



**In the
Missouri Court of Appeals
Western District**

STATE OF MISSOURI,	)	
	)	
Respondent,	)	WD83807
	)	
v.	)	OPINION FILED: March 30, 2021
	)	
DAVID JOSE ESCALONA,	)	
	)	
Appellant.	)	

Appeal from the Circuit Court of Lafayette County, Missouri
The Honorable Dennis A. Rolf, Judge

Before Division Three: Karen King Mitchell, Presiding Judge, Gary D. Witt, Judge and Anthony Rex Gabbert, Judge

David Escalona ("Escalona") appeals the judgment of the Circuit Court of Lafayette County, Missouri ("trial court") convicting him of one count of possession of a controlled substance, section 579.015,¹ and one count of failure to appear, section 544.665, and sentencing him to a total of eight years' imprisonment. On appeal, Escalona claims that the trial court plainly erred and abused its discretion in basing Escalona's sentence on the fact that he exercised his right to go to trial rather than plead guilty. We affirm the judgment and sentence of the trial court.

¹ All statutory references are to the Revised Statutes of Missouri, 2016, as updated by supplement.

Factual and Procedural Background

In November of 2018, Escalona was driving his vehicle eastbound on I-70 through Lafayette County, when Trooper Matthew Hanrahan ("Trooper Hanrahan") pulled him over for crossing the center line of the roadway and for following a tractor trailer too closely. Trooper Hanrahan noticed that Escalona appeared nervous, with his hands trembling and his eyes wide when he provided his driver's license. Trooper Hanrahan asked Escalona for permission to search his vehicle, which Escalona provided and gave the keys to the vehicle to the Trooper. On the passenger-side seat was a backpack with a zipper compartment containing a glass smoking pipe, and in the backseat, in another bag, was a small baggie of what proved to be .46g of methamphetamine. Escalona was arrested. On December 2, 2019, Escalona failed to appear for a required court proceeding on these charges, and a warrant was issued.

The case proceeded to a bench trial. Escalona testified that neither the methamphetamine nor the pipe was his, that he did not know the bags containing them were in his vehicle, and that he had met a friend in Kansas City, who had ridden in his car the evening prior, implying the items belonged to that friend. Escalona also testified that he missed his December hearing because he was in the emergency room with severe back pain. On rebuttal, Trooper Hanrahan testified that Escalona admitted that he had used the pipe to ingest illegal drugs with a friend and the friend had given him the pipe and drugs. Escalona referred to the substance as "T," which is short for "Tina," a slang term for methamphetamine. The trial court found Escalona guilty of both counts.

At sentencing, Escalona's counsel informed the court that the State had made a pre-trial plea offer whereby he would receive an SIS with probation in exchange for a guilty plea.² However, because Escalona was worried about his immigration status (although he was in the United States legally), an immigration lawyer advised him not to admit to possession of methamphetamine but, instead, to go to trial. Escalona's counsel argued that Escalona was a first-time possession offender and was employed. The prosecutor asked for sentences of five years and two years, concurrent, because Escalona had lied to the court and was not taking responsibility for his actions in the Sentencing Assessment Report ("SAR"). The trial court sentenced Escalona to five years and three years, to run consecutively and not concurrently, stating,

Well, first of all, I never sentence anybody any more differently because they put the Court or the State through having to go through a trial, but what I do look at is whether or not they accept responsibility and show me they know the difference between right and wrong. And in this case, Mr. Escalona was dishonest about the circumstances involving the drugs, and, I feel, dishonest about the circumstances involving the failure to appear. So not only has he failed to accept responsibility, he blatantly lied to the Court. And, quite honestly, his immigration status is not my problem.

This appeal followed.

Standard of Review

While sentencing is ordinarily reviewed for abuse of discretion, Escalona concedes that he did not raise this issue at his sentencing hearing. He is asking this court to review for plain error. Rule 30.20; *State v. Betts*, 559 S.W.3d 47, 55 (Mo. App. E.D. 2018). "In reviewing for plain error, we will first determine whether, based on the facts

² A pre-trial plea offer from the prosecutor is not binding on the court and it does not establish that the trial court "punished" the defendant for proceeding to trial if the sentence exceeds the pre-trial offer.

and circumstances of the case, the trial court committed error that was evident, obvious, and clear." *Betts*, 559 S.W.3d at 55 (citing *State v. Collins*, 154 S.W.3d 486, 491 (Mo. App. W.D. 2005)). "Second, we will determine whether the trial court's error so prejudiced the defendant that a manifest injustice or miscarriage of justice occurred." *Id.*

