

NOTICE
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2012 IL App (4th) 100983-U

Filed 4/5/12

NO. 4-10-0983

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
TRAVIS L. MORROW,)	No. 08CF2123
Defendant-Appellant.)	
)	Honorable
)	Jeffrey B. Ford,
)	Judge Presiding.

JUSTICE COOK delivered the judgment of the court.
Presiding Justice Turner and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in resentencing defendant after revocation of probation.

¶ 2 In February 2009, defendant, Travis L. Morrow, entered a negotiated guilty plea to burglary (720 ILCS 5/19-1(a) (West 2008)), and the trial court sentenced defendant to 36 months' probation. Defendant violated his probation and in September 2009 the trial court revoked his probation. In December 2009, the court resentenced defendant to 48 months' probation, which he again violated and the court revoked. In October 2010, the court then resentenced defendant to five years and six months in jail. Defendant appeals, arguing the court abused its discretion by sentencing defendant based on his conduct on probation and not on the original offense of burglary. We affirm.

¶ 3

I. BACKGROUND

¶ 4 In November 2008, defendant entered a Macy's store, took two bottles of cologne, stuffed them under his clothes, and left without paying for them. Loss prevention personnel stopped defendant and recovered the cologne. Defendant admitted he attempted to steal the cologne to support his drug habit. The value of the cologne was \$145.

¶ 5 The State charged defendant with burglary (720 ILCS 5/19-1(a) (West 2008)). On February 25, 2009, defendant pleaded guilty. Burglary is a Class 2 felony, punishable by three to seven years' imprisonment, with two years' mandatory supervised released. See 720 ILCS 5/19-1(b) (West 2008); 730 ILCS 5/5-8-1(a)(2.5)(5) (West 2008). The trial court sentenced defendant to 150 days in jail and 36 months' probation, with credit of 38 days for time previously spent in custody. The court ordered defendant to submit to a drug and alcohol evaluation.

¶ 6 On September 24, 2009, the State filed a petition to revoke defendant's probation. The State alleged defendant (1) failed to report to court services on June 23, 2009, (2) failed to submit to a drug and alcohol evaluation within 60 days, and (3) violated a criminal statute by presenting a document apparently capable of defrauding another to a Shoe Carnival store. Defendant admitted and stipulated to the allegations set forth in the State's petition. In December 2009, the trial court resentenced defendant to 48 months' probation to be supervised by the drug court, to commence on December 18, 2009. The court also ordered defendant to serve 180 days in jail.

¶ 7 On December 30, 2009, the State filed a petition to revoke defendant's probation. The State alleged defendant committed the offense of (1) obstructing justice by attempting to conceal a syringe with the intent to obstruct the prosecution of himself or another, and (2) unlawful possession of paraphernalia, by possessing a syringe with the intent to inject heroin into

his body. In January 2010, defendant admitted and stipulated to these allegations. The trial court allowed defendant to enter into a residential treatment program supervised by drug court.

¶ 8 Defendant stayed sober for several months, but he failed to appear in drug court on August 2, 2010. The trial court subsequently issued an arrest warrant. On October 18, 2010, the trial court resentenced defendant to five years and six months in prison, with credit for 133 days of time served.

¶ 9 In November 2010, defendant filed a motion to reconsider his sentence. Defendant alleged, among other things, that the trial court placed too much weight in aggravation on defendant's multiple opportunities at treatment and his failure to appear in drug court. After a November 2010 hearing, the trial court denied defendant's motion. The court concluded that defendant "was given the appropriate sentence for the crime that he committed." It further noted defendant had already been sentenced to probation twice and that the court usually does not offer a "third shot at probation." Defendant appeals. We affirm.

¶ 10 II. ANALYSIS

¶ 11 On appeal, defendant argues the trial court erred in resentencing defendant. Defendant argues the court resentenced defendant based on defendant's conduct while on probation and not on the original offense of burglary. Specifically, defendant contends the trial court resentenced defendant based on his failure to follow through with drug court.

¶ 12 We review defendant's sentence for an abuse of discretion. *People v. Johnson*, 347 Ill. App. 3d 570, 573-74, 807 N.E.2d 1171, 1175 (2004). A trial court abuses its discretion when its ruling is so arbitrary, fanciful, or unreasonable that no other person could adopt the position taken by the court. *Johnson*, 347 Ill. App. 3d at 574, 807 N.E.2d at 1175. Further, the

trial judge is in a far better position to sentence a defendant, and a reviewing court will not substitute its judgment for that of the trial court simply because it would have weighed the sentencing factors differently. *Johnson*, 347 Ill. App. 3d at 574, 807 N.E.2d at 1175.

