

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

No. 3-09-0937

Order filed April 6, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	No. 08-CF-1537
)	
ORSBEY T. LARKIN,)	Honorable
)	Stephen D. White,
Defendant-Appellant.)	Judge Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

Held: The trial court did not sentence defendant *in absentia* where defendant appeared at the time of the sentencing hearing, but failed to appear at a later date when the trial court announced the sentence, after taking the matter under advisement. However, defendant's sentence is vacated because the trial court considered improper factors at defendant's sentencing hearing.

Pursuant to a fully negotiated plea of guilty to the offenses of aggravated battery and obstructing justice, the trial court originally sentenced defendant to a term of probation on August 22, 2008. On April 8, 2009, defendant admitted that he violated the terms of his

probation, and the matter was continued for sentencing.

After conducting a sentencing hearing with defendant present, the court took the matter under advisement. On the date scheduled for the court to announce the sentence, defendant failed to appear. After giving defendant additional time to appear on another date, the trial court pronounced sentence in defendant's absence.

On appeal, defendant claims that the trial court erred by sentencing defendant for the violation of probation *in absentia* without previous *in absentia* admonishments. Alternatively, defendant submits the trial court abused its discretion by considering improper factors at sentencing and imposing an excessive sentence. Defendant's sentence is vacated, and the cause is remanded to the trial court for a new sentencing hearing.

FACTS

On July 10, 2008, a Will County grand jury issued a two-count bill of indictment charging defendant with the offenses of aggravated battery (720 ILCS 5/12-4(b)(18) (West 2008)) and obstructing justice (720 ILCS 5/31-4(a) (West 2008)). On August 22, 2008, defendant entered into a fully negotiated plea with the State, and the trial court sentenced defendant to a term of 24 months probation on both offenses pursuant to the terms of the plea agreement.

On February 9, 2009, the State filed a petition to revoke probation. On February 20, 2009, the trial court issued a warrant for defendant's arrest. Defendant appeared in court in custody on March 18, 2009. The trial court set bond at \$100,000 and appointed counsel to represent defendant. The court scheduled the petition to revoke probation for further hearing.

On March 31, 2009, defendant appeared in custody before the court. The trial court

denied defendant's motion for bond reduction and continued the cause to April 8, 2009.

On April 2, 2009, the State filed an amended petition to revoke probation which alleged, in part, that defendant violated the terms of his probation by committing the offenses of driving while license suspended, disobeying a traffic control device, and failing to signal on December 10, 2008. On April 8, 2009, defendant appeared in court and signed an admission that he violated the terms of his probation as to the allegations that he committed three new traffic offenses. The trial court ordered a presentence investigation report and scheduled sentencing for June 8, 2009.

The presentence investigation report indicated defendant had a juvenile history for the offense of unlawful possession of cannabis. Also according to the report, defendant committed the misdemeanor offenses of resisting a peace officer and criminal trespass to land as an adult in 2007.

The presentence investigative report revealed that defendant was not married and lived with his mother and grandmother in Joliet, Illinois. According to the report, defendant claimed he had one child, born on December 10, 2008. Defendant reported that he had never been employed and that he spent his free time with his son. Defendant also reported that he did not have a drug or alcohol problem.

On June 8, 2009, the trial court conducted a sentencing hearing with defendant present in court while in custody. Neither the State nor defense counsel presented any evidence in aggravation or mitigation. The State argued that defendant was a person who never held a job but did not have a chemical dependency. The State also argued that defendant violated the law while on probation and did not follow probation guidelines. The State asked for a sentence to the

Department of Corrections because defendant was not willing to change and was not a productive member of society.

Defense counsel argued that defendant committed a traffic violation and that defendant drove because his girlfriend was giving birth. Defense counsel indicated that defendant had not committed any new misdemeanor or felony offenses and had not failed any drug tests. Further, defendant did not have a history of committing felonies. Defense counsel asserted that if the court resentenced defendant to probation, defendant could be successful. Defendant advised that he did not have anything to say. The trial court took the matter under advisement and continued the cause for ruling to June 11, 2009.

On June 11, 2009, defendant appeared before the court in custody. Defendant advised the court that he hoped to continue on probation in order “to get my license straight, see my newborn son, so I don’t have to revoke my probation.” Defense counsel added that defendant had a newborn child and that defendant had “not had much opportunity to see his child yet.” The court responded, “That could be good for the child. If he ends up being a career criminal and being in the prison population, his son should have a right to grow up without having that.”

In response to the court’s comment, defense counsel pointed out to the court that defendant did not have any other prior felony convictions. Defense counsel also said that defendant was not a perpetual felon. The court then responded that “You can’t be perpetual until you start, and now he’s started.”

