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2014 IL App (3d) 120733-U

Order filed February 19, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 12th Judicial Circuit,
)	Will County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-12-0733
v.)	Circuit No. 08-CF-744
)	
ERNEST P. GARZA,)	Honorable
)	Daniel J. Rozak,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Carter and Holdridge concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not abuse its discretion when it resentenced defendant following the revocation of his probation.
- ¶ 2 Following a bench trial, defendant, Ernest P. Garza, was found guilty of aggravated battery (720 ILCS 5/12-4(b)(10) (West 2008)) and sentenced to 30 months' probation. Defendant's probation was subsequently revoked, and he was resentenced to two years' imprisonment. On appeal, defendant argues that the trial court improperly resentenced him for

his conduct leading to the revocation of his probation rather than for the original offense of aggravated battery. We affirm.

¶ 3

FACTS

¶ 4 On August 11, 2011, defendant was charged by indictment with two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(a)(3) (West 2008)) and one count of aggravated battery (720 ILCS 5/12-4(b)(10) (West 2008)) for acts committed against Beverly Garza, defendant's mother. After the cause proceeded to a bench trial, the trial court found defendant not guilty of two counts of aggravated criminal sexual abuse and guilty of one count of aggravated battery. On November 17, 2011, defendant was sentenced to 30 months' probation.

¶ 5 On direct appeal, this court affirmed defendant's conviction. *People v. Garza*, 2013 IL App (3d) 110859-U. On January 31, 2012, the State filed a petition to revoke defendant's probation, alleging that defendant violated the terms of his probation by committing the offenses of disorderly conduct (720 ILCS 5/26-1 (West 2012)) and possession of child pornography (720 ILCS 5/11-20.1 (West 2012)). A hearing on the petition was held on June 1, 2012.

¶ 6 Officer Paul Tuuk testified that on January 30, 2012, defendant was arrested at a public library for disorderly conduct for photographing a nine-year-old girl. Tuuk spoke with defendant following his arrest. Defendant admitted taking the photographs, but asserted that the girl had consented. Defendant stated that the girl reminded him of his former girlfriend. Defendant consented to allow Tuuk to review the photographs on his cellular telephone. Tuuk discovered several pictures that appeared to be child pornography. Tuuk identified four of these photographs for the court, each depicting one or more prepubescent females engaged in various sexual acts with a naked adult male. The trial court found that the State had proven the allegations in its petition and revoked defendant's probation.

¶ 7 On August 9, 2012, the trial court conducted a sentencing hearing. Neither the State nor defense counsel presented any evidence in aggravation or mitigation. The State argued that a sentence in the Department of Corrections (DOC) was necessary to protect the public based on defendant's conduct in approaching a young girl, photographing her, and storing that photograph on his cellular telephone with other images of child pornography. The State also noted that although probation may have been an appropriate sentence originally, defendant violated those terms. Defense counsel argued that defendant should be sentenced to another term of probation; however, if the court sentenced him to the DOC, he should receive the minimum term of two years due to his lack of criminal history.

¶ 8 The trial court took the matter under advisement, and on August 10, 2012, made the following remarks:

"Having regard for the nature and circumstances of the offense and the history, character and condition of the defendant, I'm of the opinion that any further sentence of probation would be inconsistent with the ends of justice, and I also find that a sentence to DOC is necessary for the protection of the public, so I am going to resentence him to two years in the Illinois Department of Corrections with credit for time served."

¶ 9 Defendant filed a motion to reconsider sentence, arguing his sentence was excessive. The trial court denied the motion. Defendant appeals.

¶ 10 ANALYSIS

¶ 11 Defendant argues that he is entitled to a new sentencing hearing because the trial court sentenced him based upon his conduct that resulted in the revocation of his probation rather than the original aggravated battery offense.

¶ 12 Defendant admits that he has forfeited this issue by failing to raise it with the trial court, but asks this court to review it under the second prong of the plain error doctrine. Under the

plain error doctrine, a reviewing court may consider errors when either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant; or (2) the error is so serious that it denied defendant a fair trial and challenged the integrity of the judicial process. *People v. Thompson*, 238 Ill. 2d 598 (2010). However, before addressing whether defendant's claim satisfies the plain error doctrine, we must first determine whether a clear or obvious error occurred. *Id.*

¶ 13 The determination and imposition of a sentence involves considerable judicial discretion, and we will not reverse a trial court's sentence unless we find that the court abused its discretion. *People v. Alexander*, 239 Ill. 2d 205 (2010). When sentencing a defendant after revocation of probation, the trial court may resentence defendant to any term that would have been appropriate for the original offense. *People v. Risley*, 359 Ill. App. 3d 918 (2005). The court may consider defendant's conduct while on probation in assessing his history, character, and rehabilitative potential, but it must sentence defendant for the original offense, not the probation violation. *People v. Varghese*, 391 Ill. App. 3d 866 (2009); *People v. Young*, 138 Ill. App. 3d 130 (1985). 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. *Young*, 138 Ill. App. 3d 130.

¶ 14 Defendant argues that the trial court did not consider his original offense when imposing his sentence because it failed to specifically reference the offense on the record during resentencing. However, based on our review of the record, we are not persuaded that defendant's sentence was imposed as a penalty for his conduct on probation rather than for his original offense.

¶ 15 During resentencing, the trial court explicitly stated that it had considered "the nature and circumstances of the offense." The court further considered defendant's history and character when it determined that another sentence of probation was inconsistent with the ends of justice. Based upon the court's remarks, we cannot say that it improperly punished defendant for violating his probation, particularly where the trial court did not even mention defendant's conduct while on probation.

¶ 16 Moreover, after defendant was originally sentenced to probation, he violated that probation just two months later by committing an additional offense. Since defendant's alleged criminal conduct while on probation reflected adversely on his rehabilitative potential, it was not unreasonable for the court to determine that another sentence of probation was inappropriate. Defendant's original offense of aggravated battery was a Class 3 felony with a sentencing range of two to five years' imprisonment. 720 ILCS 5/12-4(e)(1) (West 2008); 730 ILCS 5/5-8-1(a)(6) (West 2008). The trial court sentenced defendant to two years' imprisonment, which was the minimum term authorized by statute. Accordingly, we cannot say that the trial court abused its discretion when it reviewed all of the relevant circumstances and determined that a sentence of imprisonment was necessary and appropriate. See *People v. Palmer*, 352 Ill. App. 3d 891 (2004) (finding it appropriate for a defendant who conducts himself poorly while on probation to receive a more severe sentence than he originally received). Since we have found no error in the court's sentencing determination, we must honor defendant's forfeiture of this issue. See *Thompson*, 238 Ill. 2d 598.

¶ 17 CONCLUSION

¶ 18 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 19 Affirmed.