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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 11-CF-258
)	
JANEL MACKLIN,)	Honorable
)	Rosemary Collins,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Burke and Justice Hutchinson concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not err in resentencing defendant after he violated the terms of his probation. Affirmed.
- ¶ 2 Defendant, Janel Macklin, pleaded guilty to retail theft (720 ILCS 5/16A-3(a) (West 2010) (repealed by Pub. Act 97-597, § 6 (eff. Jan. 1, 2012))) and was sentenced to 180 days in the county jail and five years' probation. Four months later, the State petitioned to revoke defendant's probation. Defendant admitted to count II of the petition and the trial court resentenced him to five years' imprisonment. The court subsequently denied defendant's motion to reduce the sentence.

Defendant appeals, arguing that, in resentencing him after he violated the terms of his probation, the trial court did not sentence him on the underlying offense and failed to consider his rehabilitative potential, where, during the hearing, the court focused on defendant's failed drug test. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Underlying Offense

¶ 5 On April 13, 2011, defendant was indicted on one count of retail theft. The indictment alleged that, on January 27, 2011, defendant stole one bottle of vodka from a Mobil gas station and that, on June 13, 2003, in Winnebago County, he had been previously convicted of retail theft.

¶ 6 On September 12, 2011, defendant pleaded guilty without a sentencing agreement. After he entered his plea, the trial court, at defendant's request, ordered that defendant be evaluated for Treatment Alternative to Street Crimes (TASC). 20 ILCS 301/40-5 (West 2010).

¶ 7 The presentence report and the testimony at the October 19, 2011, sentencing hearing disclosed the following. Defendant testified that, while incarcerated, he put in numerous referrals for Narcotics Anonymous, Cocaine Anonymous, Alcoholics Anonymous, and Rosecrance, but that he was placed on a waiting list. Defendant further testified that he was currently a trustee in the county jail and that his duties included cleaning, working in the kitchen, and doing laundry. Defendant became a trustee because his crime was nonviolent, his bond was under \$75,000, and he did not have a disciplinary background or problems with the officers.

¶ 8 Defendant further testified that TASC had evaluated him and found him acceptable for treatment. Initially, he received inpatient treatment at the Sojourn House in Freeport. However, after five days of treatment, defendant was discharged because he had been incarcerated too long to do an inpatient program. Inpatient programs are reserved for those who require more treatment because

they have not achieved sobriety. Defendant explained that he achieved sobriety during his long stay in jail. Upon his discharge, Sojourn House recommended that defendant receive treatment in an intensive outpatient program.

¶9 Defendant apologized for his crime. He stated that he committed the crime when he relapsed due to a problem with his significant other, Charles Duncan.¹ Defendant testified that he now realizes that he cannot let anything happen that will cause harm to others; otherwise, he will return to jail. Further, he assured the court that, if he was put on probation, he would maintain the requirements of probation (including receiving outpatient treatment at Rosecrance), maintain sobriety, and stay away from anything that would cause him to return to jail. Defendant stated that he regretted what he did in the past, but that he is older and understands he has to take full responsibility for his actions.

¶10 On cross-examination, defendant admitted to having a problem with crack cocaine. He stated that he stole to obtain drugs. Defendant testified that he had been in drug treatment two previous times (after which he stayed clean for a time before relapsing), but that this time was different because he was older, he had gained a lot of understanding about the world, and he did not want to return to jail. Defendant then made a statement in allocution where he again apologized to the court

¹On cross-examination, the State tendered People's Exhibit No. 1, a criminal complaint against Duncan, dated October 31, 2010, for theft (possession of stolen property). It also tendered People's Exhibit No. 2, a probation order for Duncan following his conviction for aggravated domestic battery, which included a term that Duncan stay away from and maintain no contact with the victim, defendant.

and asked for probation. Defendant stated that he wanted the opportunity to prove that he could change and maintain his sobriety and that he wanted to move on with his life in a positive manner.