The trial court asked why defendant’s license was suspended. Defense counsel stated that it was due to insurance. The trial court stated that it was going to take the matter under advisement, continued the cause for further sentencing on September 11, 2009, and released

defendant on a \$50,000 personal recognizance bond. Defendant signed a written bail bond form which set forth conditions of bail bond including a provision that “[f]ailure to appear for trial shall result in the case being tried in absentia.”

The trial court stated that if defendant did not report to probation, the court would send defendant to prison. Defendant asked if he was being released. The trial judge asked defendant, “What do you think I’d like you to do.” Defendant said contact probation, get his license, get a job, and get a GED. The court said that if defendant got arrested, he was “coming right back here.”

On July 9, 2009, the Will County probation services department filed a violation report with the court which stated that defendant was arrested for the offense of driving while license suspended on June 15, 2009, following his release from custody on June 11, 2009. On July 10, 2009, the State filed a motion to advance defendant’s sentencing date which was scheduled for September 11, 2009. The State set the motion for hearing on July 16, 2009, and sent notice to defendant. On July 16, 2009, defendant failed to appear. The trial court issued a warrant for defendant’s arrest.

On September 11, 2009, defense counsel and the State appeared before the court on the previously scheduled hearing for the court’s ruling on sentencing. Defendant failed to appear. The court advised that it would sentence defendant in his absence if he failed to appear at the next court date scheduled for October 6, 2009. The court directed the clerk of the court to send notice to defendant at his last known address.

On October 6, 2009, defendant failed to appear. The court expressed concern as to whether notice was sent to defendant. The trial court again continued the cause and stated that it

would sentence defendant if he failed to appear at the next court date scheduled for October 22, 2009. The court directed the clerk of the court to send notice to defendant at his last known address.

The record contains a copy of a letter sent from the clerk's office to defendant by certified mail, postmarked October 8, 2009. The copy indicates that the postal service returned the letter unclaimed, and it was later filed with the court on November 4, 2009.

On October 22, 2009, defendant failed to appear. The court took judicial notice of the clerk's receipt indicating that notice had been sent to defendant. Defense counsel advised that he had not had any contact with defendant. The court asked the State to verify that defendant was not in custody. After doing so, the trial court then stated:

“Show cause coming on for the Court's decision. Show the – as to the count of aggravated battery, Class 2 felony, defendant to be sentenced to a term of incarceration in the Illinois Department of Corrections for six years. As to the Class 4 felony, obstructing justice, the defendant will be sentenced to a term of incarceration in the Illinois Department of Corrections for three years. Those to run concurrent to one another.”

The court directed the clerk to send defendant notification of his appeal rights.

On that same day, October 22, 2009, defendant filed a motion to reconsider sentence claiming that the trial court erred in pronouncing sentence in defendant's absence and that the trial court failed to “give full weight and consideration to Defendant's mitigation” and imposed an excessive sentence. The record contains a letter dated November 3, 2009, from the clerk of

the court to defendant advising that the court entered an order and that defendant had 30 days to appeal.

On November 6, 2009, defendant appeared in custody on the warrant issued July 16, 2009. The court continued the cause for status to November 13, 2009. The trial court remanded defendant to the county jail.

On November 13, 2009, defendant appeared in custody before the court. The court conducted a hearing on defendant's motion to reconsider sentence. The trial court stated that "the Court again having considered all the factors as previously stated, show the Court feels that the sentence was appropriate at the time, and the motion to reconsider is denied." The court entered a written judgment and order that day which sentenced defendant to six years imprisonment for the offense of aggravated battery and three years imprisonment for the offense of obstructing justice to run concurrent. On November 16, 2009, the clerk of the court filed a notice of appeal on defendant's behalf.

ANALYSIS

On appeal, defendant raises two claims of error. First, defendant argues that the trial court erred in sentencing defendant *in absentia* because the trial court did not properly admonish defendant that he could be sentenced in his absence, and therefore, defendant is entitled to a new sentencing hearing. The State responds that this issue is not properly before this court.

Alternatively, the State responds that the trial court properly sentenced defendant in his absence.

Second, defendant argues that the trial court abused its discretion because the trial court considered improper factors when sentencing defendant and alternatively, because the trial court imposed an excessive sentence. Defendant asks this court to vacate his sentence and remand the

cause for a new sentencing hearing. Alternatively, defendant asks this court to reduce defendant's sentence. The State responds that the trial court did not abuse its discretion when imposing sentence.

