FIRST DIVISION
June 15, 2015

No. 1-13-2371
2015 IL App (1st) 132371-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>HENRY LEE JEFFERS,<br><br>Defendant-Appellant. | ) | Appeal from the Circuit Court of Cook County.<br><br>No. 12 CR 4108<br><br>The Honorable Thaddeus L. Wilson, Judge Presiding. |

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

**ORDER**

*Held:* Trial court abused its discretion when, after imposing its initial sentence, it increased defendant's sentence based on improper considerations.

¶ 1 Defendant Henry Lee Jeffers appeals from the trial court's revocation of his probation, and its imposition of an eight-year prison sentence. On appeal, defendant contends that the trial court impermissibly increased defendant's sentence from five years to eight years, and that his sentence should be modified or his case remanded for a new sentencing hearing before a

different judge. Defendant also contends that he is entitled to a new probation revocation hearing before a different judge. For the following reasons, we affirm the revocation of defendant's probation, but modify defendant's sentence.

¶ 2 BACKGROUND

¶ 3 On August 27, 2012, defendant pleaded guilty to one count of delivery of a controlled substance, a Class 1 felony, in exchange for a sentence of 30 months of TASC probation. On October 23, 2012, the trial court held a hearing on the status of defendant's TASC probation. Daniel Blake, a TASC case manager, filed a report with the trial court stating that defendant was not in compliance with his TASC probation. Defendant was not present in court for this hearing. The State then filed a petition for violation of probation against defendant for "fail[ing] to continue treatment," and a warrant was issued for defendant's arrest. Defendant was subsequently arrested.

¶ 4 On February 19, 2013, the trial court discussed holding a Illinois Supreme Court Rule 402 (eff. July 1, 2012) conference. The court admonished defendant:

> "In that conference, I'll hear information about your background and history. That's information that I would not otherwise hear unless this matter proceeded to a hearing. I will make a recommendation. You're free to accept it or reject it. Nobody can force you to accept or reject the court's recommendation. Do you understand that?"

¶ 5 Defendant replied, "Yes, I do," and the court continued:

> "If you decide not to accept the Court's recommendation, this matter will proceed to a hearing. The fact that I participated in a conference will not be a sufficient basis for substitution of judges. Do you understand[?]"

¶ 6 The defendant replied, "Yes, I do, sir," and the court and the parties went off the record. The court then stated:

> "Back on the record. Alright. We're going to hold off on the conference. We'll see what the defendant does in Gateway in the 120 day program. We'll see if he can do it or not. And if he can't do it, he will be released to TASC only, then we'll take a look at that 4 to 5 years in the penitentiary."

¶ 7 On March 29, 2013, defense counsel informed the court that defendant voluntarily left Gateway drug program, and that based on her conversation with defendant, she had some questions about his mental health. She requested a behavioral clinical examination (BCX), which was granted.

¶ 8 On April 30, 2013, defense counsel informed the court that defendant had refused to participate in the BCX. The court indicated that it was ready to proceed to sentencing. The State increased its recommended sentence from four years to six years. Defense counsel stated that she was unable to "get mitigation" due to defendant's "mental deficiencies." She asked that defendant not be punished for this. The court then stated, "Defendant is re-sentenced to five years in the Illinois Department of Corrections," plus two years of mandatory supervised release.

¶ 9 Defendant objected to the sentence, and defense counsel stated, "I do believe [defendant] is correct that if he doesn't participate in a 402 conference, he has to go to a hearing. Go through the formalities." The court agreed, and passed the case for a hearing later that day.

¶ 10 Prior to the hearing, defense counsel objected to the one witness that the State intended to call, Cecily Bailey, a TASC supervisor assigned to defendant's case. Defense counsel argued that Bailey should not be allowed to testify, as "hearsay is not allowed at a probation hearing." Defense counsel's objection was overruled. The State then proceeded with its case-in-chief.

¶ 11 The State's only witness was Bailey, who testified that she oversaw the work of Daniel Blake, defendant's TASC case manager. She testified that defendant reported to TASC on September 5, 2012, as ordered, but a bed was not available for inpatient treatment, so Blake told defendant that defendant was to attend Treatment Readiness Groups (TRG) twice a week until a bed became available. Bailey testified that defendant attended TRG as ordered, but his attendance eventually became sporadic. Bailey further testified that on October 3, 2012, a bed became available, but defendant was told he would have to go to detox because he had admitted to recent heroin use. Bailey testified that defendant was told to contact TASC when he reported to detox, but defendant was not heard from again. Bailey testified that Blake tried to contact defendant after he was referred to detox to no avail. Accordingly, Blake filed a noncompliance report with the trial court.

