

No. 1-11-2218

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 C6 60156
)	
ANTHONY COLTON,)	Honorable
)	Luciano Panici,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Sterba and Pierce concurred in the judgment.

ORDER

- ¶1 *Held:* The trial court properly revoked defendant's probation when the evidence established that defendant violated the conditions of his probation. In resentencing the defendant, the trial court properly considered defendant's conduct while on probation as an indication of his potential for rehabilitation.
- ¶2 Anthony Colton, the defendant, appeals a judgment revoking his probation and resentencing him to four years in prison for aggravated battery. On appeal, defendant contends that the State failed to prove that he violated a condition of his probation. He further contends that this cause must be remanded for resentencing because the trial court improperly based its sentencing

determination on the fact that he was arrested while on probation. Defendant finally challenges the imposition of certain fines and fees. We affirm and correct the fines and fees order.

¶ 3 Defendant was arrested and charged with attempted first degree murder and aggravated battery following a January 2009 incident during which the victim Joshua Bennett was stabbed.

¶ 4 On July 1, 2010, defendant entered a plea of guilty to aggravated battery and was sentenced to two years of probation. Pursuant to the conditions of his probation, defendant was to, among other requirements, report to the probation department, pay all applicable fines, costs and fees, and refrain from violating the criminal statutes of any jurisdiction. Defendant was also required to submit a DNA sample.

¶ 5 In October 2010, a probation officer sought leave to file a violation of probation in the trial court based upon, *inter alia*, defendant's failure to (1) report to the probation department, (2) pay \$685 in fines and fees, and (3) submit a DNA sample for indexing. At a subsequent hearing, defense counsel argued that defendant had been given the wrong telephone number for the probation department, and that when defendant reached the department he was told that someone would call him back. Although counsel admitted that defendant was negligent for not following up, counsel argued that defendant did not have any new arrests and could now be instructed regarding reporting. The trial court continued the matter for two months so that defendant could comply with the requirements of his probation. The court then ordered defendant to go "upstairs" immediately and provide a DNA sample.

¶ 6 The following month, the State again sought leave to file a violation of probation as defendant had been arrested and charged with attempted aggravated battery. The State also alleged that defendant had made an admission regarding the alleged offense. The trial court granted the State leave to file the petition.

¶ 7 At a subsequent hearing, probation officer Mark Patterson testified that per the terms of defendant's probation, defendant was not "to pick up or commit any new crimes." Defendant was also to report to Patterson, submit a DNA sample, and pay certain probation and court fines and fees. However, defendant had not reported since October 25, and had not submitted DNA. Defendant had also been arrested and charged with attempted aggravated battery. This new charge was a violation of defendant's probation. Patterson admitted during cross-examination that his only knowledge of defendant's new arrest was based upon the State's petition.

¶ 8 In closing argument, the State contended that it had met its burden of proof because defendant's probation officer testified credibly that defendant failed to report, submit DNA for indexing, and pay certain fines and fees. The State further argued that defendant's arrest on a new charge violated the terms of his probation. The defense then responded that defendant could not have reported in November because he was in custody. When the trial court inquired regarding reporting between July and November, counsel replied that defendant had reported in October. Ultimately, the court determined that defendant had been charged with a new offense and failed to either report in a timely manner or submit a DNA sample. Consequently, the court determined that defendant had violated the terms of his probation, and revoked it. In denying defendant's motion to reconsider, the court stated that defendant failed to report, to submit DNA for indexing, and to pay monies "due and owing."

¶ 9 At the resentencing hearing, the trial court heard arguments in aggravation and mitigation and indicated that it had reviewed the presentence investigation report. The court noted that defendant, who had a "history" of delinquency findings in juvenile court was "17-and-a-half *** when he was arrested for stabbing" the victim. While on probation defendant failed to report and was arrested on an unrelated charge. The court then discussed defendant's background which included violent conflict with his mother, adolescent psychological hospitalizations, issues of truancy, and the use

alcohol and marijuana. Ultimately, "based on the fact" that defendant did not take the "opportunity to stay out of trouble," the court resentenced defendant to four years in prison and terminated his probation unsatisfactorily.

¶ 10 On appeal, defendant first contends that the State failed to prove that he violated his probation because its evidence was "limited" to hearsay testimony regarding a new arrest. He further argues that he was unable to report while he was in custody and that his failure to pay the required fines and fees was not willful.

