

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. 4-09-0805

Filed 01/06/11

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
PATRICIA A. RAPP,)	No. 07CF1236
Defendant-Appellant.)	
)	Honorable
)	Heidi N. Ladd,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court. Presiding Justice Knecht and Justice Myerscough concurred in the judgment.

ORDER

Held: As no meritorious claim could be raised on appeal, OSAD's motion to withdraw as counsel on appeal pursuant to *Anders v. California* was granted and the trial court's judgment affirmed.

This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal on the ground that no meritorious issues can be raised in this case. For the reasons that follow, we agree.

I. BACKGROUND

On September 26, 2007, defendant, Patricia A. Rapp, pleaded guilty to unlawful possession of a methamphetamine precursor, a Class 2 felony (720 ILCS 646/20(a)(2)(A) (West 2006)), pursuant to a fully negotiated plea agreement. According to the State's representations at the plea hearing, the State's

evidence would have shown, on July 17, 2007, defendant and three other individuals drove from store to store purchasing tablets containing pseudoephedrine with the intent of using it to manufacture methamphetamine. The trial court accepted defendant's guilty plea and sentenced her to 30 months of probation and 18 days in jail already served. Pursuant to the plea agreement, defendant's sentence carried conditions that defendant, *inter alia*, (1) not violate any criminal statute of any jurisdiction; (2) pay (a) court costs, (b) a \$10 anti-crime fee, (c) a \$100 crime-laboratory analysis fee, (d) a monthly \$10 probation fee, and (e) a \$1,000 mandatory assessment; (3) make reasonable efforts to obtain a general equivalency diploma (GED); (4) obtain a substance-abuse assessment within 60 days of sentencing and comply with any resulting treatment recommendations; (5) submit specimens of blood, saliva, or tissue for deoxyribonucleic acid (DNA) analysis and pay corresponding costs of \$200; and (5) testify truthfully if called upon by the State in Champaign County case Nos. 07-CF-1233, 07-CF-1234, and 07-CF-1235. The court accorded defendant 18 days' sentencing credit and \$90 against fines for time served.

In June 2009, the State filed a petition to revoke defendant's probation, alleging she violated a term of her probation by committing the crime of unlawful possession of drug paraphernalia, a Class A misdemeanor (720 ILCS 600/3.5(a) (West

2008)). Specifically, the State alleged defendant knowingly possessed a pipe with the intent of using it to introduce cannabis into the human body.

In June 2009, the trial court held a hearing on the State's petition to revoke. At the hearing, the State presented the testimony of Urbana police officers Matthew Mecum and Doug Pipkins. Officer Mecum testified he initiated a traffic stop of a car with one nonoperational headlight at approximately 1:27 a.m. on May 24, 2009. Mecum was informed the registered owner of the vehicle, Amber Spurton, who had been driving, had an outstanding arrest warrant. Defendant was sitting in the car behind the driver's seat, and two other passengers were in the vehicle. Officer Pipkins arrived to provide backup for Spurton's arrest. While Mecum escorted Spurton to Mecum's squad car, Pipkins initiated a conversation with defendant. When Mecum returned to the stopped car after securing Spurton in the squad car, Pipkins had obtained defendant's purse and showed Mecum a glass pipe sitting in plain view in the purse. Mecum observed a burnt residue in the bowl of the pipe that smelled like cannabis. Defendant told Mecum the pipe belonged to her ex-boyfriend, Alan Corbin, the other backseat passenger.

Mecum asked the passengers to exit the vehicle. When Corbin stated he may have a small Baggie containing cannabis on his person, Mecum searched him but found no contraband. A search

of the vehicle revealed six or seven open beer bottles. No further contraband was found in defendant's purse. Mecum issued defendant a notice to appear.

Pipkins testified to his involvement in the traffic stop. Pipkins assisted Mecum in handcuffing Spurton. As the officers were placing the handcuffs on Spurton, Pipkins was watching the remaining occupants of the car. Although it was dark outside, the intersection where the car was stopped was well lit by streetlights and the headlights of Mecum's squad car were directed at the stopped car. Pipkins saw Corbin turn over his shoulder several times to look at the officers and then observed defendant place something in her purse. As Mecum led Spurton to his squad car, Pipkins approached defendant and asked her to hand him her purse, which was situated between her and Corbin in the backseat. The purse was open when defendant gave it to Pipkins, and Pipkins observed a glass pipe containing a burnt residue in the purse. The pipe appeared to be drug paraphernalia and was consistent with pipes used in consuming cannabis. Because Mecum was in charge of the traffic stop, Pipkins's involvement in the stop and investigation concluded when he gave the purse and its contents to Mecum although he remained at the scene to provide security during the search of the vehicle.

