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2011 IL App (4th) 990049-U

Order filed October 20, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
FOURTH DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF  
ILLINOIS,

Plaintiff-Appellee,

v.

NAPOLEON WILLIAMS,

Defendant-Appellant.

) Appeal from the Circuit Court  
) of the 6th Judicial Circuit,  
) Macon County, Illinois,  
)  
) Appeal Nos. 4-99-0049, 4-09-0404  
) Circuit No. 97-CF-467  
)  
) Honorable  
) Scott B. Diamond,  
) Judge, Presiding.

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JUSTICE HOLDRIDGE delivered the judgment of the court.  
Justice McDade concurred in the judgment.  
Presiding Justice Carter concurred in part and dissented in part.

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**ORDER**

¶ 1 *Held:* The eavesdropping statute was not unconstitutionally vague as applied to the defendant because his conduct fell squarely within the statutory proscriptions. However, the trial court erred in considering the defendant's conduct that occurred after the original sentencing and the matter must be remanded for a new sentencing hearing.

¶ 2 After a jury trial, the defendant, Napoleon Williams, was convicted of two counts of eavesdropping. 720 ILCS 5/14-2(a) (West 1996). He was originally sentenced to 30 months' probation. The State subsequently filed a petition to revoke the defendant's probation, which the

trial court granted. However, before a new sentence could be imposed, the defendant fled the jurisdiction of the court and remained a fugitive for approximately 10 years. When the defendant eventually returned, he was sentenced to three years in the Department of Corrections for each count of eavesdropping with both sentences to run concurrently. On appeal, he argues that: (1) the eavesdropping statute in effect at the time of his conviction was unconstitutionally void for vagueness; and (2) the trial court erred by sentencing him for conduct that occurred after his probation was revoked. We affirm the defendant's conviction but vacate his sentence and remand the matter for a new sentencing hearing.

¶ 3

### FACTS

¶ 4 The record reveals that, prior to the acts of eavesdropping for which the defendant was ultimately convicted, he was involved in a dispute with the Department of Children and Family Services over the custody of two of his children. The defendant operated a radio station called Black Liberation Radio which he used, in part, to criticize the State's Attorney of Macon County.

¶ 5 At trial, David Chesko, the family's caseworker, testified that he called the defendant to inform him that a visitation with his children had been stayed. Chesko stated that the defendant was argumentative and asked him when he would get a visit with his children. Chesko replied that he would work on it, and he would let the defendant know the arrangements at a later date. Chesko also testified that he called the defendant at his radio station, and that he heard the defendant's voice in the background. He asked the defendant if they were on the radio. The defendant replied, "[n]o." A tape of the conversation was played for the jury.

¶ 6 Wanda Nichols, a secretary at Bridgeway Family Services, testified that when the

defendant called her, he asked to speak to a supervisor, but no supervisor was available. She stated that the defendant started questioning her as to why Bridgeway Family Services would stop a supervised visit. Nichols testified that, while she did not know she was being recorded, she "knew that there was an echo in the background." A tape of Nichols's conversation with the defendant was played for the jury. Neither Nichols or Chesko gave consent to being recorded.

¶ 7 The jury returned a guilty verdict for both counts of eavesdropping. The defendant was initially sentenced to 30 months' probation. However, the defendant violated his probation by failing to turn in the requisite number of job applications per week. After the trial court officially revoked the defendant's probation, a brief recess was called prior to resentencing. During that recess, the defendant fled the jurisdiction and resided in Poplar Bluff, Missouri, for approximately 10 years with his wife and children.

¶ 8 The defendant eventually returned to the jurisdiction of Macon County. At his sentencing hearing, the defendant presented evidence that he was a changed man, and that he had led a law-abiding life since his probation was revoked. He also testified to a history of medical problems.

¶ 9 After hearing the evidence, the trial court found that it made a mistake in giving the defendant probation in the first place and by not increasing the defendant's bond. The court also discussed the defendant's criminal history, and how eavesdropping was a violation of the victim's privacy. The court then stated that it was most concerned about the idea of rewarding the defendant for his bad behavior for fleeing the jurisdiction. The defendant was sentenced to three years for each count of eavesdropping with the sentences to be served concurrently. He appealed.

¶ 10

## ANALYSIS

¶ 11

### I. Constitutionality

¶ 12 The defendant's first argument on appeal is that his conviction should be reversed because the eavesdropping statute was void for vagueness. The defendant contends that the definition of "conversation," as used in the statute, encompasses many forms of innocent conduct. See 720 ILCS 5/14–1(d) (West 1996). We review the defendant's claim *de novo*. *People v. Larson*, 379 Ill. App. 3d 642 (2008).

¶ 13 Statutes are presumed constitutional, and a party challenging the constitutionality of a statute bears the burden of demonstrating its invalidity. *People v. Law*, 202 Ill. 2d 578 (2002). Reviewing courts have a duty to uphold the constitutionality of a statute if it can reasonably be done. *Larson*, 379 Ill. App. 3d 642.

