factors for determining whether probation was appropriate and that his policy thwarted the legislative purpose of having a wide range of sentencing possibilities. *Id.* at 221-22. In *Clemons*, the court held that the trial court abused its discretion by denying the defendant's motion to vacate his sentence pursuant to its " 'personal policy' of not disturbing a sentence without the approval of the victim involved" rather than by applying the applicable statutory factors. *Clemons*, 175 Ill. App. 3d at 13.

¶ 62 We find defendant has not shown that an error occurred in the instant case with respect to the trial court's consideration of his criminal history. Here, unlike in *Bolyard*, *Wilson*, and *Clemons*, the court did not indicate it was making its sentencing decision based solely on a rigid personal sentencing policy unrelated to or inconsistent with the statutory factors it was required to consider. Rather, the court's "philosophy" in the instant case of imposing longer sentences based on the amount of criminal history accumulated by the defendant is clearly consistent with the legislature's directive that the court consider, in aggravation, that "the defendant has a history of prior delinquency or criminal activity." 730 ILCS 5/5-5-3.2(a)(3) (West 2022). Also, we do not interpret the court's sentencing comments as indicating the court believed a defendant's criminal history was always the most important aggravating factor.

Rather, the court considered defendant's criminal history to be the most important aggravating factor in this particular case.

¶ 63 Contrary to defendant's argument on appeal, the trial court's consideration of his criminal history did not constitute a failure to base defendant's sentence on the particular circumstances of his case and life. Rather, his criminal history was an important component of his particular circumstances, and, significantly, it was not the sole factor upon which the court based its sentencing determination. The court indicated its sentencing decision was based on its consideration of other factors as well, including the nature and circumstances of the offense and the need for deterrence.

¶ 64 We conclude defendant has not established the trial court sentenced him pursuant to an improper personal sentencing policy. Accordingly, defendant is not entitled to relief under the plain error doctrine or based on a claim of ineffective assistance of counsel. See *Hensley*, 2014 IL App (1st) 120802, ¶ 47.

¶ 65 C. Evidence in Mitigation

¶ 66 Defendant argues the trial court failed to properly consider two applicable statutory mitigating factors—that his imprisonment would endanger his medical condition and that he would be a caregiver to his elderly parents. Under section 5-5-3.1(a)(12) of the Unified Code of Corrections (Code) (730 ILCS 5/5-5-3.1(a)(12) (West 2022)), the trial court is to consider as a factor in mitigation whether "[t]he imprisonment of the defendant would endanger his or her medical condition." Section 5-5-3.1(a)(19) of the Code (*id.* § 5-5-3.1(a)(19)) provides that another statutory factor in mitigation is whether "[t]he defendant serves as the caregiver for a relative who is ill, disabled, or elderly."

¶ 67 Consideration of the statutory factors in mitigation is mandatory, and a sentencing court may not refuse to consider relevant evidence in mitigation. *People v. Markiewicz*, 246 Ill. App. 3d 31, 55 (1993). A court's failure to consider relevant statutory mitigating factors is typically an abuse of discretion (*People v. Miller*, 2021 IL App (2d) 190093, ¶ 22), but we will not find an abuse of discretion merely because we may have weighed mitigating factors differently than the trial court. See *People v. Alexander*, 239 Ill. 2d 205, 214-25 (2010).

¶ 68 1. *Endangerment of Defendant's Medical Condition*

¶ 69 Defendant argues the trial court's finding that he did not establish that his imprisonment would endanger his medical condition was contradicted by the record. Defendant contends the record showed that he had abnormal EKGs, followed by testing in July 2022 and a cardiology referral in October 2022. Defendant notes that he reported he was still awaiting an MRI and diagnosis in April 2023, when the updated PSI was prepared. Defendant contends this shows his imprisonment endangered his heart condition by delaying diagnosis and treatment of the condition.