The defense presented the testimony of Corbin and defendant. Corbin testified he and his girlfriend, the front-

seat passenger, had been consuming alcohol and cannabis at several Champaign nightclubs on the night in question. Rather than drive themselves back to Danville in their intoxicated state, they called Spurton for a ride home. Because she was tired, Spurton asked defendant to accompany her to Champaign and back.

After the trial court admonished him regarding his fifth-amendment right not to incriminate himself, Corbin testified he possessed on the night in question a glass pipe for smoking cannabis, which he kept in his pocket. While he and his girlfriend were waiting for Spurton to arrive, Corbin went to a gas station and purchased some alcohol. When he placed the change in his pocket, he feared the change would break or damage his pipe. When Spurton and defendant arrived, according to Corbin, Corbin put his pipe in defendant's purse for safekeeping.

Defendant testified she had no knowledge of what Corbin placed in her purse. According to defendant, after getting in the car, Corbin told defendant he was afraid "this is gonna break" and asked her permission to put "it" in her purse. Defendant assumed "this" and "it" meant a soft pack of cigarettes. Defendant did not look to see what Corbin placed in her purse. Defendant asserted she had abstained from using alcohol or illicit drugs since conceiving her daughter, who was six months old at the time of the hearing. Defendant invoked her right not to incriminate herself when the State asked whether she had used

drugs while on probation.

The trial court found the State had proved defendant violated the terms of her probation by a preponderance of the evidence. It found the pipe was clearly an item of drug paraphernalia and defendant clearly possessed it. It noted the sole question was whether defendant knowingly possessed the pipe. The court found the State's witnesses "very credible ***, very professional" and free from bias or motive. In contrast, the court found the defense's witnesses incredible and obviously biased and noted their demeanor was questionable. The court specifically noted Corbin's explanation of his placing the pipe in defendant's purse to prevent it from breaking was incredible in light of Pipkins's testimony that he observed defendant herself place the pipe in her purse. The court noted defendant's response, when confronted by Mecum with the pipe, "was not one of surprise or disapproval or disavowal or some statement that she believed it was cigarettes." Having found the State satisfied its burden, the court revoked defendant's probation.

In September 2009, the trial court held a resentencing hearing. The State did not present evidence at the hearing. Defendant's evidence consisted of 11 letters attesting to, *inter alia*, defendant's character, employment and education status, and capacity for rehabilitation. One of the letters was written by defendant in lieu of giving an in-court statement in allocution.

In its argument, the State noted defendant's reports of her own drug and alcohol use varied widely between her accounts to different court-services employees and asserted, "[U]ntil she's ready to tell the truth, no community-based sentence is gonna help her." The State also asserted defendant's account of her own drug history in her presentence investigation report was inconsistent with her involvement, in the underlying offense, in a methamphetamine-manufacturing operation. The State noted the court had found defendant's testimony at the hearing on the petition to revoke incredible. The State emphasized the public policy behind sending a strong message in sentencing offenders in methamphetamine cases. It recommended a prison sentence and, alternatively, asked the court to include a sentence to county jail if the court found a community-based sentence appropriate.

The defense emphasized the progress defendant had made while on probation. Specifically, it noted defendant had obtained her GED, found gainful employment, completed substance-abuse treatment and subsequently begun consistently testing negative for drugs, and generally complied with probation-reporting requirements. The defense further noted the hardship defendant's then-10-month-old daughter would suffer if defendant were sentenced to imprisonment. It asked for a sentence to probation.

Finding defendant had generally complied with the terms of her probation and shown her ability to change her unlawful

behavior, the trial court resentenced defendant to a new term of 24 months of probation. The court then held a brief hearing on the issue of attorney fees for defendant's court-appointed counsel. Defense counsel did not present any evidence, and the State took no position on the matter. The court set the reimbursement amount at \$100 and ordered defendant to pay the fee in monthly \$5 installments.

In October 2009, defendant filed a notice of appeal and the trial court appointed OSAD to serve as her attorney. In September 2010, OSAD moved to withdraw, attaching to its motion a brief in conformity with the requirements of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967). The record shows service of the motion on defendant. On its own motion, this court granted defendant leave to file additional points and authorities by October 22, 2010, but defendant has not done so. After examining the record and executing our duties in accordance with *Anders*, we grant OSAD's motion and affirm the trial court's judgment.

II. ANALYSIS

OSAD contends the record shows no meritorious issues that can be raised on appeal and an appeal from the trial court's denial of defendant's motion to reconsider her sentence would be frivolous. Specifically, OSAD contends (1) the petition to

revoke defendant's probation was timely and validly filed, (2) the State established by a preponderance of the evidence defendant knowingly possessed an item of drug paraphernalia, (3) the seizure of the pipe was lawful, (4) the court did not abuse its discretion in resentencing defendant to a new term of probation, and (5) the court properly imposed reimbursement for attorney fees. We consider each of these potential arguments in turn.