¶ 12 Throughout the State's case-in-chief, defense counsel renewed her objections to Bailey's testimony on hearsay and foundation grounds. The trial court overruled those objections. On cross-examination, Bailey stated that she was not sure whether defendant would have qualified for the detox program and defendant never told her whether he reported to the detox program or not.

¶ 13 The trial court found that defendant's admitted use of heroin was enough to find him in violation of his probation. The court sustained the petition to revoke probation, and proceeded to sentence defendant for a second time.

¶ 14 In aggravation, the State pointed out defendant's six prior felony convictions: a 1979 robbery conviction, four convictions for possession of a controlled substance, and a 2002 conviction for identity theft. In mitigation, defense counsel noted that prior to the hearing, the trial court sentenced defendant to five years, and she asked that the sentence be no higher than

that. The trial court responded, "Actually, the conduct now the court has heard is more egregious than the court was aware of at the time." Defense counsel noted that the court was aware of the TASC noncompliance report before the hearing and that "everything that was in the hearing" was in the report. The trial court then stated, "Defendant is resentenced to nine years in the Illinois Department of Corrections." Defense counsel responded:

> "I don't believe the PSI was ordered. Also I believe the sentence is *** excessive, given he asked for a hearing and I'm trying to protect his due process rights and he's being punished by four years for having a hearing. I'd ask for a date for a PSI as well as for post hearing motions."

¶ 15 The trial court denied defense counsel's requests. Defense counsel informed the court of defendant's desire to appeal, and the court prepared an order. Later that same day, the trial court recalled the case outside of the presence of counsel. It stated that it was holding the case over until the next day to allow the court to order the presentence investigation report (PSI).

¶ 16 The next day, on May 1, 2013, the trial court indicated that the matter was going to be vacated because the court failed to get the PSI report. The court then asked the State if it had formally entered the probation report used by Bailey into evidence as a business record at the hearing. The State then asked for leave to admit it into evidence, over defense counsel's objection. Defense counsel argued that the foundational requirements for introduction as a business record were not met, and that it was not identified as an exhibit at the hearing. The trial court overruled the objection, noting that the reports were business records of the agency, and that everyone saw that the witness had the report before her in court at the hearing.

¶ 17 On May 31, 2013, defense counsel filed a motion to reconsider revocation of probation. The motion argued that the trial court had erred in revoking defendant's probation based on

inadmissible hearsay, and that the trial court sentenced defendant to nine years, which was a four-year increase from "an hour before," and that the trial court heard nothing new at the hearing that it should not have already known from the TASC noncompliance report.

¶ 18 On June 17, 2013, the trial court denied defense counsel's motion, stating:

> "And again, Bailey was intimately involved, personally involved with respect to [defendant's] probation and alleged violation including her supervising authorities, but her involvement was more than just supervisory. Again, she was intimately involved and aware of the facts. And while some of the information she had was from people who she supervised such as information that she was following up on and directing her staff personally and that the records she kept were in the regular course of business of supervisory role and not for the sole purpose or main purpose of litigation."

¶ 19 On July 12, 2013, defendant was sentenced for a third time. The State noted that defendant was eligible for an extended sentence of 4 to 30 years and it was now asking for 10 years' incarceration.

¶ 20 Defense counsel argued in mitigation that defendant had no violent felonies and was potentially suffering from mental health issues. She also argued that as a maximum, defendant should be sentenced to five years in prison, which is what he had previously been sentenced to.

¶ 21 The trial court stated that "there was no formal recommendation by the court for five years" but rather that it was its practice to "throw out numbers to get [defendants'] attention as to what they might be facing so that they can perhaps reconsider their actions." The court stated that defendant had not complied with drug treatment programs and refused to comply with BCX. Accordingly, the trial court stated:

> "The Court has reviewed the presentence investigation report. The court has considered all of the factors with respect to sentencing, and it's this Court's opinion that the defendant should do more than 9 years in the Illinois Department of Corrections; however, given the confusion with IDOC back and forth and because the Court did not originally order the presentence investigation report, the defendant is resentenced to eight years in the Illinois Department of Corrections ***."