¶ 70 Defendant also argues that the evidence showed incarceration led to his knee ailment because it was caused by an attack he suffered while incarcerated and imaging showed he had mild tricompartmental osteoarthritis of both knees. Defendant further contends his incarceration caused and furthered his mental health problems, asserting the original PSI indicated his PTSD and anxiety stemmed from an incident where he was assaulted while incarcerated. Defendant notes the updated PSI also reflected his PTSD diagnosis, indicated he suffered panic attacks while incarcerated, and stated the medications he had been prescribed in prison to address these issues had not helped and had negative side effects.

¶ 71 Here, the trial court indicated that it had considered the evidence of defendant's health issues in reaching its sentencing determination, though it found defendant's conditions were being treated in prison and that defendant's imprisonment did not result in any undue risk. The court's assessment of this evidence was not an abuse of discretion. While defendant presented evidence that he had a heart condition, osteoarthritis in his knees, and mental health issues, the evidence also showed he was being treated for these conditions while in prison. While defendant argues his treatment for his mental health issues had been inadequate because the medications prescribed to him in prison had not helped, it was unclear from the evidence whether other effective medications or treatments for these issues existed that were unavailable to him in prison. With regard to the alleged delay in diagnosis and treatment of his heart condition, defendant presented evidence that he had undergone multiple tests on his heart, had received a cardiology referral, and was still waiting to undergo an MRI. He did not present evidence as to when the MRI was ordered or how long he had been waiting to undergo one. Based on the evidence presented, the court's finding that defendant's medical conditions were being adequately treated such that his continued incarceration did not place him at undue risk was not arbitrary, fanciful, or unreasonable. See *People v. McDonald*, 2016 IL 118882, ¶ 32 ("[A]n abuse of discretion occurs where the trial court's decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it.").

¶ 72 We note that, in his brief, defendant cites reports and decisions related to several federal cases concerning the quality of healthcare provided by the Illinois Department of Corrections (IDOC). Defendant argues that we should take judicial notice of these documents on the basis that they are public records (see *Dietz v. Property Tax Appeal Board*, 191 Ill. App. 3d. 468, 477 (1989)) or on the basis that federal decisions may be considered as persuasive authority

(*Hadley v. Montes*, 379 Ill. App. 3d 405, 412 (2008)). We question the propriety of considering these materials on appeal, as defendant appears to be citing them solely in an attempt to establish certain facts—namely, that IDOC has a history or pattern of providing poor medical care to inmates—rather than for any proposition of law. We find such use of these materials would be inappropriate, as they were never presented to the trial court. See *People v. Barham*, 337 Ill. App. 3d 1121, 1130 (2003) ("Judicial notice cannot be extended to permit the introduction of new factual evidence not presented to the trial court."). Even if we were to consider these materials, they would not establish that the medical care that defendant received in this particular case was inadequate.

¶ 73 2. *Service as Caregiver*

¶ 74 Defendant argues the trial court abused its discretion in its assessment of the factor of whether he "serve[d] as a caregiver for an ill or elderly relative" because it was based on a misunderstanding of the law. Specifically, defendant contends the court erred by failing to "evaluate whether [defendant] would serve as the caregiver for his elderly and ill parents" if released and instead noted that defendant's parents were not his legal dependents and stated that it was skeptical defendant's continued imprisonment would impose "undue hardship" on them.

¶ 75 We note that, at the time of the offense, one of the statutory factors in mitigation was whether "[t]he imprisonment of the defendant would entail excessive hardship to his dependents" (730 ILCS 5/5-5-3.1(a)(11) (West 2016)), and defense counsel argued that this was an applicable mitigating factor in his sentencing memorandum. Thus, it appears the trial court's challenged remarks were addressing counsel's argument as to this factor and did not reflect a misunderstanding of section 5-5-3.1(a)(19) of the Code, as defendant contends.