A. Timeliness of the State's Petition To Revoke

First, OSAD asserts the State's petition to revoke was timely and validly filed. We agree. Defendant was sentenced to 30 months of probation on September 26, 2007. As a condition of her probation, defendant was ordered not to violate any criminal statute of any jurisdiction. The State filed its petition to revoke on June 2, 2009, within the term of defendant's probation, alleging defendant violated a criminal statute of the State of Illinois. The trial court properly took judicial notice of these facts prior to its hearing on the petition to revoke on the State's motion, without objection by defendant. Thus, the petition was timely and validly filed and any argument to the contrary would lack merit.

B. The State's Burden of Establishing Defendant
Violated the Terms of Probation by a
Preponderance of the Evidence

Second, OSAD asserts the State proved by a preponderance of the evidence the allegations in its petition to revoke.

Specifically, OSAD maintains the State showed defendant knowingly possessed an item of drug paraphernalia. We agree.

A probation-revocation proceeding is civil, not criminal, in nature. *People v. Woznick*, 278 Ill. App. 3d 826, 828, 663 N.E.2d 1037, 1038 (1996). Accordingly, proof of a probation violation need only be shown by a preponderance of the evidence and the trial court's finding will not be overturned unless it is against the manifest weight of the evidence. *Woznick*, 278 Ill. App. 3d at 828, 663 N.E.2d at 1038-39; see also 730 ILCS 5/5-6-4(c) (West 2008).

In its petition to revoke defendant's probation, the State alleged defendant violated section 3.5(a) of the Drug Paraphernalia Control Act (Act) (720 ILCS 600/3.5(a) (West 2008)-), which criminalizes possession of drug paraphernalia. Section 3.5(a) of the Act states, in pertinent part,

"A person who knowingly possesses an item of drug paraphernalia with the intent to use it in ingesting, inhaling, or otherwise introducing cannabis *** into the human body *** is guilty of a Class A misdemeanor for which the court shall impose a minimum fine of \$750 in addition to any other penalty prescribed for a Class A misdemeanor." 720 ILCS 600/3.5(a) (West 2008).

A person knows "[t]he nature or attendant circumstances of his conduct, described by the statute defining the offense, when he is consciously aware that his conduct is of such nature or that such circumstances exist." 720 ILCS 5/4-5(a) (West 2008). That is, a defendant is said to have acted knowingly if he or she was aware of the existence of facts that make his or her conduct illegal. *People v. Hodogbey*, 306 Ill. App. 3d 555, 559, 714 N.E.2d 1072, 1076 (1999). Knowledge is generally established through circumstantial evidence since it is not susceptible to direct proof. *Hodogbey*, 306 Ill. App. 3d at 559, 714 N.E.2d at 1076. Thus, in the context of possession of a controlled substance, for example, a defendant's knowledge may be established by evidence of acts or conduct that allow the inference the defendant was aware of the presence of a controlled substance at the place of discovery. *Hodogbey*, 306 Ill. App. 3d at 560, 714 N.E.2d at 1076. This principle applies in the context of drug paraphernalia.

In the present case, the State showed defendant knowingly possessed an item of drug paraphernalia by a preponderance of the evidence. It is uncontested defendant possessed the pipe and the pipe is drug paraphernalia. The questions remaining under section 3.5(a) of the Act are (1) whether defendant knowingly possessed the pipe and (2) whether she intended the pipe to be used to introduce cannabis into the human body. Both these

questions are satisfied by the trial court's findings of fact which, in turn, are supported by the State's evidence.

First, we consider whether defendant's possession of the pipe was knowing. The trial court found, based on Pipkins's testimony, defendant herself placed the pipe in her purse, and this finding was not against the manifest weight of the evidence. From defendant's conduct of placing the pipe in her purse, the trial court could properly infer defendant was aware of the pipe's presence in her possession. Further, defendant reacted without surprise when Mecum showed her the pipe he had recovered from her purse. Thus, the trial court was entitled to conclude defendant knowingly possessed an item of drug paraphernalia by exercising control over the pipe when placing it in her purse.

Second, we consider whether defendant possessed the pipe with the intent to use it to introduce cannabis into the human body. Defendant testified she knew the pipe was used to smoke cannabis. Her conduct in concealing the pipe from the police by placing it in her purse demonstrates her intent to preserve it within her possession so it could later be used to smoke cannabis. Further, the trial court entertained the inference defendant herself intended to use the pipe to consume cannabis, as it found the car in which defendant was riding was generally characterized by drinking and drug usage when it was stopped by police on the night in question. This inference was permissi-

ble from the evidence. For these reasons, we find the State satisfied its burden of showing defendant violated section 3.5(a) of the Act and, in turn, violated the terms of her probation.