¶ 22 Defense counsel orally moved to reconsider the sentence, arguing that it was improperly increased from the original five-year sentence. She argued that it was "clearly punishment for exercising his due process rights." The trial court responded that it had "jumped the gun" and sentenced defendant "without all of the information [it] needed," and that it now had the opportunity to "look at a rather lengthy [PSI]," which gave the court "additional information that it did not have." The court continued that it was now of the opinion that defendant's sentence was "on the light side *** but rather than going higher to 12 or 15 years," the court went lower to credit defendant for the court "jumping the gun" the first time.

¶ 23 Defendant's motion to reconsider was denied, and defendant now appeals the revocation of probation and the imposition of his eight-year sentence.

¶ 24 ANALYSIS

¶ 25 We first address defendant's contention that the trial court improperly increased his sentence from five years to eight years, and that his sentence should be modified, or his case remanded, for a new sentencing hearing before a different judge. The State responds that the eight-year sentence was entirely appropriate. We agree with defendant and find that the trial court abused its discretion in imposing an eight-year sentence.

¶ 26 Illinois Supreme Court Rule 615(b)(4) authorizes a reviewing court to reduce a sentence imposed by the trial court where the record demonstrates that the trial court abused its discretion. *People v. Clark*, 374 Ill. App. 3d 50, 69 (2007). Reviewing courts have historically been reluctant to exercise that power and our supreme court has repeatedly held that "the power to reduce a sentence should be exercised 'cautiously and sparingly.'" *People v. Alvarez*, 2012 IL App. (1st) 092119, ¶ 59 (quoting *People v. Jones*, 168 Ill. 2d 367, 378 (1995)). An abuse of discretion occurs when the sentence was based on improper considerations or is otherwise erroneous in the defendant's particular situation. *People v. Thomas*, 277 Ill. App. 3d 214, 220 (1995). We cannot affirm a sentence that the trial court based on an improper factor unless we can "determine from the record that the weight placed on the improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence." *People v. Heider*, 231 Ill. 2d 1, 21 (2008). Before reversing a sentence imposed by the trial court it must be clearly evident that the sentence was improperly imposed. *People v. Ward*, 113 Ill. 2d 516, 526 (1986). In making the determination, the reviewing court should not focus on a few words or statements of the trial court, but rather must consider the record as a whole. *Id*. In this case, after considering the record as a whole, we find that the trial court abused its discretion in sentencing defendant to eight years in prison, as the sentence was based on improper considerations.

¶ 27 First, there is no question that if defense counsel had not objected to defendant's original sentence on the basis of the trial court's failure to conduct a hearing, defendant's sentence would remain at five years in prison. It is well-settled that "[a] court may not increase a sentence once it is imposed." 730 ILCS 5/5-4.5-50(d) (West 2012); see also *People v. Kilpatrick*, 167 Ill. 2d 439, 446-47 (1995) (increase in sentence following a motion to reconsider found to be impermissible). A harsher sentence is only permissible after a successful appeal or motion to

reconsider if it is based on additional bad conduct performed by the defendant after the original sentencing. *People v. Moore*, Ill. 2d 421, 433 (1997).

¶ 28 Here, defendant's second sentence was imposed in the afternoon of the same day as his original sentence was imposed. At that hearing, the trial court heard testimony from a TASC supervisor regarding defendant's alleged noncompliance with the TASC program and his alleged admitted heroin use. This conduct was not conduct that had occurred since the original sentence was imposed, but rather was conduct that occurred before defendant's arrest for violation of his probation. As such, as defense counsel pointed out to the trial court, this information was available to the trial judge at the time he imposed the original sentence. There is no authority that we can find, nor any authority that the State points to, which allows a trial court to increase a sentence based on information that was available to it at the original sentencing.

¶ 29 Moreover, the conduct that the trial court relied on in increasing defendant's sentence did not constitute proper sentencing considerations. After revoking a sentence of probation, the trial judge may resentence a defendant to any sentence that would have been appropriate for the original offense. *People v. Risley*, 359 Ill. App. 3d 918, 920 (2005). The court may consider the defendant's conduct while on probation in reassessing his rehabilitative potential, but the sentence imposed "must not be in punishment for the probation violation." *Id.*

¶ 30 Here, the TASC supervisor testified as to the conduct that led to the petition for revocation of defendant's probation. After the hearing, the court specifically justified the imposition of a nine-year sentence by stating that the conduct he heard about during the hearing was "more egregious" than he was first aware of. The trial judge did not reference the original conviction for possession of a controlled substance, and did not state that he was only considering defendant's conduct while on probation in terms of defendant's rehabilitative

potential. Accordingly, we find that the trial judge relied on an improper consideration when sentencing defendant following his sentencing hearing.