¶ 11 The presentence report reflected that defendant, age 42, had been convicted 19 previous times for theft (aside from two bond forfeitures). Defendant had been given probation, including TASC, seven times, and he had violated probation on several occasions. Additionally, defendant had been imprisoned six times. The State asked the court to sentence defendant to four years' imprisonment in light of his criminal history and his numerous opportunities at probation.²

¶ 12 In announcing its ruling, the trial court stated that it had considered the testimony, the presentence report, defendant's statement, counsels' arguments, and the factors in mitigation and aggravation. The court recognized that defendant had an extensive record. The court also recognized that defendant chose to follow the court's order when he was released from the Sojourn House and immediately reported back to jail. Moreover, the court accounted for the fact that defendant was a trustee of the jail and that defendant had requested treatment a number of times while incarcerated. However, the court stated that rehabilitation is not the only goal the court evaluates; one of the primary obligations is to protect the community from crime. The court acknowledged that defendant was a substance abuser, but it believed that defendant might positively

²Retail theft of property, the full value of which does not exceed \$300, is a class A misdemeanor punishable by less than one year in prison. 720 ILCS 5/16A-10 (West 2011); 730 ILCS 5/5-4.5-55(a) (West 2011). However, defendant's prior record enhanced his offense to a class 4 felony and made him eligible for an extended term of not less than one year and not more than six years in prison. 720 ILCS 5/16A-10(2) (West 2011) (repealed by Pub. Act 97-597, § 6 (eff. Jan. 1, 2012)); 730 ILCS 5/5-4.5-45(a) (West 2011).

change his life. The court cautioned defendant that retail thefts are a significant problem within the community. The court questioned whether the community would be better served by imprisoning defendant or by trying to rehabilitate him. The court ultimately found, however, that the defendant had strong rehabilitative potential and placed him on TASC probation for five years. The court warned defendant that he would be under strict supervision by the court, the probation department, and TASC individuals. The court ordered that defendant: (1) not use alcohol or drugs; (2) submit to random urinalysis and/or blood tests; (3) cooperate with, and satisfactorily complete, any assessment, treatment, education and/or counseling as directed by the probation department and TASC; and (4) have no contact with Duncan.

¶ 13

B. Revocation of Probation

¶ 14 On December 1, 2011, the court conducted a status hearing on defendant's probation. The status report stated that defendant was compliant with reporting, was actively seeking employment, had begun counseling at Rosecrance, and provided negative urinalysis results on November 16, and 29, 2011. However, the report also showed that, on November 2, 2011, defendant admitted to relapsing with crack cocaine on October 30, 2011. During the hearing, the court stated that it had "some concerns about this" and that "we [the court] have zero tolerance." The court granted a January 12, 2012, status date.

¶ 15 On January 12, 2012, the State petitioned to revoke defendant's probation, alleging that defendant: (1) admitted to using crack cocaine on October 30, 2011; (2) on January 11, 2012, tested positive for cocaine and admitted to using two weeks prior and one week prior; and (3) failed to report to TASC to provide a urine specimen.

¶ 16 At a hearing on the State's petition, defendant admitted that he tested positive for cocaine on January 11, 2012. The court clarified that entering an open plea meant that defendant could receive anything within the possible sentencing range (one to six years in the Department of Corrections along with a mandatory supervised release or a term of probation or conditional discharge). Defendant stated that he understood, and the court found that there was a factual basis for the underlying offense and the State's allegations as to defendant's probation violations and accepted defendant's plea. It ordered a new presentence report and set a May 15, 2012, resentencing hearing.