¶ 14 A statute is considered unconstitutionally vague if it fails to: (1) "provide the kind of notice that would enable a person of ordinary intelligence to understand what conduct is prohibited"; or (2) "provide explicit standards for those who apply it, thus authorizing or even encouraging arbitrary and discriminatory enforcement." *Law*, 202 Ill. 2d at 582-83. Whether a statute is void for vagueness must be determined based on the facts of each case. *Larson*, 379 Ill. App. 3d 642.

¶ 15 The eavesdropping statute stated that a person commits eavesdropping when he:

"uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation \*\*\* unless he does so (A) with the consent of all of the parties to such conversation." 720 ILCS 5/14-2(a)(1) (West 1996).

¶ 16 In 1994, the Illinois legislature amended the statute to define the term "conversation," which is described as "any oral communication between 2 or more persons regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation." 720 ILCS 5/14-1(d) (West 1996). It is well-recognized that by adding the definition of "conversation" to the statute in 1994, the legislature "extended the coverage of the eavesdropping statute to all conversations, regardless of whether they were intended to be private." *People v. Nestrock*, 316 Ill. App. 3d 1, 7 (2000) (quoting *People v. Siwek*, 284 Ill. App. 3d 7, 14 (1996)).

¶ 17 In the instant case, the defendant does not allege that the statute was vague as applied to him. Instead, he argues that there are numerous instances where the statute could have prohibited otherwise innocent conduct. However, if the defendant's conduct clearly falls within the statutory proscription, it is irrelevant that the statute is vague as to other conduct. *Larson*, 379 Ill. App. 3d 642.

¶ 18 We find that the eavesdropping statute was not unconstitutionally vague as applied to the defendant. The statute states that using an eavesdropping device to record all or any part of an oral communication between two or more persons is not allowed without consent. In the defendant's case, he recorded his conversations with Chesko and Nichols without their consent. His behavior falls squarely within that prohibition. Therefore, we decline to declare the statute unconstitutionally vague.

¶ 19

## II. Sentencing

¶ 20 The defendant's second issue is that the trial court improperly sentenced him for uncharged conduct that occurred after his probation was revoked, namely the fact that he fled the jurisdiction for 10 years. A trial court's sentence will not be disturbed on appeal absent an abuse of discretion. *People v. Johnson*, 347 Ill. App. 3d 570 (2004).

¶ 21 When resentencing a defendant, the trial court "may impose any other sentence that was available \*\*\* at the time of initial sentencing." 730 ILCS 5/5-6-4(e) (West 2008). In general, the trial court may consider conduct that occurred after the original sentencing as evidence of rehabilitative potential. *People v. Risley*, 359 Ill. App. 3d 918 (2005). However, a trial court may not punish a defendant based upon conduct that gave rise to a probation violation. *Id.* If the defendant's conduct constitutes a separate offense, "the defendant should be tried and found guilty, and the sentence should conform to 'orderly criminal processes.'" *People v. Varghese*, 391 Ill. App. 3d 866, 876 (2009) (quoting *People v. Koppen*, 29 Ill. App. 3d 29, 32 (1975)). In considering whether a sentencing court improperly commingled uncharged conduct with the original offense, reviewing courts should consider whether the sentence was within the proper statutory range and whether the record demonstrates the trial court considered the defendant's original offense when fashioning his sentence. *Id.*

¶ 22 In the instant case, the trial court's sentence is the maximum sentence allowed for the offense of eavesdropping. In considering the trial court's oral order, the court noted in one sentence that the defendant had a record of delinquency. The court also considered, in one paragraph, that eavesdropping is an issue of privacy, and that privacy has become a bigger issue because of the Internet. The next full page of the trial court's order focuses on the fact that the

defendant did not show up in court, and that the trial judge did not want to reward bad behavior. The trial court explicitly stated:

"So, we can't send this message to the Community that you're going to post bond, but if you don't show up and you get away with it for ten years, you're going to come to court and say, 'Oh, I'm a different person now. I'm not going to be punished.'

I am not going to reward bad behavior. I am not going to send a bad message to the Community that we are going to reward bad behavior.

So, the answer is, no, I'm not giving him any more probation. I'm not giving him an extended term, but I'm sentencing him to DOC for 3 years concurrent on both charges[.]"

¶ 23 Based on the trial court's comments, we are convinced that the trial court improperly punished the defendant for conduct that occurred after the original sentencing instead of for the original offense. The trial court only made a "passing reference to [the] defendant's original offense[.]" *Varghese*, 391 Ill. App. 3d at 877. While the trial court was allowed to consider the defendant's subsequent conduct in fashioning an appropriate sentence, "the trial court's concluding comments, by focusing on defendant's conduct \*\*\*, demonstrate that it improperly commingled uncharged conduct with his original offense." *Id.*

¶ 24 Despite this error, the issue is nonetheless forfeited because the defendant's counsel did not object to the error at the time of sentencing or raise it in his motion to reconsider sentence. *In re Detention of Lieberman*, 379 Ill. App. 3d 585 (2007). When an issue is forfeited, it is subject only to plain error review. Under this standard, when reviewing a sentencing error, the defendant must show: "(1) the evidence at the sentencing hearing was closely balanced[;] or (2)

any of the alleged errors deprived him of a fair sentencing hearing." *People v. Ahlers*, 402 Ill. App. 3d 726, 734 (2010).