¶ 31 This was not the end of defendant's resentencing, however. The trial court then ordered the PSI and another sentencing hearing was held. The third time defendant was sentenced, brief arguments were heard by both parties, and then the trial court stated that the first sentence imposed on defendant was not a "formal recommendation" by the court but rather the five years was just the trial court "throw[ing] out numbers to get [defendant's] attention." The trial court stated that the information received from the TASC supervisor detailing defendant's noncompliance with TASC, and that defendant voluntarily left the Gateway program, was suggestive that defendant was "not ready to face his demons." The trial court stated that defendant refused to submit to a BCX, and that defendant's demeanor in court indicated that his actions were volitional in nature. The trial court further noted that it had reviewed defendant's PSI and "considered all of the factors with respect to sentencing," and stated that it was its opinion that defendant should serve nine years in jail. The court then stated that given "the confusion with IDOC back and forth" and because it had not originally ordered a PSI, it was resentencing defendant to eight years in jail.

¶ 32 Defense counsel then orally moved to reconsider the sentence, arguing that the trial court was still punishing defendant for exercising his right to a hearing. The State responded that the sentencing range was "4 to 30 years," and that defendant had a significant criminal history. The trial court stated that the court now had the opportunity to look at "a rather lengthy [PSI], which was information the court did not previously have, and that it should probably impose a sentence of "12 to 15 years" but it lowered the sentence "to credit defendant for the Court jumping the gun the first time."

¶ 33 We first note that the State admits in its brief on appeal that the appropriate sentencing range for defendant was 4 to 15 years and that he was not eligible for extended sentencing. 720 ILCS 570/401(a)(1) (West 2012); 730 ILCS 5/5-4.5-30(a) (West 2012). While the final sentence of eight years was within this sentencing range, we nevertheless find that the court abused its discretion in imposing the sentence by again relying on improper considerations. We note that while the trial court briefly mentioned that it "considered all the factors with respect to sentencing," the only factors it specifically enumerated were the defendant's noncompliance with TASC while on probation, his refusal to submit to BCX, and his voluntary departure from the Gateway program, which was all conduct that occurred before the original imposition of the sentence in this case. Additionally, the violations of probation are improper considerations in sentencing defendant, as stated above. Because these improper factors were the only factors, along with defendant's PSI, specifically addressed by the trial court in making its final sentencing ruling, we conclude that the weight placed on such factors was significant enough that it led to a greater sentence. *People v. Heider*, 231 Ill. 2d 1, 24 (2008). Accordingly, we reduce defendant's sentence to the original sentence of five years in prison, with two years of mandatory supervised release, pursuant to Rule 615(b)(4).

¶ 34 Defendant's second argument on appeal is that he is entitled to a new probation revocation hearing because the petition for revocation of probation only alleged that he did not comply with TASC, and not on his alleged admission to recent drug use, and therefore his due process rights were violated because he did not have notice of the alleged drug violation.[1] We first note that only "minimum requirements" of due process need be applied at a probation revocation hearing. *People v. Acevedo*, 216 Ill. App. 3d 195, 200 (1991). "This rule is based on

[1] While defendant has waived this issue for review by failing to object at the hearing or in a post-hearing motion, we elect to review defendant's alleged due process violation under Illinois Supreme Court Rule 615(a), which allows us to consider errors that have not been properly preserved for review where those errors affect substantial rights.

the qualitative difference between a criminal prosecution and the revocation of probation." *Id*. "Rather, the proceeding takes place only after the probationer has already been convicted, sentenced to probation, and then is charged with violating the conditions of his probation." *Id*. at 200-01. Due process at a revocation hearing *does* "require that the probationer have notice of the alleged violations; and that revocation follows a hearing at which the probationer had an opportunity to be heard, present evidence, confront witnesses, and be represented by counsel." *Id*. at 201.

