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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Du Page County.
Plaintiff-Appellant,)	
)	
v.)	No. 11-CF-764
)	
CHAUNTEL L. TIMS,)	Honorable
)	John J. Kinsella,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant did not establish that it was error for the trial court to rely on defendant's previous arrests that did not result in a conviction where it limited its consideration of the arrests to the issue of defendant's suitability for probation; cause would be remanded to allow the State to seek modification of sentencing order regarding period of mandatory supervised release.

¶ 2 Defendant, Chauntel L. Tims, was convicted of two counts of stalking (720 ILCS 5/12-7.3(A)(2) (West 2010)) following a bench trial in the circuit court of Du Page County. Defendant was sentenced to five years' imprisonment. He now appeals, arguing that the trial court considered improper evidence during his sentencing hearing. For the reasons that follow, we affirm.

¶ 3 At issue in this case is whether the trial court improperly relied upon nine arrests of defendant that did not result in convictions. In the course of pronouncing the sentence, the trial court stated the following:

“I’ll note as well is [*sic*] the fact the defendant has nine other arrests which did not result in conviction. And for purposes of evaluating the appropriateness of probation, I think the Court can, at least, look to the fact of these other contacts with police that involve several. [*Sic.*] It looks likes [*sic*] like four or five batteries of obstructing justice, a couple of trespass to property. All of which speaks to the conclusion that I draw that the defendant has not in the past nor does it appear likely in the future to be amendable [*sic*] to probation or to rehabilitation through probation.”

Thus, the trial court expressly relied on defendant’s arrests in finding that probation was not an appropriate sentence.

¶ 4 We generally review a sentence using the abuse-of-discretion standard of review. See *People v. Andrews*, 132 Ill. 2d 451, 464 (1989). It is, of course, the case that “[c]onsideration of an improper factor in aggravation affects a defendant’s fundamental right to liberty, and therefore, is an abuse of discretion.” *People v. McAfee*, 332 Ill. App. 3d 1091, 1096 (2002). However, the question of whether a factor is, indeed, improper presents a question of law subject to *de novo* review. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8. Under the *de novo* standard, we may freely disregard the trial court’s judgment and substitute our own. *People v. Davis*, 403 Ill. App. 3d 461, 464 (2010). While a sentencing court may consider evidence of criminal conduct that did not result in a conviction that is unrelated to the offense for which a defendant is being sentenced, it is improper to rely upon the mere fact of an earlier arrest as an aggravating factor. *People v. Wallace*, 145 Ill. App. 3d 247, 255-56 (1986); see also *People v. Johnson*, 347 Ill. App. 3d 570, 575-76 (2004).

¶ 5 Defendant cites *People v. Kennedy*, 66 Ill. App. 3d 35, 39-40 (1978), where the Fourth District held that prior arrests may not be considered in determining whether a defendant should be placed on probation. That position was expressly rejected by this court. See *People v. Fritz*, 77 Ill. App. 3d 1, 6 (1979), *rev'd on other grounds by People v. Fritz*, 84 Ill. 2d 72, 82 (1981). Moreover, we note that additional authority exists that does not support the Fourth District's position. *People v. Dean*, 126 Ill. App. 3d 631, 635 (1984) (“[W]hile it is generally error for a trial court to consider arrests and charges not followed by convictions, it is nevertheless proper to consider such arrests and charges when a convicted defendant has, as here, made an application for probation.”); *People v. Andreano*, 64 Ill. App. 3d 551, 558 (1978).

¶ 6 Here, the trial court explicitly limited its consideration of defendant's prior arrests to the issue of probation, explaining as follows: “And for purposes of evaluating the appropriateness of probation, I think the Court can, at least, look to the fact of these other contacts with police that involve several.” [*Sic.*] Defendant cites nothing to show that this was error beyond a case from another appellate district that has expressly been rejected by this court. As such, defendant has not carried his burden of showing error on appeal. See *People v. Majer*, 131 Ill. App. 3d 80, 83 (1985) (“The well-established rule is that an appellant must demonstrate the existence of error in the record and failure to do so creates a presumption of regularity that attaches to all trial court proceedings.”).

¶ 7 Before closing, we note that the State contends this issue is waived due to defendant's failure to include it in his motion to reconsider the sentence. Defendant contends it should be reviewed as plain error. See *People v. Kopczick*, 312 Ill. App. 3d 843, 852 (2000). The first step in the plain-error analysis is to determine whether an error has occurred. *People v. Sargent*, 239 Ill. 2d 166, 189 (2010). As we have determined that no error occurred, we need not consider whether the error was plain.

¶ 8 Finally, the State requests that we amend defendant's sentence to reflect a four-year period of mandatory supervised release (MSR), as required by section 5-8-1(d)(6) of the Unified Code of Corrections (730 ILCS 5/5-8-1(d)(6) (West 2010)). We deem it best to allow the trial court to make such changes. Accordingly, we vacate that portion of the trial court's order imposing one year of MSR and remand to allow the State to seek modification of that order before the trial court.

¶ 9 In light of the foregoing, the judgment of the circuit court of Du Page County is affirmed in part, vacated in part, and this cause is remanded.

¶ 10 Affirmed in part, vacated in part; cause remanded.