

No. 1-13-0395

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

<i>In re TEVIN C., A Minor</i>)	Appeal from the
(THE PEOPLE OF THE STATE OF ILLINOIS,)	Circuit Court of
Petitioner-Appellee,)	Cook County.
)	
v.)	No. 11 JD 1747
)	
TEVIN C.,)	Honorable
)	Carol A. Kelly,
Respondent-Appellant).)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Simon and Justice Liu concurred in the judgment.

O R D E R

¶ 1 *Held:* Respondent in juvenile delinquency case did not preserve his claim that the trial court incorrectly applied Juvenile Court Act in his sentencing proceeding, thus requiring plain error review. In addition, the court did not err in sentencing respondent to secure confinement even where an alternative to that confinement was presented.

¶ 2 In June 2011, respondent Tevin C., pled guilty to two counts of possession of a controlled substance and was sentenced to 18 months of probation. In January 2013, based upon a finding

that respondent had violated that probation, the trial court sentenced respondent to an indeterminate term of incarceration in the Illinois Department of Juvenile Justice (DOJJ). On appeal, respondent contends the trial court erred as a matter of law in sentencing him to the DOJJ because the court heard evidence of a less restrictive alternative to incarceration and did not explain why that alternative was inadequate. Respondent also asserts the court failed to address each factor set out in section 5-750(1) of the Juvenile Court Act of 1987 (the Juvenile Court Act) (705 ILCS 405/5-750(1) (West 2012)) before sentencing him to the DOJJ. In addition, respondent argues that the court abused its discretion in selecting incarceration instead of the alternative sentencing arrangement offered by his counsel. We affirm.

¶ 3 On April 29, 2011, the State filed a petition for adjudication of wardship against respondent (born May 20, 1994) in case No. 11 JD 1747 (hereinafter referred to as the instant case). The petition charged respondent with committing possession of a controlled substance (heroin) (720 ILCS 570/402(c) (West 2010)) on April 18, 2011. After that petition was filed, respondent allegedly committed possession of a controlled substance again on May 17, 2011.

¶ 4 On June 9, 2011, respondent pled guilty to two counts of possession of a controlled substance in those cases, and the court entered a finding of delinquency. At the time of his plea, respondent was on juvenile probation for an aggravated battery in case No. 10 JD 2609.

¶ 5 Respondent was placed on electronic monitoring, and the court admonished him as follows:

"Also, if you violate electronic monitoring, the State will file an additional charge of escape. That will be your fourth case. If you were found delinquent of that, that would be your third felony case and you're facing time in the Department of Juvenile Justice. Do you understand all of that?"

Respondent indicated he understood.

¶ 6 On August 26, 2011, juvenile arrest warrants were issued for respondent, and he was found in violation of his probation in case No. 10 JD 2609 for failing to meet with his probation officer and failing to attend school from April 5 through April 29 and on May 2 and May 6, 2011. Respondent was placed in custody until his next court date.

¶ 7 On September 1, 2011, respondent appeared before the court, and a probation officer recommended that respondent be placed on intensive probation. The court advised respondent that if he violated intensive probation, he was "going to the Department of Juvenile Justice."

¶ 8 On September 15, 2011, the court placed respondent on one year of intensive probation in the instant case, noting that he had not previously complied with the court's orders of home confinement, evening reporting to a probation officer, or electronic monitoring. The court admonished respondent that this was his "last opportunity to stay out of the Department of Corrections." Respondent was adjudged a ward of the court. The court ordered that respondent attend school, have no gang contact or activity and complete 60 hours of community service, among other conditions.

¶ 9 The court admonished respondent that if he were to be placed on home confinement and did not comply with that condition, or if he tested positive for marijuana, he would violate his probation. The court ordered a progress date of December 15, 2011, and addressed respondent:

"If everything is going fine between now and that court date, you don't have to come back to court. I will just get a report from the probation officer. You will never have to come back to court again if you follow all the rules and regulations of your probation and you do not pick up any other cases.