I. Sentencing *in absentia*

The State asserts that this court lacks jurisdiction to review any procedural errors in defendant's original guilty plea proceedings, including the failure to give *absentia* admonishments at the time of defendant's original arraignment, where defendant did not file a timely appeal from defendant's original sentence. The State misunderstands the sentence at the heart of this appeal. Defendant does not appeal his original sentence of probation, but now appeals the court's sentencing order entered on October 22, 2009, following revocation of probation, and claims that the trial court did not properly admonish defendant that he could be sentenced for the probation violations in his absence. Therefore, we conclude the issue of whether defendant was properly sentenced *in absentia* for violating the terms of his original sentence of probation is properly before the court.

The question of whether defendant's due process rights were violated due to the trial court's failure to admonish defendant of his *in absentia* rights prior to sentencing presents a question of law, and we review *de novo*. See *People v. Lindsey*, 199 Ill. 2d 460, 472 (2002), (citing *People v. Dilworth*, 169 Ill. 2d 195, 201 (1996)); *People v. Robinson*, 172 Ill. 2d 452, 457 (1996).

It is well established that a defendant at a probation revocation proceeding is afforded less due process protection than a defendant initially standing trial for an offense. *People v. Lindsey*, 199 Ill. 2d at 473; *People v. Sherrod*, 279 Ill. App. 3d 383, 387 (1996), (citing *People v. Allegri*,

127 Ill. App. 3d 1041 (1984)). The Supreme Court has held that only minimum requirements of due process apply to a probation revocation hearing. See *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756 (1973). However, those minimal requirements of due process include the right of a defendant to be admonished prior to a trial court conducting probation revocation proceedings without defendant present. See *People v. Sherrod*, 279 Ill. App. 3d at 387; *People v. Williams*, 229 Ill. App. 3d 677 (1992).

The cases cited by defendant in support of his contention that his due process rights were violated due to a lack of *in absentia* admonishments involve situations where a defendant was not present at any time during either the revocation hearing or during the sentencing hearing. Thus, the cases cited are distinguishable. However, the parties have not directed this court to case law involving the unique circumstances which occurred in this case.

Here, the record reveals that defendant was present both at the hearing on the State's petition to revoke probation and during the sentencing hearing, but failed to appear only when the court announced the sentence at a later date. In the case at bar, defendant not only participated in the preparation of the presentence investigation report, as evidenced by the record but also appeared in person and with counsel on June 8, 2009, when the cause came before the court for a sentencing hearing and later on June 11, 2009, when the trial court allowed defendant to make a statement to the court. Following defendant's statement on June 11, 2009, which indicated he hoped to be allowed to continue on probation, the trial court then released defendant from custody, advised defendant of release conditions, and set the cause for a ruling on sentencing for September 11, 2009.

When defendant did not appear on September 11, 2009, the court continued the cause to

provide defendant with additional notice and to provide defense counsel with additional time to contact defendant. When defendant did not appear again on October 22, 2009, the trial court did not hear any additional evidence, did not receive or consider any additional arguments, and did not make any findings in mitigation or aggravation without defendant present. The trial court simply announced defendant's sentence, in his absence, without any discussion or dialogue with counsel. Importantly, defendant was present at the hearing on defendant's motion to reconsider sentence when the court denied the motion to reconsider by stating, "show the Court feels that the sentence was appropriate at the time, and the motion to reconsider is denied."

The Unified Code of Corrections provides that at the sentencing hearing, the court shall consider the evidence, if any, received at trial, consider any presentence reports, hear evidence and information offered by the parties in aggravation and mitigation, hear arguments as to sentencing alternatives, and allow a defendant the opportunity to make a statement in his own behalf. 730 ILCS 5/5-4-1(a) (West 2008). Based upon our review of the record, we conclude that the trial court conducted defendant's sentencing hearing on June 8 and 11, 2009, with defendant present. The trial court only pronounced the term of defendant's sentence in defendant's absence. Under these unique circumstances, we conclude that defendant's due process rights were not violated in this case regardless of the insufficiency of the bail bond form signed by defendant advising defendant that the trial court could conduct future proceedings in his absence.

II. Errors in Sentencing

Next, we address defendant's other contentions on appeal that the trial court abused its discretion in sentencing defendant. Sentencing judges are vested with wide discretion in

formulating an appropriate penalty. *People v. Hillenbrand*, 121 Ill. 2d 537, 566 (1988), (citing *People v. Younger*, 112 Ill. 2d 422, 427 (1986)). However, that discretion is not without limits, and in reviewing a trial court's sentence, the question is whether the trial court abused its discretion. *People v. O'Neal*, 125 Ill. 2d 291, 297-298 (1988); *People v. Younger*, 112 Ill. 2d at 427; *People v. La Pointe*, 88 Ill. 2d 482, 492 (1981).

