



grams of cocaine to a confidential informant. Defendant was sentenced to 30 months of probation and ordered to pay a fine and to undergo a substance-abuse evaluation.

¶ 5 On October 31, 2008, a revocation of probation action was filed against defendant for driving under suspension. After defendant failed to report on the hearing for probation, and failed to otherwise comply with the requirements of probation, she was resentenced (March 4, 2009) to 36 months of probation.

¶ 6 On May 4, 2009, another revocation of probation action was filed, based on defendant's resisting a police officer by jerking her arms. On July 22, 2009, defendant was resentenced to a new 36 months of probation.

¶ 7 On April 29, 2010, defendant went to the probation department in connection with an appointment for her son, who was on juvenile court supervision. At that time, defendant agreed to do her required urine test, which tested positive for cocaine. On May 12, 2010, a petition to revoke probation was filed, and on October 27, 2010, defendant was resentenced to five years in the Department of Corrections.

¶ 8 II. ANALYSIS

¶ 9 A. Mistaken Reliance on an Aggravating Factor

¶ 10 On appeal, defendant points to the following language of the trial court:

"For the underlying offense, the underlying offense was almost four years ago as of today, or yesterday. And then again in November, on two separate occasions, Ms. Timpone chose to sell cocaine to an undercover police officer. The sale that led

to her conviction was [0].8 grams of cocaine that she sold, from her residence, to a confidential source. Actually it was monitored by the police in a controlled buy."

¶ 11 Defendant argues no record shows evidence that any sales to police officers took place, that the sale of 0.8 grams of cocaine was to a cousin, a confidential informant who was released from jail to go to her to try to get drugs. Defendant also points out there were not two sales in November. The trial court abuses its discretion during sentencing when it relies on a fact not supported by the evidence. *People v. Reed*, 298 Ill. App. 3d 285, 305, 698 N.E.2d 620, 634-35 (1998); *People v. Luna*, 409 Ill. App. 3d 45, 50, 946 N.E.2d 1102, 1109 (2011). The State responds that a complete reading of the record indicates that the trial court did not take any mistaken fact into account in aggravation, pointing to the trial court's final sentence.

¶ 12 Defendant describes the State's argument as "worthy of the Sophists of Athens." We disagree. The trial court was discussing the count to which defendant pleaded guilty ("the underlying offense"), and the count which was dismissed at that time. The underlying offense "was almost four years ago," in October, and "then again in November" she did it again. There were two separate occasions. One of the difficult things in preparing a transcript is determining where a sentence ends and the next one begins. The transcript here would have made better sense if the words, "And then again in November," had been a separate sentence instead of being joined to the next sentence, "On two separate occasions, Ms. Timpone chose to sell cocaine to an undercover police officer."

¶ 13 When the trial judge used the word "actually," she was making a correction: there was no sale to an undercover police officer, rather there was a sale monitored by the police in a

controlled buy. There were two such sales, one on October 29, 2006, and one on November 7, 2006, but the second count was dismissed in response to defendant's guilty plea. As the trial court correctly noted, "[t]he sale that led to [defendant's] conviction was [0].8 grams of cocaine." The trial court clearly understood the count defendant was being sentenced on. When probation is revoked, the court resentences defendant on the original offense, but may properly consider defendant's conduct while on probation as evidence of rehabilitation. *People v. Varghese*, 391 Ill. App. 3d 866, 876, 909 N.E.2d 939, 947-48 (2009). Upon revocation of probation, trial courts can consider the crime that resulted in revocation of probation as evidence of the defendant's rehabilitative potential. The new sentence, however, cannot punish the defendant for anything other than the original underlying offense. *People v. Witte*, 317 Ill. App. 3d 959, 963, 740 N.E.2d 834, 837-38 (2000).

¶ 14 Even if we assume mistaken reliance on an aggravating factor here, where it can be determined that the weight placed on the factor was so insignificant that it did not lead to a greater sentence, remandment is not required. *Luna*, 409 Ill. App. 3d at 51-52, 946 N.E.2d at 1109. It made no difference in resentencing whether the sale was to an undercover police officer or to a confidential informant. It does not appear that the trial court took the dismissed charge into account, but even if she did, there is no abuse of discretion. The ordinary rules of evidence are relaxed during sentencing hearings. Evidence may be admitted so long as it is both relevant and reliable. Even a defendant's criminal conduct not resulting in prosecution or conviction may be considered. *People v. Harris*, 375 Ill. App. 3d 398, 408-09, 873 N.E.2d 584, 593 (2007). It would have been helpful if defendant would have presented this question to the trial court. Defendant should have raised this issue in her postsentencing motion. *Reed*, 298 Ill. App. 3d at

305, 698 N.E.2d at 634.

¶ 15

#### B. Excessive Sentence

¶ 16

The sentencing range for defendant's Class 2 felony is three to seven years. 730 ILCS 5/5-4.5-35(a) (West 2008). Defendant argues that the information before the trial court, good and bad, on balance should show that her sentence was excessive (and implicitly given out of some factor not in the official record). Defendant notes the stresses she has endured, divorce, anxiety, troubled child, and employment difficulties. Although there were several instances of non-compliance with probation requirements, there were no reports of felony recidivism or violence. Defendant also notes the average sentence for Class 2 drug offenses is 3.8 to 4.0 years, citing Department of Corrections statistics. The trial court, however, noted that this was the fourth time defendant was being sentenced on this conviction, that defendant was previously warned that if she would violate probation again it was likely she would go to the Department of Corrections and it would not be a minimal sentence. The trial court was disturbed that defendant, after all this, had again tested positive for cocaine, the same controlled substance involved in the underlying conviction. The trial court determined that "enough is enough" and it had reached a point where "deterrence acquires increasing significance."

¶ 17

The sentence imposed by a trial judge should not be overturned absent an abuse of discretion. The trial judge's ruling is entitled to great deference and weight because the trial judge is better able to make a firsthand, reasoned judgment based on such factors as the defendant's general moral character, credibility, demeanor, social habits and age. *People v. Anders*, 228 Ill. App. 3d 456, 467, 592 N.E.2d 652, 659 (1992). A sentence within statutory

limits will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *People v. Fern*, 189 Ill. 2d 48, 56, 723 N.E.2d 207, 210 (1999). A trial court need not justify its sentence in relation to sentences imposed in other cases; it is not a basis for attacking a sentence that a defendant in a separate, unrelated case received a lighter sentence. *Fern*, 189 Ill. 2d at 62, 723 N.E.2d at 214. The trial court's analysis of the sentence here, in the middle range of possible sentences, seems reasonable. We cannot say the trial court abused its discretion.

¶ 18

### III. CONCLUSION

¶ 19 For the foregoing reasons, we affirm the trial court's judgment. We award the State \$50 in costs against defendant as costs of this appeal.

¶ 20 Affirmed.