If you are arrested for any other cases and appear – listen to me, okay. This is important because if you mess up, you are going to the Department of Juvenile Justice. If you are arrested for any other cases and you appear in front of me, you will be held in custody until the case is disposed of. If you are found delinquent of any other cases obviously you are going to the Department of Juvenile Justice. Understood?

MINOR RESPONDENT: Yes, ma'am."

¶ 10 On November 8, 2011, the State filed a supplemental petition in the instant case alleging that respondent violated his probation by failing to comply with home confinement on seven occasions between October 2 and November 1, 2011.

¶ 11 On November 10, 2011, respondent was present in court, and the probation officer asked that the court place respondent on electronic monitoring pending a hearing on the recent probation violations in the instant case and in another case. The court told respondent that if he did not follow the rules of the intensive probation program, he would "end up in the Department of Juvenile Justice."

¶ 12 The court further addressed respondent:

"I'll give you a chance here. Maybe you didn't quite get it. I'll give you another chance. I'm going to place you on electronic monitoring which means you may not leave your house for any reasons unless it's on fire or you have to go to the hospital. Do you understand me?"

MINOR RESPONDENT: Yes, ma'am.

THE COURT: Except to go to school. And, you have to go to school every day, every class, on time, no suspensions. Understood?

MINOR RESPONDENT: Yes, ma'am."

¶ 13 On November 30, 2011, respondent pled guilty to one count of violating the probation that had been ordered on September 15 in the instant case. Respondent was found in violation of his probation by being absent from his home at 7:28 p.m. on October 2 while on restrictive home confinement without permission of his probation officers. The case was continued for a progress report and for sentencing because respondent had a case pending in adult court. The court addressed respondent:

"For the record, I told your attorney that if your [adult case] is dismissed and you're following all the rules and regulations of probation, I may consider just placing you back on [intensive probation]. I'm giving you one more chance."

¶ 14 The court admonished respondent that a conviction in adult court would be a violation of his probation and that he would be sent to the DOJJ.

¶ 15 Before the next court date on January 18, 2012, respondent was taken into custody in the adult case, which involved the delivery of drugs. On March 7, 2012, the court was advised that respondent had pled guilty to the adult charge. The court continued the case for one month to allow the probation officer to investigate an educational program mentioned by the officer. The court ordered that respondent undergo a urinalysis to test for the presence of drugs. A sample respondent provided that day tested positive for cannabinoids and cocaine.

¶ 16 The case was continued until September 11, 2012, when the State filed a supplemental petition alleging that respondent had violated his probation in the instant case. The petition asserted that respondent committed the offense of possession of a controlled substance in case No. 11 CR 2036601 on November 8, 2011, and pled guilty to that offense in adult court on February 10, 2012. The petition also asserted that respondent committed the offense of

possession of a controlled substance in case No. 12 CR 1086601 on May 16, 2012, and pled guilty to that offense in adult court on July 5, 2012.

¶ 17 On October 3, 2012, respondent appeared in juvenile court and pled guilty to violating his probation in the manner described in the supplemental petition. The court ordered respondent to complete the Gateway residential drug treatment program and admonished respondent that if he did not successfully do so, he would be sentenced to the DOJJ.

¶ 18 On December 20, 2012, the State filed a supplemental petition alleging that respondent violated his probation by leaving the Gateway program without permission after arguing with a staff member. On January 2, 2013, the court ordered a urinalysis be performed on respondent, who later tested positive for cannabinoids. The court issued a juvenile arrest warrant and set a sentencing date. Counsel for respondent mentioned he had been seeking an alternative to incarceration for respondent.

¶ 19 On January 11, 2013, the trial court held a sentencing hearing. On that date, a supplemental social investigation report was filed with the court. (Although that report indicates an initial social investigation report was prepared by a prior probation officer, the record on appeal includes the supplemental report but does not contain any initial report.) The supplemental report sets out respondent's juvenile and adult criminal history, respondent's school history and his progress while on intensive probation.