When a defendant's probation is revoked, the trial court may sentence a defendant to any term that would have been appropriate for the underlying offense. See *People v. Gaurige*, 168 Ill. App. 3d 855 (1988). However, a trial court may not resentence a defendant on revocation of probation based upon or as a punishment for the conduct which constituted the probation violation. The court may only consider defendant's conduct while on probation to assess his rehabilitative potential. *People v. Young*, 138 Ill. App. 3d 130, 135 (1985); *People v. Gaurige*, 168 Ill. App. 3d 855, 868-69 (1988); *People v. Butler*, 137 Ill. App. 3d 704, 722 (1985).

In reviewing a sentence following revocation of probation, an appellate court must determine whether the trial court improperly “ ‘commingled’ ” the underlying offense and the defendant's subsequent acts. *People v. Vilces*, 186 Ill. App. 3d 983, 986 (1989), (quoting *People v. Young*, 138 Ill. App. 3d at 135). A reviewing court is presumed to have considered all relevant factors, including any mitigating evidence, absent a contrary showing in the record. *People v. Franks*, 292 Ill. App. 3d 776, 779 (1997), (citing *People v. Back*, 239 Ill. App. 3d 44 (1992)). “ ‘[A] sentence within the statutory range for the original offense will not be set aside on review unless the reviewing court is strongly persuaded that the sentence imposed after revocation of probation was *in fact* imposed as a penalty for the conduct which was the basis of revocation, and not for the original offense.’ ” (Emphasis in original). *People v. Vilces*, 186 Ill. App. 3d at 986,

(quoting *People v. Young*, 138 Ill. App. 3d at 142.)

In determining whether a trial court improperly punished a defendant for conduct while on probation, reviewing courts have concluded that the record must clearly show that the court considered the original offense when determining a defendant's sentence. *People v. Varghese*, 391 Ill. App. 3d 866, 876 (2009); *People v. Hess*, 241 Ill. App. 3d 276, 284 (1993); *People v. Gaurige*, 168 Ill. App. 3d at 869; *People v. Clark*, 97 Ill. App. 3d 953, 956 (1981). Reviewing courts may consider the remarks of the trial court during sentencing. *People v. Varghese*, 391 Ill. App. 3d at 876; See *People v. Young*, 138 Ill. App. 3d at 140. Further, the record should show that the trial court considered the evidence, if any, received during the original trial, any presentence reports, and evidence and information in aggravation and mitigation, along with hearing sentencing alternatives and allowing defendant an opportunity to speak. *People v. Gaurige*, 168 Ill. App. 3d at 868-869; *People v. Clark*, 97 Ill. App. 3d at 956.

Based upon our review of this record, we find that the record does not clearly show that the trial court sentenced defendant based only upon the original offenses. Here, the trial court took the matter of sentence under advisement and released defendant from custody, presumably to allow defendant to obtain a driver's license and employment and return to court prepared to show his ongoing rehabilitative potential. However, just days after his release, defendant was charged with a new offense for driving while license suspended.

When reconsidering the sentence imposed on October 22, 2009, the court stated he relied on the factors previously recited. However, the record does not contain any previous findings in mitigation or aggravation announced by the court before taking the sentence under advisement or when announcing the sentence imposed.

Instead, the remarks and questions posed by the trial court at the June 8 and 11, 2009, sentencing hearing focused on defendant's probation violation, the status of defendant's driving privileges, and matters the trial court wanted defendant to address while on probation, including obtaining a GED, seeking employment and obtaining a driver's license. Additionally, during the sentencing hearing, the trial court made inaccurate comments about defendant's criminal history, contrary to the contents of the presentence investigation report. Moreover, the court's only reference to the original offenses occurred when the court summarily delineated the sentence for each offense on October 22, 2009. With only this passing reference to defendant's original offenses, it becomes apparent that the trial court improperly commingled the nature of the original offenses with a consideration of defendant's unsuccessful conduct on probation and while released on bond, when the court took the matter of sentencing under advisement. See *People v. Varghese*, 391 Ill. App. 3d at 876.

Accordingly, we vacate defendant's sentence and remand the cause to the trial court to conduct a new sentencing hearing. In light of our decision, we need not reach defendant's other claim on appeal that the trial court imposed an excessive sentence.

CONCLUSION

The sentencing order of the circuit court of Will County is reversed and vacated, and the cause is remanded to the trial court for a new sentencing hearing.

Order vacated and remanded.