¶ 17 At the resentencing hearing, Richard Johnson, a criminal justice outpatient addictions counselor at Rosecrance, testified on defendant's behalf. Johnson testified that defendant was transferred into his jail reentry group at Rosecrance and that he had known defendant for four or five months. Defendant attended classes three days each week, and his attendance was excellent. Johnson testified that the classes covered the criminal-thinking model to help the patients understand their errors in thinking, and the classes also addressed various aspects of substance abuse. Johnson stated that defendant made progress in these classes because he opened up and recognized errors in his thinking, he recognized where he had failed in the past, and he became a role model in the group by sharing personal information and giving thoughtful feedback. Johnson testified that, if defendant were released, the next step for him would be to enter an intensive outpatient program at Winnebago County Resource Intervention Center. According to Johnson, defendant had "maintained some long-term sobriety" and "so at this point because he has, you know, the skills to be able to maintain sobriety, he would need an opportunity in the real world while attending classes outside to be able to practice those things." On cross-examination, Johnson stated that his contact with defendant had been while defendant was in custody on the State's petition to revoke probation. The court then

asked Johnson how long-term sobriety is clinically defined. Johnson replied that “it’s a case-by-case basis.”

¶ 18 In his statement, defendant stated that he took full responsibility for his actions. Defendant maintained that the relapse was a recovering addict’s mistake and that he “accepted the fact of [his] repercussions and consequences of this program.” He noted that he had regularly attended Rosecrance outpatient classes, had made appointments with the probation officer, and met all of the TASC’s requirements. Defendant then asked for the mercy of the court to give him another opportunity at probation.

¶ 19 Acknowledging that addiction is difficult and that defendant has been struggling with it for most of his life, the State argued that defendant could not comply with probation. The State contended that, although defendant had previously been on TASC probation and been involved with drug court, when the court gave him another chance at TASC probation, he again began using illegal drugs. The State noted that defendant had committed numerous retail thefts (along with other drug and theft charges) and that he had been placed on probation and been incarcerated numerous times. “The only time that this defendant maintains his sobriety is when he is incarcerated.” The State requested that defendant be sentenced to six years’ imprisonment:

“[T]his defendant is way too big a risk to the community and to himself to let him out.

When this defendant is out of custody and using, he goes into stores and treats them like his personal kitchen or his personal wine cellar and just takes whatever he wants to without thinking of the consequences.

And, no, they're not violent offenses. Retail thefts do affect the community, they affect prices, they affect security for the people that work in those establishments.”

¶ 20 Defense counsel requested probation, noting that, although defendant had substantial drug-abuse issues, he had tried to comply with probation. The defense claimed that “[defendant’s] problems all revolve around drug use,” and that “we would understand perhaps [defendant] being sentenced to the Department of Corrections if he went out and committed another crime. He didn’t commit another crime. He reported to probation. It’s just that he’s still troubled by the drug use.” Moreover, defense counsel argued that defendant applied himself at Rosecrance, he made progress, and that “[i]t’s just gonna be a matter of application.” Counsel recognized that defendant’s presentence report might lead the court to order a prison sentence, but he further argued that most of the small retail thefts probably occurred to support defendant’s addiction.

¶ 21 The trial court stated that it “considered the arguments of counsel, the testimony [] from the witness, the statement of the defendant, the information in the presentence report, [and] the factors in aggravation and mitigation.” The court found that defendant had “a very long history of criminal offenses for a significant period of time,” that he had been placed in the Department of Corrections prior to this offense, and that he had been “given probation many times.” Defendant was placed on probation on October 19, 2011. The court noted that defendant admitted in November to relapsing on October 30, 2011, by using crack cocaine. Also, after a January 11, 2012, urinalysis tested positive, defendant reported to using cocaine two weeks prior; however, after being notified that the drug would not stay in his system that long, he admitted that he used cocaine on January 3, 2012.

¶ 22 The court disagreed that defendant had sustained long-term sobriety. It noted that he had relapsed within weeks of starting probation in October 2011 and then again in January 2012.

“Hopefully, everybody in the jail has sobriety while they’re in jail.” The court questioned its order that defendant be placed on TASC probation in the first place (*i.e.*, the original sentence):

“So when I look at your rehabilitative potential in light of your extraordinary extensive prior record and your behavior while you’ve been placed on probation, I do not see that the court has any realistic view of you following the terms of probation, and in fact, you’ve shown the court that you will not.