¶ 11 The State has the burden to prove by a preponderance of the evidence that a defendant violated a condition of his probation. 730 ILCS 5/5-6-4(c) (West 2008); *People v. Colon*, 225 Ill. 2d 125, 156-57 (2007). A proposition is proved by a preponderance of the evidence when that proposition is more probably true than not true. *People v. Love*, 404 Ill. App. 3d 784, 787 (2010). When determining whether the State has met this burden, the trial court is free to resolve any inconsistencies in the testimony and to accept or reject as much of each witness's testimony as the court pleases. *Love*, 404 Ill. App. 3d at 787. The trial court is in a better position to weigh the evidence and determine witness credibility, and, consequently, a reviewing court may not reverse the trial court's judgment merely because it might have reached a different conclusion. See *Love*, 404 Ill. App. 3d at 787. Rather, the trial court's finding that the State met its burden must be affirmed unless it is against the manifest weight of the evidence (*Colon*, 225 Ill. 2d at 158), that is, when the opposite result is clearly evident. *Love*, 404 Ill. App. 3d at 787. Even when the State's evidence is "slight" the revocation of probation will be affirmed as long as the opposite conclusion is not clearly evident. *Love*, 404 Ill. App. 3d at 787. After finding a violation of probation, the trial court has the discretion to determine whether to revoke a defendant's probation; its determination will not be disturbed absent an abuse of that discretion. *People v. Jones*, 377 Ill. App. 3d 506, 508 (2007).

¶ 12 Here, the record reveals that the State first sought leave to file a violation of probation based upon defendant's failure to report, submit a DNA sample for indexing, and pay certain fines and fees. Although the trial court continued the cause so that defendant could comply with the requirements of his probation, the court ordered defendant to immediately submit a DNA sample for indexing. The State subsequently sought leave to file a violation of probation based upon defendant's arrest on an unrelated charge. Although Patterson admitted that his knowledge of the circumstances of defendant's new arrest came solely from the petition to revoke defendant's probation, he also testified that defendant failed to submit DNA and to report. While defendant is correct that Patterson did not testify regarding defendant's reporting history between July and October, the record reveals that defendant's noncompliance with the terms of his probation during that time period was the basis of the first petition for violation of probation, and that defense counsel admitted at a subsequent hearing that defendant was given the wrong contact information for the probation department.

¶ 13 Defendant contends that Patterson's hearsay testimony regarding the new arrest was an insufficient basis upon which to revoke his probation. He also argues that absent some indication that his failure to pay the assessed fines and fees was willful, his nonpayment cannot serve as a basis upon which to revoke his probation.

¶ 14 In the case at bar, considering the evidence and testimony before the trial court (*Love*, 404 Ill. App. 3d at 787), this court cannot say that the court's ultimate finding that the State met its burden to establish that defendant violated the conditions of his probation was against the manifest weight of the evidence (*Colon*, 225 Ill. 2d at 158) when defendant failed to report, to submit a DNA sample for indexing, to pay certain fines and fees, and was arrested on an unrelated charge while on probation. See *Jones*, 377 Ill. App. 3d at 508 (a single failure to report, in and of itself, is a sufficient ground upon which to revoke a defendant's probation).

¶ 15 Although defendant's probation officer had no personal knowledge of defendant's new arrest, he did not testify as to the details of the alleged crime, only to the fact that defendant had been arrested and charged. The fact remains that his new arrest was not the sole basis upon which the trial court relied in finding that defendant violated his probation. We reject defendant's argument that his failure to report and to provide a DNA sample is excused by his incarceration, in the absence of any case law supporting his assertion. While a defendant's probation shall not be revoked based upon a failure to comply with the financial requirements imposed by his probation unless the defendant's failure to pay is willful, a defendant's failure to make an effort to pay his probation fees can reflect an insufficient concern for repaying the debt he owes to society. See *People v. Walsh*, 273 Ill. App. 3d 453, 457 (1995). Here, there is no indication that defendant paid any of the fines, fees or costs assessed as part of his probation or attempted to explain his failure to do so. Although defendant argues on appeal that he was a minor without financial resources, he cites no authority for the proposition that underage students are excused from such financial responsibilities. The trial court properly considered defendant's nonpayment of the fines, fees, and costs assessed as part of his probation as one of the bases upon which to revoke his probation. *Walsh*, 273 Ill. App. 3d at 457 (the trial court may revoke the probation of a defendant who does not make an effort to either pay restitution or explain why he cannot pay it). Consequently, the trial court did not abuse its discretion when it revoked defendant's probation. *Jones*, 377 Ill. App. 3d at 508.

¶ 16 Defendant next contends that the trial court abused its discretion when it resentenced him to four years in prison because the court improperly based its sentencing determination upon the fact that he was arrested while he was on probation.