¶ 20 The court stated that respondent had two adult convictions and had received numerous chances to complete his probation. Counsel for respondent provided the court with a letter from Lois Whalen, who became acquainted with respondent when her daughter was a social worker at respondent's high school. Whalen outlined her background as a teacher and school suspension coordinator working with students with disciplinary issues. Whalen stated in the letter that

respondent had spent time at her house in the rural community of Seneca, Illinois, about 60 miles west of Chicago. She stated she was willing to allow respondent to live with her and her husband in a different environment, work part-time and take classes to earn his high school diploma. Counsel told the court that respondent was interested in that arrangement as an alternative to incarceration.

¶ 21 The court then issued its ruling as to respondent's sentence, stated here in its entirety:

"I think I've gone through all the opportunity this minor respondent has been given and the fact that he picked up 2 adult cases, he uses an alias, the second adult case, another alias. I'm tired of hearing people say that these drug cases are nonviolent cases as if that doesn't bring violence to the community. That's what is causing the violence in the community. Gangs and the drug cases that these gang members are involved in. And if you're selling drugs you're involved in a gang. Because the gangs control the drugs. And he wasn't just satisfied to be a drug dealer when he was in juvenile he went on to the adult court not once but twice. He got probation the first time and what does he do? Goes out and commits another offense and gets convicted of that also. And he gets probation. Probation, probation, probation. And over and over and over again.

He does have a wonderful opportunity and it's wonderful that this family is going to take him in, and he can still have that opportunity if he wants to take the opportunity if he chooses but not before he goes to the Department of Corrections because he needs to learn a lesson. He did not learn on all of his cases in juvenile case [*sic*] he didn't learn on his first adult matter and he didn't learn on his second adult matter that you can't violate the law. Drug cases are

serious cases, they cause communities on the west side to be filled with violence, gang banging, drug dealing and kids see that, and they think that that's the life style that they should have too and apparently that's what you want. That's what you wanted anyway.

Hopefully your time in the Department of Corrections will convince you that maybe you should start to make some changes because otherwise if you violate your adult cases then you're going to the State penitentiary. You already have felony convictions. The juvenile cases wouldn't have had to follow you but no, now you got convicted twice in adult court. Now you are a convicted felon, twice convicted felon. Nothing that we did in juvenile court kept you out of the adult system and yet I was still giving you another opportunity. Now you're a convicted felon, twice. I don't care if it was one day.

I have made it very clear to you what would happen. And you made the decision not to follow the rules and knowing what would happen. That was your decision. You have to start to learn that the decisions that you make determine what will happen to you. You have to face the consequences and if you haven't learned that -- and apparently you haven't then I hope you learn it now. You won't spend that much time here in the Department of Juvenile Justice but hopefully it will convince you that you don't want to violate your adult probation. And I'm sure that the people who are willing to help you right now will still be willing to help you when you get out. Hopefully you will take advantage of that help and stay out of further trouble.

At this point, his original probation will be revoked. And he will be committed to the Department of Juvenile Justice – individualized facts contained in the EJJ [*sic*] commitment report and I feel it is necessary to ensure the protection of the public from the consequences of the criminal activity of this minor, the parents are unable to discipline him for reasons other than financial circumstances alone. Reasonable efforts have been made to remove or eliminate the minor from his home."

¶ 22 The court admonished respondent as to his right to appeal. The court entered an order revoking respondent's original probation and committing respondent to the DOJJ. The record includes an order of commitment indicating that secure confinement was necessary in this case following a review of the factors set out in the pertinent statute. Respondent now appeals that ruling.

¶ 23 On appeal, respondent contends that in sentencing him to the DOJJ, the trial court failed to comply with the requirements of the Juvenile Court Act. He contends the trial court did not adequately explain the statutory factors to support its sentence or indicate why it elected incarceration when respondent presented evidence of a less restrictive alternative to secure confinement. He further argues the court abused its discretion in sentencing him to the DOJJ instead of allowing him to live with the Whalen family in Seneca, Illinois.