Discussion

Escalona's single point on appeal is that the trial court improperly held Escalona's exercise of his right to receive a full and fair trial against him in formulating the sentence. A sentencing court "cannot use the sentencing process to punish a defendant for exercising his right to proceed to trial." *State v. Wright*, 998 S.W.2d 78, 83 (Mo. App. W.D. 1999) (abrogated on other grounds by *State v. Porter*, 439 S.W.3d 208 (Mo. banc 2014)). "[W]hether a defendant exercises his constitutional right to trial . . . to determine his guilt or innocence must have no bearing on the sentence." *State v. Vaughn*, 940 S.W.2d 26, 29 (Mo. App. S.D. 1997). Indeed, "[i]t is fundamental that one convicted of a crime must not be subjected to a more severe punishment simply because he or she exercised a constitutional right." *State v. Fields*, 480 S.W.3d 446, 453 (Mo. App. W.D. 2016) (quoting *State v. Ise*, 460 S.W.3d 448, 464 (Mo. App. W.D. 2015)).

A sentencing court may, however, "take into account the character of the defendant, including his attitude concerning the offense." *State v. Lindsey*, 996 S.W.2d 577, 580 (Mo. App. W.D. 1999). Moreover, "a court may take into account a good faith belief that an accused has committed perjury." *Id.* at 581. At sentencing, the State

argued that Escalona had not accepted any responsibility for his crimes "[i]n the SAR,"³ which was compiled after trial and after he was found guilty. The State also specifically referred to the SAR when it argued that Escalona "wasn't honest with the Court," that he "accepted zero responsibility whatsoever for any of the crimes that he committed" that "he still insists that the trooper was lying and lied to the Court" and Escalona "failed to appear" which called into question his ability to comply with terms of probation.

Most importantly, the trial court affirmatively stated that it did not consider Escalona's exercise of his right to trial in reaching its sentencing decision:

Well, first of all, I never sentence anybody any more differently because they put the Court or the State through having to go through a trial, but what I do look at is whether or not they accept responsibility and show they know the difference between right and wrong. And in this case, Mr. Escalona was dishonest about the circumstances involving the drugs, and, I feel, dishonest about the circumstances involving the failure to appear. So not only has he failed to accept responsibility, he blatantly lied to the Court.

To accept Escalona's argument that the trial court sentenced him more harshly based upon his exercise of his right to trial, we would have to conclude that the trial court was simply lying when it stated that this was not a factor. We do not so conclude.

Based on the State's argument at sentencing that Escalona continued to deny any responsibility for the crimes in the SAR, which was prepared following the trial and after he had been convicted, together with the trial court's statement that it does consider in

³ The SAR was not included within the legal file. "Rule 81.12 imposes a duty on appellants to file a legal file with all records necessary for review. We are entitled to presume that omitted portions of the record are unfavorable to the appellant and favorable to the trial court's decision." *State v. Richter*, 504 S.W.3d 205, 208 n.3 (Mo. App. W.D. 2016). Where the disposition of an issue on appeal may depend upon the contents of an SAR, either party may request that the SAR be made part of the record on appeal, even though the SAR is not normally "filed" in the circuit court and is not a public document until after the defendant pleads guilty pursuant to Section 557.026. See *Webb v. State*, 334 S.W.3d 126, 130-31 (Mo. banc 2011). When a party fails to include the SAR in the record on appeal, "the intendment and content of the SAR will be taken as favorable to the [sentencing] court's ruling and as unfavorable to [the defendant]." *Rouff v. State*, 493 S.W.3d 904, 907 n.5 (Mo. App. E.D. 2016).

sentencing whether a defendant accepts responsibility for his actions, it is clear that the trial court was not referring to the fact that Escalona pled not guilty and exercised his right to trial but properly took into account his continued denial of committing the offenses in the SAR after he had been found guilty in reaching his sentencing decision.

Further, the trial court clearly had a good-faith belief that Escalona had committed perjury, which is an acceptable fact for a court to consider in arriving at a sentence. *Lindsey*, 996 S.W.2d at 581. Escalona testified at trial that he did not have any drugs with him, that he had only used a legal substance with his friend called "bofers," and that he had never seen the bag in his car in which the pipe had been found, despite photocopies of Escalona's debit or credit cards also having been in the bag. However, Escalona told Trooper Hanrahan that he had used the methamphetamine and glass pipe with his friend the night before, referring to the substance as T, which was short for Tina, which is a slang term for methamphetamine. Escalona also testified that he failed to appear because he was in the emergency room with severe back pain, which the trial court also believed to be not credible. We find no plain error in the trial court's belief that Escalona had perjured himself and continued to refuse to take responsibility for his actions after he had been found guilty or that the court considered these factors in sentencing Escalona.

Conclusion

For all of the above-stated reasons, we affirm the judgment of the trial court.

A handwritten signature in black ink, appearing to read 'G. D. Witt', is written over a horizontal line.

Gary D. Witt, Judge

All concur