¶ 17 A trial court has broad discretion in determining the appropriate sentence for a particular defendant and its determination will not be disturbed absent an abuse of that discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). When resentencing a defendant, the trial court may properly

consider the defendant's conduct while on probation as evidence of his potential for rehabilitation. *People v. Varghese*, 391 Ill. App. 3d 866, 876 (2009). However, the trial court may never punish the defendant for the conduct which served as the grounds for the probation violation. *Varghese*, 391 Ill. App. 3d at 876. Generally, a sentence that is within the applicable statutory sentencing range for the original offense will not be disturbed on review unless the reviewing court is strongly persuaded that the sentence imposed after probation was revoked was in fact imposed as punishment for the actions which served as the basis for the probation revocation rather than for the original offense. *Varghese*, 391 Ill. App. 3d at 876. In making this determination, a reviewing court considers, *inter alia*, whether the sentence at issue is within the proper statutory range and whether the record reflects that the court considered the original offense. *Varghese*, 391 Ill. App. 3d at 876; see also *People v. Gaurige*, 168 Ill. App. 3d 855, 869 (1988) ("the record must clearly show that the court considered the original offense when imposing the sentence").

¶ 18 Here, defendant was convicted of aggravated battery, a Class 3 felony with an applicable sentencing range of between two and five years in prison. See 720 ILCS 5/12-4 (West 2008), 730 ILCS 5/5-8-1(c)(6) (West 2008), now 730 ILCS 5/5-4.5-40 (West 2010).

¶ 19 At resentencing, the trial court heard arguments in aggravation and mitigation and indicated that it reviewed the presentence report. The court noted that defendant had a "history" of delinquency findings in juvenile court, was convicted in this case for stabbing the victim, failed to report, and was arrested on an unrelated charge while on probation. The court then discussed defendant's home life, history of psychological hospitalizations, educational issues, and use of alcohol and marijuana. The court concluded that defendant, who had "problems," was given an opportunity to stay out of trouble that he did not take. Although the court did mention the new arrest, the court did so within the context of the opportunity defendant was given to stay out of trouble and his inability to take advantage of that opportunity, that is, to be rehabilitated. See

Varghese, 391 Ill. App. 3d at 876 (in determining defendant's sentence, the court may consider the defendant's conduct while on probation as evidence of his potential for rehabilitation).

¶ 20 Considering the trial court's comments in their entirety, this court is not persuaded that the sentence imposed upon defendant was in fact imposed because he was arrested while on probation. *Varghese*, 391 Ill. App. 3d at 876. Rather, the record indicates that the court considered the original offense, defendant's background, and his conduct while on probation when determining defendant's potential for rehabilitation and crafting his sentence. *Varghese*, 391 Ill. App. 3d at 876. Even if this court were to agree that the trial court's brief mention of the new arrest was improper, the record reveals ample evidence to support the trial court's sentencing determination, and, accordingly, this court will not disturb the trial court's exercise of its discretion. *Patterson*, 217 Ill. 2d at 448.

¶ 21 Defendant finally contests the imposition of certain fees and fees. This court reviews the imposition of fines and fees *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 22 Defendant first contends, and the State concedes, that he was improperly assessed the \$5 Court System fee, \$25 Traffic Court Supervision fee, and \$20 Serious Traffic Violation fee because he was not convicted of an offense under the Illinois Vehicle Code. See 55 ILCS 5/5-1101(a) (West 2008); 625 ILCS 5/16-104c (West 2008); 625 ILCS 5/16-104d (West 2008). We agree and order that these fines be vacated. See *Price*, 375 Ill. App. 3d at 702.

¶ 23 Defendant further contends, and the State agrees, that he is entitled to a \$5 per day credit for each of the 57 days he was in custody before sentencing for a total of \$285. See 725 ILCS 5/110-14(a) (West 2008). Defendant has one fine against which he may apply this credit, the \$30 Child Advocacy Center assessment (see *People v. Jones*, 397 Ill. App. 3d 651, 660, 664 (2009)). We therefore order that the \$30 Child Advocacy Center assessment be offset by defendant's presentence custody credit. See 725 ILCS 5/110-14(a) (West 2008) (credit is applied against fines; in no case shall the amount credited exceed the amount of the fine). Accordingly, pursuant to our power to

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correct a mittimus without remand (*People v. Rivera*, 378 Ill. App. 3d 896, 900 (2008)), we direct the circuit court clerk to correct the order assessing fines and fees as stated above.

¶ 24 Pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order that the fines and fees order be corrected to reflect (1) the vacation of the \$5 Court System fee, the \$25 Traffic Court Supervision fee, and the \$20 Serious Traffic Violation fee, (2) \$285 in presentence custody credit, and (3) the offset of the \$30 Child Advocacy Center assessment fee by defendant's presentence custody credit for a total amount due of \$605. We affirm the judgment of the circuit court of Cook County in all other aspects.

¶ 25 Affirmed; fines and fees order corrected.