The court does consider that you have a significant prior record and the need to deter you from committing criminal activity in our community as a justification for a term in the Department of Corrections, and I’m sentencing you to five years in the Department of Corrections at this time with credit for the time you served in custody.”

Finally, the court stated that it would check the box on the judgment form that would allow defendant to receive treatment while in the Department of Corrections.

¶ 23 On May 25, 2012, defendant moved to reduce the sentence. At the hearing, defendant argued that the court did not give proper weight to his rehabilitative potential. Defendant contended that the sentence was excessive because, although he may have a longstanding substance abuse problem, he has a willingness to address his addiction and comply with probation. The State replied that the sentence was appropriate because defendant had initially been given TASC probation on October 19, 2011, but, regardless, on October 30, 2011, he again used drugs. The trial court denied the motion, noting that it had sentenced defendant after it considered his rehabilitative potential, history, and character. The court noted that it “didn’t sentence [defendant] because [he] committed a—a crime on probation. I sentenced [him] for—for the underlying offense and the fact that [he] violated the terms of [his] Probation Order by using drugs.” This timely appeal followed.

¶ 24

II. ANALYSIS

¶ 25 On appeal, defendant contends that the trial court abused its discretion and frustrated the purposes of the Alcoholism and Other Drug Abuse and Dependency Act (Act) (20 ILCS 301/1-1 *et seq.* (West 2010)), because it focused on defendant's probation violation, instead of the underlying offense, when resentencing defendant to five years in the Department of Corrections. He requests that we vacate his sentence and remand for a new sentencing hearing. For the following reasons, we reject defendant's arguments.

¶ 26 A reviewing court gives great deference to the trial court's sentencing determination, and this court will overturn a sentence only if the trial court has abused its discretion. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000); *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). When a trial court sentences a defendant "[a]ll penalties should be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11; *Perruquet*, 68 Ill. 2d at 154-55. The trial judge should consider a number of factors, such as "defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *Perruquet*, 68 Ill. 2d at 154.

¶ 27 When resentencing the defendant after a probation violation, the trial court can only punish the defendant for the original underlying offense; *however, the court may consider the crime that caused the revocation and the defendant's conduct during the probationary period to evaluate the defendant's rehabilitative potential.* *People v. Bouyer*, 329 Ill. App. 3d 156, 161 (2002). The court should not commingle the conduct that triggered the revocation of probation with the original offense. *People v. Gaurige*, 168 Ill. App. 3d 855, 870 (1988). "[A] sentence within the statutory range for the original offense will not be set aside on review *unless* the reviewing court is strongly

persuaded that the sentence imposed after revocation of probation was *in fact* imposed as a penalty for the conduct which was the basis of revocation, and *not* for the original offense.” (Emphases in original). *People v. Young*, 138 Ill. App. 3d 130, 142 (1985). The record should clearly show that the trial court considered the defendant’s underlying offense and that the sentence imposed was appropriate for the underlying offense. *People v. Hess*, 241 Ill. App. 3d 276, 284 (1993). To determine whether the trial court punished defendant for the original offense, the reviewing court may consider statements the trial court made during sentencing. *People v. Varghese*, 391 Ill. App. 3d 866, 876 (2009). These statements should be “taken in context, and read in their entirety, including arguments of counsel.” *Young*, 138 Ill. App. 3d at 142. Further, the trial court may give the defendant a more severe sentence than it originally imposed. *Varghese*, 391 Ill. App. 3d at 876.

¶ 28 Defendant argues that the trial court abused its discretion at resentencing by focusing on his conduct that resulted in the revocation of his probation (*i.e.*, the failed drug test) rather than the underlying offense of retail theft. Defendant requests that we vacate the sentence and remand for a new hearing because the court here made no mention of the underlying offense and focused solely on defendant’s failed drug test and relapse. The cases upon which defendant relies, however, do not support his claim.