This result is not affected by the State's failure or decision not to produce the pipe at the hearing on its petition to revoke or to introduce it into evidence. The absence of the pipe from the hearing is insubstantial in light of the four witnesses' agreement that the pipe existed and was present in defendant's purse when the officers discovered it. The witnesses testified to the pipe's specific physical and proprietary characteristics, including its size, coloring, material constitution, configuration, contents, use, and ownership. These details demonstrate by a preponderance of the evidence the pipe indeed existed and constituted an item of drug paraphernalia. Its production as evidence at the hearing was, therefore, not necessary to the trial court's finding that defendant violated a term of her probation.

For these reasons, we agree with OSAD defendant could not reasonably argue on appeal the State failed to prove she violated a term of her probation by a preponderance of the evidence.

C. Seizure of the Pipe

Third, OSAD contends defendant could not show the pipe was unlawfully seized and should have been excluded from the

hearing on the State's petition to revoke probation. We agree.

The exclusionary rule does not apply *per se* to a proceeding on a petition to revoke, but evidence may be excluded as a sanction if police misconduct occurred. *People v. Dowery*, 62 Ill. 2d 200, 206-07, 340 N.E.2d 529, 532-33 (1975).

In this case, no police misconduct occurred in the seizure of the pipe from defendant's purse. Pipkins testified he observed Corbin acting suspiciously and saw defendant place an object in her purse. When Pipkins asked her to give him her purse, defendant complied. The pipe was plainly observable as it was sitting on top of the other contents of the purse, which was open. As no misconduct is apparent from Pipkins's seizure of the pipe, it was not necessary for the trial court even to consider excluding the pipe, let alone testimony regarding the pipe. Accordingly, defendant could not reasonably argue the court erred in allowing testimony about the pipe at the hearing on the State's petition.

D. Defendant's Subsequent Sentence to Probation

Fourth, OSAD contends defendant could not argue the trial court erred in resentencing defendant to 24 months of probation. We agree.

Initially, we note defendant forfeited any potential argument regarding her sentencing by failing to file a motion to reconsider sentence. Even if we were to reach the merits on the

sentencing issue, however, we would conclude the trial court did not err.

Trial courts enjoy broad discretion in fashioning criminal sentences, and we will not alter a sentence on review absent an abuse of that discretion. *People v. Chester*, 396 Ill. App. 3d 1067, 1077, 926 N.E.2d 723, 731 (2010).

In this case, the trial court did not abuse its discretion. Defendant was convicted of possession of a methamphetamine precursor, a Class 2 felony (720 ILCS 646/20(a)(2)(A) (West 2006)). Accordingly, defendant was eligible for a determinate sentence of imprisonment of between three and seven years and for a probationary sentence of up to four years. 730 ILCS 5/5-8-1(d)(5), 5-6-2(b)(1) (West 2006). The court considered the evidence in aggravation and mitigation and the parties' arguments and recommendations and sentenced defendant to 24 months of probation. The 24-month probationary term was well within the sentencing range permitted by statute, and we cannot say this sentence was an abuse of discretion. Thus, defendant could not reasonably argue on appeal her sentence was erroneous.

E. Attorney Fees

Fifth, OSAD asserts defendant could not reasonably challenge the trial court's imposition of an order to reimburse defendant's attorney fees in the amount of \$100. We agree.

Section 113-3.1(a) of the Code of Criminal Procedure of

1963 allows the trial court to order a defendant with appointed counsel to reimburse the county or the State for attorney fees. 725 ILCS 5/113-3.1(a) (West 2008). Section 113-3.1(a) mandates,

"[i]n a hearing to determine the amount of the payment, the court shall consider the affidavit prepared by the defendant under Section 113-3 of this Code and any other information pertaining to the defendant's financial circumstances which may be submitted by the parties." 725 ILCS 5/113-3.1(a) (West 2008).

Such a hearing must be held within 90 days after the entry of a final order. 725 ILCS 5/113-3.1(a) (West 2008). In a felony case, the amount of the payment cannot exceed \$5,000. 725 ILCS 5/113-3.1(b) (West 2008).

In this case, immediately following the resentencing hearing, the trial court held a hearing on its own motion to determine defendant's capability to reimburse the fee for her court-appointed attorney. The court considered defendant's affidavit and evidence of defendant's financial circumstances adduced at the sentencing hearing. When it entered the reimbursement order, the court expressed confidence in defendant's ability to make the monthly \$5 installment payments toward the \$100 amount. This amount was authorized by section 113.1-3.1(b).

Because the court fully performed the procedures defined in section 113-3.1(a), we agree with OSAD defendant could not reasonably argue the court erred in imposing the reimbursement order.

III. CONCLUSION

Our review of the record shows that no meritorious issues could be raised on appeal. Accordingly, we grant OSAD's motion to withdraw and affirm the trial court's judgment.

Affirmed.