¶ 24 This court must apply different standards of review to those separate points. Whether the court complied with statutory requirements is a question of law that we review *de novo*. See *In re Ashley C.*, 2014 IL App (4th) 131014, ¶ 22. However, a trial court's decision to send a minor to the DOJJ, as in the instant case, is reviewed for an abuse of discretion. *Id.*

¶ 25 Section 5-750(1) of the Juvenile Court Act (705 ILCS 405/5-750(1) (West 2012))

provides:

"[W]hen any delinquent has been adjudged a ward of the court under this Act, the court may commit him or her to the Department of Juvenile Justice, if it finds that:

(a) his or her parents, guardian or legal custodian are unfit or are unable, for some reasons other than financial circumstances alone, to care for, protect, train or discipline the minor, or are unwilling to do so, and the best interest of the minor and the public will not be served by placement under section 5-740, or it is necessary to ensure the protection of the public from the consequences of criminal activity of the delinquent; and

(b) commitment to the Department of Juvenile Justice is the least restrictive alternative based on evidence that efforts were made to locate less restrictive alternatives to secure confinement and the reasons why efforts were unsuccessful in locating a less restrictive alternative to secure confinement. Before the court commits a minor to the Department of Juvenile Justice, it shall make a finding that secure confinement is necessary, following a review of the following individualized factors:

(A) Age of the minor.

(B) Criminal background of the minor.

(C) Review of results of any assessments of the minor, including child centered assessments such as the CANS.

(D) Educational background of the minor, indicating whether the minor has ever been diagnosed with a health issue and if so what services were provided as well as any disciplinary incidents at school.

(E) Physical, mental and emotional health of the minor, indicating whether the minor has ever been diagnosed with a health issue and if so what services were provided and whether the minor was compliant with services.

(F) Community based services that have been provided to the minor, and whether the minor was compliant with the services, and the reason the services were unsuccessful.

(G) Services within the Department of Juvenile Justice that will meet the individualized needs of the minor."

¶ 26 As respondent points out on appeal, section 5-750 was amended effective January 1, 2012, to add section (b) and subsections (A) through (G) to ensure the court's careful consideration of "a less restrictive alternative to secure confinement" before committing a minor to the DOJJ. Because this respondent was sentenced in January 2013, after the amended version of the statute took effect, the trial court in this case was required to follow the amended version of section 5-750 set out above, which requires evidence of less restrictive alternatives to incarceration.

¶ 27 The State argues that respondent forfeited the claimed sentencing errors when his counsel did not complain before the trial court that the court failed to follow the statute's requirements. Even though minors are not required to file post-adjudication motions, a minor still must object at trial to preserve a claimed error for review. *In re Samantha V.*, 234 Ill. 2d 359, 368 (2009); see also *In re J.P.J.*, 109 Ill. 2d 129, 137 (1985) (forfeiture principle encouraging a respondent to raise issues before the trial court applies in proceedings under the Juvenile Court Act).

¶ 28 Respondent argues that he preserved his claims by offering arguments to the court as to a less restrictive sentencing alternative. However, a review of the record shows that at the sentencing hearing, respondent's counsel did not raise the current contentions that the court's ruling did not comply with the procedure set out in the Juvenile Court Act. Respondent's failure to challenge the procedure at his sentencing hearing forfeits consideration of the claimed error on appeal, unless respondent can demonstrate plain error. *In re M.W.*, 232 Ill. 2d 408, 430-31 (2009) (applying plain error rule in juvenile proceedings); see also *In re Javaun I.*, 2014 IL App (4th) 130189, ¶ 38.