¶ 13 Initially, the State argues that defendant forfeited his complaint that the trial court resentenced him based on his conduct during probation because defendant did not raise the issue in his motion to reconsider sentence. Rather, the State asserts, defendant's motion only alleged that the trial court "gave too much weight" in aggravation to defendant's (1) failure to appear in drug court and (2) multiple opportunities at treatment. We agree with the State.

¶ 14 On appeal, defendant argues that the trial court resentenced defendant based on an improper factor—namely, his conduct on probation. However, defendant's posttrial motion alleged that the court placed "too much weight in aggravation" on defendant's conduct on probation. The issues raised by defendant on appeal and in his posttrial motion are not one in the same. A sentencing error based on an improper factor is not equivalent to a trial court affording undue weight to a proper sentencing factor. Therefore, defendant did not preserve the issue for appeal because he did not allege in his posttrial motion that he was improperly resentenced for conduct on probation. See 730 ILCS 5/5-8-1(c) (West 2008).

¶ 15 Defendant argues he did not forfeit his right to raise the issue on appeal. Defendant alleges that the trial court did not clarify the reasons for its resentencing decision until the close of the hearing on defendant's motion to reconsider sentence. Defendant cites two comments the court made during the posttrial hearing: (1) "[defendant] was sentenced to the term of incarceration he was sentenced to mainly because he walked away from drug court" and (2) "[t]he court sentenced [defendant] because [defendant] walked away from drug court."

Therefore, defendant posits, he could not have known the court based its decision on defendant's conduct on probation until hearing these remarks and could not have raised the issue in his original posttrial motion. After reviewing the record in its entirety, we disagree.

¶ 16 During the October 18, 2010, resentencing hearing, the trial court made it known that it was displeased with defendant's failure to follow through with probation and drug court. It remarked:

"So he's been in drug court. He's been told this is what you need to do. He was told when we held the sentencing over his head this is it. You need to do it now. It was just like him getting drug court again because he wasn't being sentenced. And what did he do? He walked away. He decided he didn't need drug court anymore. He walked away. He didn't show up. Warrants had to be issued for his arrest. And as the TASC [(Treatment Alternatives for Safer Communities)] report states, [defendant] reported that during the time he absconded, he was drinking three to six times weekly until he blacked out. So he just decided he would take his vacation from drug court and go drink."

These statements are in the same vein as those defendant complains of at the hearing on the motion to reconsider. Therefore, defendant should have addressed this issue during his posttrial motion. However, he did not, and thus has forfeited the issue. See *People v. Reed*, 177 Ill. 2d 389, 391, 686 N.E.2d 584, 585 (1997) (holding that failure to challenge defendant's sentence in a posttrial motion forfeits such issue on appeal).

¶ 17 Moreover, although defendant forfeited the issue, we would reject his argument were we to reach the merits. We conclude that the trial court did not abuse its discretion in resentencing defendant. We do not set aside a sentence within the statutory range for the original offense unless we are "strongly persuaded that the sentence imposed after revocation of probation was imposed as a penalty for the conduct that was the basis of revocation and not the original offense." *People v. McMann*, 305 Ill. App. 3d 410, 414-15, 712 N.E.2d 935, 938 (1999).

¶ 18 Defendant was resentenced to five years and six months in prison. The authorized sentencing range for burglary is three to seven years. See 720 ILCS 5/19-1(b) (West 2010); 730 ILCS 5/5-8-1(a)(2.5)(5) (West 2008). During resentencing, the trial court remarked on defendant's juvenile record, his history of alcohol and drug abuse, his opportunities at probation and rehabilitation, his failure to comply with probation and drug court, and that he has squandered the limited resources of the judicial system. Further the court noted:

"[H]e admitted and stipulated to the petition to revoke that we're here on last January. Did he have a sentencing then? No. We gave him another chance. He already had his last chance, now we gave him another chance. Today he's asking for a second chance. Well, this is not the second chance. He's asking for a third chance after his last chance.

It's clear that there is no change here. ***

* * *

He has had chance, after chance, after chance, after chance, after chance and now he's asking to give him a second chance. Well, we

are out of second chances, we're out of third chances, we're out of fourth chances, Mr. Morrow. ***

* * *

At this point, giving you probation again is sending you the wrong message."

The record reflects that the court was not punishing defendant for his conduct on probation that led to the revocation. Rather, it was apparent that defendant was not having success with probation, which goes to defendant's rehabilitative potential, that is, undermining the court's prior assessment of defendant's rehabilitative potential. The court concluded imprisonment necessary and appropriate. It did not abuse its discretion in the sentence imposed on revocation. We affirm.

¶ 19

III. CONCLUSION

¶ 20 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 21 Affirmed.