¶ 25 Looking at the totality of the evidence presented at the sentencing hearing following the revocation of the defendant's probation, it is clear that the evidence presented at the hearing was closely balanced. In determining the appropriate sentence, a trial court must balance several factors, including the nature and circumstances of the offense, the defendant's conduct in the commission of the offense, his personal history, and his rehabilitative potential. *People v. Quintana*, 332 Ill. App. 3d 96, 106 (2002). Here, the aggravating factors included only the fact that the defendant had a past history of criminal activity. However, several mitigating factors were present which weighed against the trial court's imposition of the maximum available sentence. Mitigating factors present in this matter included the non-violent nature of the eavesdropping offense, the fact that the offense occurred in the emotionally-charged environment of a child custody dispute, the defendant's undisputed current medical problems, and his rehabilitative potential as evidenced by his 10 years of law-abiding conduct while living in Poplar Bluff, Missouri. It is only by improperly considering the defendant's flight as an aggravating sentencing factor that it can be said the evidence was not closely balanced. Since it is improper to consider the defendant's flight as an aggravating factor, we must find that the evidence at the sentencing hearing was closely balanced. We observe, moreover, that given the weight of the evidence in mitigation, the evidence was not only closely balanced, it strongly favored leniency for the defendant. See *People v. Martin*, 119 Ill. 2d 453, 458-59 (1988) (where the evidence weighs heavily in favor of the defendant at a sentencing hearing, it is appropriate to apply the plain error rule).

¶ 26 Given the closely balanced nature of the evidence presented at the sentencing hearing, we find that the trial court's erroneous consideration of the defendant's flight as a sentencing factor was plain error. We therefore vacate the sentence and remand the matter for a new sentencing hearing.

¶ 27

#### CONCLUSION

¶ 28 For the foregoing reasons, the judgment of conviction by the circuit court of Macon County is affirmed; however, the sentencing is vacated and the cause is remanded for a new sentencing hearing.

¶ 29 Affirmed in part, vacated in part and remanded.

¶ 30 PRESIDING JUSTICE CARTER, concurring in part and dissenting in part:

¶ 31 I concur in the majority's analysis on the constitutionality of the eavesdropping statute.

However, I respectfully dissent from the majority's analysis of the forfeited sentencing issue.

¶ 32 I disagree with the majority's conclusion that the evidence at the sentencing hearing was closely balanced and that plain error existed. I also disagree with the majority's conclusion that because "it is improper to consider the defendant's flight as an aggravating factor, we must find that the evidence at the sentencing hearing was closely balanced." *Supra* ¶ 25.

¶ 33 The forfeiture rule is intended to bar from review claims not first considered by the circuit court, which if raised at the circuit court could have been answered by explaining or correcting the sentence. *People v. Ahlers*, 402 Ill. App. 3d 726, 732 (2010); *People v. Rathbone*, 345 Ill. App. 3d 305, 310 (2003). The plain error doctrine is a narrow and limited exception to the forfeiture rule. *People v. Bannister*, 232 Ill. 2d 52, 65 (2008); *Ahlers*, 402 Ill. App. 3d at 733. The mere fact that aggravating and mitigating factors were present in this case does not establish that the hearing was closely balanced and prejudicial to the defendant. See *People v. White*, 2011 IL 109689, ¶ 139 ("[a] qualitative—as opposed to strictly quantitative—commonsense assessment of the evidence demonstrates that the evidence was not closely balanced"). The defendant produced witnesses who testified about the defendant's positive presence in Poplar Bluff, and he described his recent medical problems. However, the defendant also had an extensive criminal history, and the fact that he fled the jurisdiction after his probation was revoked but before he would have been sentenced was a factor that the court could indeed consider when assessing the defendant's rehabilitative potential (*People v. Young*, 138 Ill. App. 3d 130, 138 (1985) ("[t]he trial court on sentencing after revocation of probation is authorized by

statute to consider the defendant's conduct through the time of the sentencing hearing"); accord *People v. Cissna*, 170 Ill. App. 3d 398, 402 (1988) (citing *Young* with approval). Accordingly, I believe that the sentencing hearing was not closely balanced and, therefore, the defendant's procedural default of the issue should not be excused.

¶ 34 In addition, although it was not addressed by the majority, I believe the defendant was not deprived of a fair sentencing hearing. He was allowed to present evidence in mitigation. Although the circuit court in part sentenced the defendant based on conduct that occurred after the revocation of probation, the error is simply that the court gave a proper factor undue weight, which invokes the court's exercise of discretion, rather than the fairness of the hearing or the integrity of the judicial process. *Rathbone*, 345 Ill. App. 3d at 312. Claims that address these matters do not warrant plain error review. *Rathbone*, 345 Ill. App. 3d at 312.

¶ 35 For the foregoing reasons, I concur in part and dissent in part and would affirm the circuit court's judgment.