¶ 76 To the extent that the trial court's remarks indicate it did not find section 5-5-3.1(a)(19) of the Code (*id.* § 5-5-3.1(a)(19)) to be an applicable mitigating factor, we find no error occurred. This factor applies when the defendant "*serves* as the caregiver for a relative who is ill, disabled, or elderly." (Emphasis added.) *Id.* Here, defendant was not serving as a caregiver for his parents at the time of the resentencing hearing, nor did he present evidence that he had served as their caregiver prior to his incarceration. The only "evidence" presented by defendant as to this factor was defense counsel's statement during argument that defendant's parents wanted him to be released to "help" them and defendant's statement during allocution that he "would be there" for his mother if he were released. These vague assertions indicate, at most, a possible future intent for defendant to provide care for his parents and did not establish any past or current caregiving arrangement that would be affected by his continued incarceration.

¶ 77 D. Predisposition to Order the Maximum Sentence

¶ 78 Defendant argues the 15-year sentence imposed by the trial court at resentencing must be vacated because the court was improperly predisposed to ordering the same maximum sentence that it had previously ordered. Defendant contends that, at both the initial sentencing hearing and the resentencing hearing, the trial judge articulated his sentencing philosophy of imposing longer sentences based on the amount of criminal history accumulated by the defendant. Defendant notes that he had a less extensive criminal history at the resentencing hearing than at the initial sentencing hearing after four of his prior convictions were vacated in *Matthews II*. He also notes that the classes of two of his prior felonies were corrected in the updated PSI to show they were less serious than was indicated in the original PSI. Defendant also contends he presented more mitigating evidence than he did at the initial sentencing hearing. This, defendant argues, shows the court was improperly predisposed to ordering the same

sentence rather than ordering a sentence "particular to [defendant] and his corrected criminal history."

¶ 79 Defendant acknowledges he failed to preserve this issue for review but argues the doctrine of forfeiture should be relaxed because the trial judge's conduct is at issue. See *Thompson,* 238 Ill. 2d at 612. He alternatively argues that the first prong of the plain error doctrine applies and that his counsel was ineffective for failing to preserve the issue.

¶ 80 In support of his argument, defendant cites *People v. Morris,* 2023 IL App (1st) 220035. In *Morris,* the defendant had originally been sentenced to an aggregate term of 100 years' imprisonment, but the sentence was vacated on appeal and the matter remanded for resentencing upon finding the trial court did not adequately consider defendant's youth and its attendant characteristics during sentencing. *Id.* ¶¶ 16-20. At the resentencing hearing, the trial court again sentenced the defendant to an aggregate term of 100 years' imprisonment. *Id.* ¶ 42. The appellate court vacated the sentence and again remanded the matter for resentencing. *Id.* ¶ 66. The court found that, during the resentencing hearing, the judge abused his discretion by failing to adequately consider the youth-related factors and instead was "preoccupied with whether he could simply reimpose the same 100-year sentence on remand." *Id.* ¶ 63.

¶ 81 We find defendant has not shown the trial court based its resentencing determination on an improper predisposition to reorder the same sentence that was originally imposed. While the court ultimately imposed the same sentence as it originally did, nothing in its sentencing remarks indicated the court was improperly predisposed to reimpose the maximum sentence or that it failed to adequately consider the relevant sentencing factors. Unlike in *Morris,* the court's sentencing comments indicated it properly considered the evidence presented at the resentencing hearing and fashioned its sentenced based on its consideration of the particular facts

and circumstances of defendant's case. While defendant had less of a criminal history at resentencing than at the initial sentencing hearing, his criminal history was still significant even without the vacated convictions. Also, while defendant characterizes the mitigating evidence he presented at resentencing as "significant," the court did not appear to agree, and we cannot say the court's weighing of the mitigating evidence at the resentencing hearing constituted an abuse of discretion. See *People v. Pippen*, 324 Ill. App. 3d 649, 652 (2001) ("The existence of mitigating factors does not require the trial court to reduce a sentence from the maximum allowed.").