¶ 29 The first step in plain error review is to determine whether an error occurred. *In re M.W.*, 232 Ill. 2d at 430-31, citing *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). This requires a substantive review of the issues raised. *Samantha V.*, 234 Ill. 2d at 369, citing *People v. Walker*, 232 Ill. 2d 113, 124-25 (2009).

¶ 30 Respondent contends the court did not comply with the statutory requirements of section 5-750(1) because the court did not specifically address the factors set out in subsections (A) through (G). He argues the court did not mention his age, mental health or his educational needs or consider why previous services that he was provided were unsuccessful. Respondent also contends the court failed to comply with the statute because the court did not consider the

alternative to commitment to incarceration and explain why the less restrictive alternative of living with the Whalen family was unacceptable.

¶ 31 At a sentencing hearing in a delinquency case, the trial court must decide the "proper disposition best serving the interests of the minor and the public." 505 ILCS 405/5-705(1) (West 2012). In making that determination, the court may consider all helpful evidence, including oral and written reports. *Id.* Here, before committing respondent to the DOJJ, the court found as required by section 5-750(1)(a) that respondent's parents were unable to discipline him for reasons other than financial circumstances alone. The court further found that secure confinement was necessary to protect the public from the consequences of respondent's criminal activity (though the statute only requires one of those findings, not both). As to the requirements in subsections (A) through (G), the record contains information regarding those factors and also includes the trial court's commitment order in which the court indicated it considered those factors. See *Javaun I.*, 2014 IL App (4th) 130189, ¶ 32 (finding the presence of that information in the record, along with the presentation of alternatives to incarceration to the trial court, was sufficient to support sentence).

¶ 32 We find no wording in the statute, nor does respondent quote any, that required the trial court to expressly make findings based on the individualized factors in the statute when making its ruling. Unless a statute specifically requires the court to make findings, we will not read a finding requirement into a statute that does not contain one. See *In re Commitment of Trulock*, 2012 IL App (3d) 110550, ¶ 37 ("[a] court may not depart from the plain language of the statute and read into it exceptions, limitations, or conditions that are not consistent with the express legislative intent.") The record shows respondent was before this trial judge on multiple court dates, on June 9, 2011, September 1, 2011, September 15, 2011, November 10, 2011, November

30, 2011, October 3, 2012, and his sentencing in January 11, 2013. The court therefore was familiar with respondent's case history. The record reveals the court complied with section 5-750(1) in regards to consideration of the factors in subsections (A) through (G).

¶ 33 Respondent also asserts the court did not make an express finding that a less restrictive alternative to incarceration was not available and did not explain why the alternative to incarceration that was presented by his counsel was unacceptable. He contends the court did not "determine that placing Tevin with Lois Whalen would likely fail based on evidence that similar placements had been tried and previously failed."

¶ 34 The record establishes the court heard evidence as to Lois Whalen's offer to house respondent and serve as his guardian and considered that option for respondent. We note that section 5-750 does not require the court to select the alternative for a juvenile respondent, if such an alternative is presented; rather, the court must be presented with evidence on the efforts made to find a less restrictive alternative to secure confinement and the reason why efforts were unsuccessful. 705 ILCS 405/5-750(1)(b) (West 2012). Respondent's position implies that because an alternative to DOJJ incarceration was offered, the court was required to select it, despite his lengthy juvenile record and his adult convictions. He cites no authority to support his contention that the less restrictive alternative must be chosen if such evidence is presented. In conclusion on those points, we find that the trial court complied with the statutory requirements of the Juvenile Court Act.

¶ 35 Respondent further contends the court abused its discretion in committing him to the DOJJ. As previously noted, a trial court's decision to send a minor to the DOJJ is reviewed for an abuse of discretion. *Ashley C.*, 2014 IL App (4th) 131014, ¶ 22. A trial court abuses its

discretion when no reasonable person could agree with its decision. *In re M.P.*, 408 Ill. App. 3d 1070, 1073 (2011).