¶ 29 In *Bouyer*, the defendant pleaded guilty to two counts of burglary. The trial court sentenced the defendant to probation, and the defendant agreed to pay restitution. The defendant’s probation was revoked after he admitted to testing positive for marijuana, but the trial court agreed to defer sentencing as long as the defendant made restitution payments. The defendant stopped making payments, and the trial court sentenced him to five years in prison. The appellate court reversed, holding that the defendant was sentenced, not for the underlying crime, but for “failing to abide by

the arrangement with the court and with no determination that defendant was willfully refusing to pay.” *Id.* at 163-64.

¶ 30 Defendant also relies on *People v. Bedenkop*, 252 Ill. App. 3d 419 (1993). In that case, the defendant was placed on probation for possession of a controlled substance with intent to deliver and for delivery of a controlled substance. The trial court held a hearing that addressed the defendant’s failure to appear and report her use of cocaine and her giving birth to a baby addicted to cocaine.³ At the hearing, the court vigorously questioned the defendant about her cocaine use and pregnancies. The judge finally stated, “I’m not here to punish you, ma’am, believe me I have no intention of doing that, but I certainly am going to preclude you as best I can for as long as I can from becoming pregnant,” and then sentenced the defendant to seven years’ imprisonment “without offering her any medical services or other therapy.” *Id.* at 426-27. The appellate court reversed, holding that the defendant’s sentence was based solely on her conduct while on probation, as opposed to the original crime and her potential for rehabilitation. *Id.* at 427.

¶ 31 This case is distinguishable from *Bouyer* and *Bedenkop*. In each of those cases, the trial court made an affirmative statement that it was sentencing the defendant for a reason other than the underlying crime. In this case, however, the trial court made no statement or finding that defendant

³ The State initially filed a petition for revocation citing only the defendant’s failure to report, but, at this hearing, the trial court allowed the State to add the defendant’s drug use. The appellate court stated that “defendant was denied a fair probation revocation hearing when the trial court expanded the hearing to include allegations of defendant’s drug use without providing defendant notice” and the trial court “blurred the line of demarcation between the revocation and the sentencing hearing.” *Bedenkop*, 252 Ill. App. 3d at 423.

was being sentenced because of his relapse. Indeed, the trial court specifically evaluated defendant's rehabilitative potential. In doing so, the court stated, "I look at your rehabilitative potential in light of your extraordinary extensive prior record and your behavior while you've been placed on probation." The court noted that its previous assessment of defendant's rehabilitative potential (*i.e.*, at the original sentencing hearing) was erroneous. It found that defendant's failed drug test showed that he could not comply with the probation order. Moreover, the court acknowledged that defendant had previously been "given probation many times," and it disagreed that defendant had achieved long-term sobriety because "[h]opefully, everybody in jail has sobriety while they're in jail."⁴ *Bouyer*, 329 Ill. App. 3d at 161 (in evaluating the defendant's rehabilitative potential, the trial court may consider the crime that caused the revocation and the defendant's conduct during the probationary period).

¶ 32 Although the trial court in this case did not specifically mention the words "retail theft," the court's findings in their entirety, including arguments by counsel, show that the court did sentence defendant for the underlying offense and not for the failed drug test. First, defendant's five-year prison term fell within the available one-to-six-year sentencing range for his conviction. Second, in announcing its findings, the court explicitly noted that it considered the arguments of counsel, witness testimony, the statement of the defendant, the presentence report, and the factors in aggravation and mitigation. Further, the court found that "[defendant has] a significant prior record

⁴The propriety of the assumption that abstinence (or lack of withdrawal symptoms) is equivalent to sobriety is not challenged on appeal. However, we note that abstinence, which is the discontinuance of the use of drugs, is not identical to sobriety, which involves long-term, continued abstinence.

and the need to deter [him] from committing criminal activity in our community as a justification for a term in the Department of Corrections.” Again, unlike the cases upon which defendant relies, the court here did not affirmatively state that it was sentencing defendant for the relapse; instead, it recalled that, at the initial sentencing hearing for the underlying offense, “the State very strongly argued against the court giving [defendant] the opportunity to be placed on probation,” and that defendant “in fact, showed [her] by [his] actions that they were right.” The court noted that it considered that defendant had a significant prior record and acknowledged the need to deter him from committing further crimes. “I do not see that the court has any realistic view of [defendant] following the terms of probation.” Accordingly, it sentenced defendant to five years in prison. Based on these findings, we are not strongly persuaded that the sentence was *in fact* imposed as a punishment for the conduct that caused the revocation of probation, rather than as a punishment for the original offense.