¶ 82 As defendant has not shown that the trial court was erroneously predisposed to reordering the maximum sentence, he is not entitled to relief under the plain error doctrine or based on a claim that his counsel was ineffective for failing to preserve the issue. See *Hensley*, 2014 IL App (1st) 120802, ¶ 47.

¶ 83 E. Excessive-Sentence Claim

¶ 84 Finally, defendant argues the 15-year sentence imposed by the trial court at resentencing was excessive. Defendant argues the maximum sentence was not warranted by the seriousness of the offense, noting that firing a gun at an occupied vehicle was inherent in the offense and that no evidence showed anyone was harmed as a result of the incident. Defendant also argues the court incorrectly characterized his criminal history as extensive and spanning much of his adult life. Defendant asserts his prior felony convictions were primarily for "mere contraband offenses," most of the offenses occurred between 1993 and 2001, and the most recent conviction was from 2013. Defendant also argues that the court's imposition of the maximum sentence does not account for his rehabilitative potential, which was shown by the family support he received at the resentencing hearing, his educational background, and his employment history.

Defendant also argues there was evidence that his continued incarceration would endanger his medical conditions and that his parents needed him to care for them at their home.

¶ 85 "It is well settled that the trial court has broad discretionary powers in imposing a sentence [citation], and the trial court's sentencing decision is entitled to great deference." *Stacey*, 193 Ill. 2d at 209. This is because "the trial judge, having observed the defendant and the proceedings, is in a much better position to consider factors such as the defendant's credibility, demeanor, moral character, mentality, environment, habits, and age." *People v. Snyder*, 2011 IL 111382, ¶ 36. "Consequently, the reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently." *Stacey*, 193 Ill. 2d at 209.

¶ 86 We will not disturb the trial court's sentencing decision absent an abuse of discretion. *Id.* at 209-10. "[A] sentence within statutory limits will be deemed excessive and the result of an abuse of discretion by the trial court where the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Id.* at 210.

¶ 87 Here, the trial court did not abuse its discretion by imposing the maximum sentence of 15 years' imprisonment. The record indicates the offense was very serious. While discharging a firearm at an occupied vehicle was inherent in the nature of the offense of aggravated discharge of a firearm (see 720 ILCS 5/24-1.2(a)(2) (West 2016)), the court also noted the trial evidence showed the incident occurred in a residential neighborhood, the vehicle was moving at the time defendant discharged a firearm at it, and it flipped over as a result of the incident. These additional facts were properly considered by the court as aggravating.

¶ 88 Also, the trial court properly found defendant had an extensive criminal history and that he had "been in some phase of the criminal court system or the penal system for the majority of his adult life." The updated PSI considered by the court indicated defendant had six prior felony convictions. While five of these offenses occurred between 1991 and 2001, defendant received a sentence of 15 years' imprisonment for the 2001 case, largely accounting for the gap in his criminal history between 2001 and 2013, when he incurred another felony conviction. The updated PSI reflects that he received a sentence of three years' imprisonment in his 2013 felony case before committing the offense in the instant case in 2016. Accordingly, the court's findings that defendant's criminal history was extensive and his involvement in the criminal court system and penal system spanned most of his adult life were accurate.

¶ 89 We also find the record indicates the trial court adequately considered the mitigating evidence presented by defendant. The court expressly considered defendant's family support, his medical issues, and the "human cost" of his incarceration on his family members. The court also indicated it had considered the PSI, which contained information about his employment history and educational background. See *People v. Laliberte*, 246 Ill. App. 3d 159, 177 (1993) ("Where evidence is offered in mitigation and before the trial court, the sentencing judge will be presumed to have considered it unless there is some statement in the record, aside from the sentence imposed, which would tend to indicate otherwise."). However, the court was not required to afford great weight to the mitigating evidence or to impose a sentence less than the maximum merely due to the existence of this evidence. See *Pippen*, 324 Ill. App. 3d at 652.

¶ 90 III. CONCLUSION

¶ 91 For the reasons stated, we affirm the trial court's judgment.

¶ 92 Affirmed.