¶ 36 The trial court did not abuse its discretion in sentencing respondent to the DOJJ. Although respondent contends the court's sentence indicated a desire to punish him as opposed to allow his rehabilitation, the Juvenile Court Act indicates that one of its purposes is to protect the public from serious crimes committed by delinquent minors (705 ILCS 405/5-101(1)(a) (West 2012)), a fact that the court expressly mentioned in its ruling. Respondent had a juvenile criminal history of aggravated battery and heroin possession and an adult criminal history of drug possession and delivery. Respondent tested positive for drugs during his probation, repeatedly displayed the inability to comply with other terms of his probation, including home confinement, and failed to complete a residential drug treatment program.

¶ 37 Specifically, on June 9, 2011, the court threatened respondent with sentencing to the DOJJ. On September 15, 2011, the court placed respondent on one year of intensive probation because he had not complied with the court's previous orders of home confinement, evening reporting to a probation officer, or electronic monitoring. On November 10, 2011, the court ordered that respondent be placed on electronic monitoring and admonished respondent that if he did not comply with the rules of the intensive probation program, he would be sentenced to the Department of Juvenile Justice. On October 3, 2012, after respondent pled guilty to a probation violation, the court ordered respondent to complete the Gateway residential drug treatment program and admonished respondent that the failure to do so would result in a sentence to the DOJJ. Given the progressive discipline imposed on respondent and the placement in a residential drug treatment facility, and considering respondent's violations of the court's orders,

we find the court did not abuse its discretion when it sentenced respondent to the DOJJ, even when an alternative to incarceration was proffered.

¶ 38 Respondent contends his case is "remarkably similar" to *In re Raheem M.*, 2013 IL App (4th) 130585. We find the circumstances in that case to be clearly distinguishable from the facts here.

¶ 39 In *Raheem M.*, the appellate court vacated the juvenile's sentence to the DOJJ and remanded for a new sentencing hearing, holding that the court had to consider evidence that efforts were made to find a less restrictive alternative to secure confinement before the juvenile could be sentenced to secure confinement, as required by section 5-750(1)(b). *Id.* at ¶ 49. Noting that the statutory revisions were made to "ensure trial courts are treating the DOJJ sentences as a last resort," the court noted that the sentencing court "was not given, nor did it ask for, any evidence regarding efforts made to find a less restrictive alternative to secured confinement." *Id.* at ¶¶ 49-53. Because the trial court failed to require and consider evidence of less restrictive alternatives to secure confinement, the court found the respondent was deprived of a fair sentencing hearing, and the court reversed the disposition based on the second prong of plain error. *Id.* at ¶ 55.

¶ 40 *Raheem M.*'s facts are different from the facts in the instant case because the trial court in *Raheem M.* did not request, and was not given, any evidence of efforts to identify a less restrictive alternative to secure confinement. In this case, the trial court was presented with evidence of an alternative to incarceration. The court explained why it did not elect that alternative for respondent, stating that respondent had "a wonderful opportunity and it's wonderful that this family is going to take him in, and he can still have that opportunity if he chooses but not before he goes to the Department of Corrections [*sic*] because he needs to learn a

lesson." A sentence in the DOJJ can be the "least restrictive alternative" based on the facts of a particular case. See *Javuan I.*, 2014 IL App (4th) 130189, ¶ 43 (finding no plain error in DOJJ sentence where court heard alternative dispositions of substance abuse treatment and home confinement; respondent had multiple encounters with juvenile court, had "a drug problem," and required constant supervision).

¶ 41 In conclusion, we find that the trial court complied with the statutory requirements of the Juvenile Court Act in sentencing respondent. Moreover, the record on appeal establishes that the court did not abuse its discretion in committing respondent to the DOJJ. Finally, we hold that the trial court did not commit a sentencing error and, as a consequence, there was no plain error, and therefore, respondent has forfeited consideration of the claimed errors on appeal.

¶ 42 Accordingly, the judgment of the trial court is affirmed.

¶ 43 Affirmed.