¶ 33 Defendant’s second contention is that the trial court frustrated the purposes of the Act when it sentenced him to five years in prison after he relapsed. He argues that a relapse is part of the recovery process for substance abusers. Again, we reject his argument.

¶ 34 In sentencing a defendant, the trial court should not frustrate the purposes of the Act. *People v. Hamelin*, 181 Ill. App. 3d 350, 355 (1989). The legislative declaration of the Act’s purpose states, in pertinent part:

“The abuse and misuse of alcohol and other drugs constitutes a serious public health problem the effects of which on public safety and the criminal justice system cause serious social and economic losses, as well as great human suffering. It is imperative that a comprehensive and coordinated strategy be developed *** to empower individuals and

communities through local prevention efforts and to provide intervention, treatment, rehabilitation, and other services *** to lead healthy and drug-free lives and become productive citizens in the community.” 20 ILCS 301/1-5 (West 2010).

Thus, the General Assembly has recognized that substance abuse is a problem within the community and that efforts should be made to restore addicts to good health and useful citizenship.

¶ 35 Defendant relies on *In re Joshua K.*, 405 Ill. App. 3d 569 (2010) (withdrawn and republished at 947 N.E.2d 280 (2010)), a parental rights termination case. There, in assessing the mother’s fitness, the appellate court noted that relapses are a part of substance abuse recovery, but concluded that respondent was an unfit parent because she continued to relapse after periods of sobriety, where she drank several times while in treatment, tested positive for alcohol, and failed to leave the impression on therapists, counselors, and caseworker that she was dedicated to staying sober. *Id.* at 292. In this case, defendant contends that the court frustrated the purpose of the Act in finding that he had no rehabilitative potential because his relapse was a part of his recovery, and, unlike *Joshua K.*, he left an impression on his counselor and caseworker that he wanted to remain sober, was compliant with the terms of probation until January 11, 2011, had excellent attendance at treatment sessions, tested negative for drugs, and was always cooperative.

¶ 36 Defendant’s attempt to distinguish *Joshua K.* is unavailing. Similar to *Joshua K.*, defendant here admitted to using drugs multiple times while on probation and he also tested positive for drugs while on probation. This conduct, along with defendant’s multiple prior probation violations, supports the trial court’s finding that defendant cannot follow the terms of probation. Defendant also fails to recognize that probation is a privilege “employed when the defendant’s continued presence in society would not be threatening and the defendant’s rehabilitation would be enhanced.” *People*

v. Allegri, 109 Ill. 2d 309, 314 (1985). In an attempt to rehabilitate defendant, the court ordered probation multiple times, and, nevertheless, defendant has continuously violated this privilege.

¶ 37 Defendant also argues that this court should reverse his sentence in an effort to restore him to good health and useful citizenship because the Act strongly favors rehabilitation programs for addicts. He relies on *Hamelin*, where the appellate court held that the trial court abused its discretion in revoking the defendant's probation before he had the opportunity to begin his rehabilitation program. *Hamlin*, 181 Ill. App. 3d at 354-55. However, in *Hamelin*, the defendant was *never* given an opportunity for treatment, whereas, in this case, the trial court *gave* defendant the opportunity for treatment, but he chose to violate the terms of his probation by using drugs. Accordingly, we reject defendant's argument that the trial court frustrated the Act's purpose in sentencing defendant to five years in prison.

¶ 38

III. CONCLUSION

¶ 39 For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed.

¶ 40 Affirmed.