¶ 35 Here, we find that defendant had sufficient notice of the alleged drug use violation of probation. While the petition for revocation did not specifically enumerate this drug use violation, Daniel Blake, defendant's TASC manager, filed a report with the court on October 23, 2012, which stated that defendant was not in compliance with his TASC probation. As part of that report, Blake specifically noted "[defendant] admitted to recent heroin use," and "client could not be admitted due to lack of sobriety." Based on this report, the State filed the petition for violation of probation against defendant for failing to continue treatment, and a warrant was issued for defendant's arrest. Accordingly, we find that Blake's report enumerating the ways in which defendant did not comply with his TASC probation included the alleged drug violation, and thus defendant had sufficient notice of this allegation. He further had an opportunity to "be heard, present evidence, confront witnesses, and be represented by counsel." See *Acevedo*, 216 Ill. App. 3d at 201. Thus, we find defendant's due process argument to be without merit.

¶ 36 Defendant's final contention on appeal is that the State failed to meet its burden to prove defendant violated his probation because the sole evidence presented by the State was inadmissible hearsay evidence. At a probation hearing, the State has the burden of going forward with the evidence and proving the violation of probation by a preponderance of the

evidence, while using only competent evidence. *People v. Renner*, 321 Ill. App. 3d 1022, 1025 (2001). Hearsay evidence is not competent evidence in probation revocation proceedings. *Id*. at 1026. The confrontation clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 8) permits hearsay evidence to be admitted against a defendant only where either the evidence is firmly rooted in a hearsay exception or particularized guarantees of trustworthiness assure the reliability of the evidence. *Id*.

¶ 37 The constitutional protection due to a defendant at the probation revocation stage, however, is not as strict as that due to a nonconvicted person. *People v. Allegri*, 127 Ill. App. 3d 1041, 1045 (1984). At a probation revocation proceeding, the defendant is awaiting resentencing, not sentencing. *Allegri*, 127 Ill. App. 3d at 1045. Evidentiary rules are not applied with full force to probation revocation proceedings. *Id*. at 1046. The State's standard of proof is lower as it needs to demonstrate only by a preponderance of the evidence that the act giving rise to the petition to revoke probation occurred. *Id*. at 1045.

¶ 38 Here we find that even if the TASC supervisor's testimony was hearsay, the allowance of such testimony was harmless error because the testimony mirrored what was in Blake's report on defendant's noncompliance, which was admissible as a business record. A business record is admissible as an exception to the general rule prohibiting hearsay. Section 115-5 of the Code of Criminal Procedure of 1953 (Code) states that a writing or record, made as a memorandum or record of any act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of such business to make such record at the time of such act, transaction, or occurrence. 725 ILCS 5/115-5(a) (West 2012). However, a document is not admissible as evidence under the business record exception if it "has been made by anyone during an investigation of an alleged offense or during any investigation relating to pending or

anticipated litigation of any kind." 725 ILCS 5/115-5(c) (West 2012). The foundation of a business record may be established through the testimony of any person familiar with the business and its mode of operation; the witness need not be the author of the document and the author need not be unavailable to testify. *People v. Henderson*, 336 Ill. App. 3d 915, 921 (2003).

¶ 39 Here, the State was required to show by a preponderance of the evidence that defendant failed to comply with TASC. Blake's supervisor testified that she oversaw Blake's work on defendant's case and spoke to him "every step of the way." She monitored the cases assigned to her and was involved in termination decisions as she had "jurisdiction over every note that's written for [a] client." She testified that she received a request to terminate defendant's probation and that after speaking to Blake, it was determined that defendant was not following the conditions of this probation. A case report was then generated in order to "inform[] the court that he was in noncompliance with TASC *** [and] [s]tated every step that we took to get him in compliance. Accordingly, we find that under the relaxed evidentiary rules in a revocation of probation hearing, this testimony constituted a proper foundation for the case report to be entered into evidence as a business record. The case report outlined the ways in which defendant had failed to comply with TASC, including admitted drug use. Accordingly, we find that any elements of Blake's supervisor's testimony that could be construed as hearsay were harmless in this case, and we affirm the trial court's revocation of his probation. See *In re Jovan A.*, 2014 IL App (1st) 103835, ¶ 37 (when examining whether the admission of hearsay is harmless, the pertinent inquiry is whether there is a reasonable probability that the outcome would have differed had the hearsay testimony been excluded).

¶ 40 CONCLUSION

¶ 41 For the foregoing reasons we affirm the revocation of defendant's probation, but modify defendant's sentence to five years in jail with two years of mandatory supervised release.

¶ 42 Judgment affirmed; sentence modified.