

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2015 IL App (4th) 130528-U

NO. 4-13-0528

FILED

May 8, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
MARKIE D. LOCKETT,)	No. 11CF701
Defendant-Appellant.)	
)	Honorable
)	Harry E. Clem,
)	Judge Presiding.

PRESIDING JUSTICE POPE delivered the judgment of the court.
Justices Harris and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* We grant appointed counsel's motion to withdraw under *Anders v. California*, 386 U.S. 738 (1967), and affirm the trial court's judgment where no meritorious issues could be raised on appeal as to whether (1) the probation revocation admonishments comported with due process, (2) the State proved the probation violation by a preponderance of the evidence, (3) defendant's 364-day jail sentence was an abuse of discretion, and (4) defendant's guilty plea is void.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal on the ground no meritorious issues can be raised in this case. For the following reasons, we grant OSAD's motion and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 In May 2011, the State charged defendant by information with unlawful restraint

(720 ILCS 5/10-3(a) (West 2010)), a Class 4 felony, and domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2010)), a Class A misdemeanor. As to the domestic battery charge, the State alleged defendant "knowingly made physical contact of an insulting or provoking nature with [the victim], a family or household member of said defendant, in that said defendant grabbed her breast causing a bleeding abrasion and covered her mouth with his hand."

¶ 5 That same month, defendant and the State reached a negotiated plea agreement. Defendant offered to plead guilty to the charge of domestic battery in exchange for the dismissal of the charge of unlawful restraint. The plea was presented to the trial court. The court admonished defendant pursuant to the provisions of Illinois Supreme Court Rule 402(a) (eff. July 1, 1997). Specifically, the court advised defendant of (1) his right to a jury or bench trial, (2) the presumption of innocence and right to cross-examine witnesses at trial, (3) the State's burden to prove guilt beyond a reasonable doubt, (4) the nature of the charge, and (5) the sentencing range. Defendant confirmed his signature on his jury waiver form and his understanding of the rights he was giving up by signing the form. The court found defendant understood his rights and knowingly and voluntarily waived those rights and persisted in his offer to plead guilty. The State offered the following factual basis: On May 7, 2011, two weeks after defendant and the victim ended their dating relationship, defendant went to the victim's residence while she was in the bathtub. He grabbed the victim's breast, causing a bleeding laceration. The victim tried to yell, but defendant placed his hand over her mouth. Defendant stipulated to the factual basis and acknowledged the State could present sufficient evidence to sustain the charge of domestic battery. The court found the factual basis sufficient and the plea to be knowing and voluntary and therefore accepted defendant's guilty plea and dismissed the charge of unlawful restraint.

¶ 6 As to sentencing, the trial court concurred in the sentencing recommendation incorporated in the plea agreement and sentenced defendant to (1) 12 months' conditional discharge, subject to certain rules and conditions; (2) 7 days' incarceration, with credit for 7 days served; and (3) pay certain assessments. The court further required defendant to enroll in and successfully complete a partner-abuse-intervention or anger-management program within 60 days. Finally, the court ordered defendant to have no contact with the victim. Defendant was advised of his appellate rights pursuant to Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001).

¶ 7 In June 2011, the State filed a petition to revoke conditional discharge, alleging defendant had direct contact with the victim in violation of the conditional discharge order.

¶ 8 In July 2011, defendant appeared with counsel, offering to admit the conditional discharge violations. The trial court admonished defendant pursuant to Illinois Supreme Court Rule 402A(a) (eff. Nov. 1, 2003). The court advised defendant as to the nature of the proceedings and the possible penalties. The court found defendant understood his rights and knowingly and voluntarily waived those rights. The State presented a factual basis as laid out in the State's petition to revoke. Defendant admitted and stipulated to the allegations contained in the petition. Having found a factual basis and the admission to be knowing and voluntary, the court accepted defendant's admission and revoked his conditional discharge. The court resentenced defendant to (1) 24 months' probation, subject to certain rules and conditions; (2) 48 days' incarceration, with credit for 9 days served; and (3) pay certain assessments, including those previously assessed. The court further mandated defendant enroll in a partner-abuse-intervention or anger-management program within 60 days and successfully complete such program without termination. The court stayed the execution of the sentence until August 1,

2011.

¶ 9 On August 1, 2011, defendant failed to appear and the trial court issued an arrest warrant. On August 17, 2011, defendant appeared before the court in the custody of the Champaign County sheriff. The court remanded defendant to the custody of the sheriff to begin serving his sentence.

¶ 10 In April 2013, the State filed a petition to revoke probation, alleging defendant violated the rules of probation as ordered by the court. Specifically, the State alleged defendant failed to report to probation appointments in (1) October 2011, (2) February 2012, (3) March 2012, (4) August 2012, (5) September 2012, (6) November 2012, (7) December 2012, (8) January 2013, (9) February 2013, and (10) March 2013. The State also alleged defendant willfully refused to pay fines, fees, and costs and failed to enroll in a partner-abuse-intervention program.

¶ 11 In May 2013, defendant appeared in court with counsel, offering to admit the probation violations. The trial court admonished defendant pursuant to Illinois Supreme Court Rule 402A(a) (eff. Nov. 1, 2003). Specifically, the court advised defendant of (1) his right to a hearing on the petition, (2) the "opportunity for [his] lawyer to cross[-]examine the witnesses" at such hearing, (3) the State's burden to prove violations by a preponderance of the evidence, (4) the nature of the charge, and (5) the sentencing range. The court found defendant understood his rights and knowingly and voluntarily waived those rights. The State presented a factual basis as laid out in the State's petition to revoke. Defendant admitted and stipulated to the allegations contained in the petition to revoke. Having found a factual basis and the admission to be knowing and voluntary, the court accepted defendant's admission and revoked his probation.

¶ 12 In June 2013, the trial court conducted a resentencing hearing. Both parties confirmed the presentence investigation report prepared by the probation and court services department contained accurate information and did not omit any matter of substance. The State did not present evidence in aggravation. In mitigation, defendant's grandmother testified regarding her reliance on defendant to care for her and defendant's prior work history and parental responsibilities. The State requested 364 days' incarceration, with 62 days' credit for time served, arguing defendant's actions in the pending case as well as his past criminal behavior and his failure to complete sentences successfully demonstrated defendant's unwillingness to abide by court orders. Defendant requested a community-based sentence and time served, arguing the fact he pleaded guilty and stipulated to the petitions to revoke indicated his rehabilitative potential and his acceptance of responsibility for his actions. Defendant further noted his underlying offense was a misdemeanor for a battery of an insulting or provoking nature, "as opposed to actually physically hurting somebody." As to the failure to successfully complete prior sentences, defendant contended he completed a majority of each sentence. Defendant personally addressed the court, apologizing for his actions and requesting leniency.

¶ 13 In determining defendant's sentence, the trial court considered the information contained in the presentence report, the testimony of defendant's grandmother, and the arguments of the parties. In its oral ruling, the court noted at the initial plea, defendant secured the dismissal of a felony unlawful restraint charge. The court also disagreed with defendant's assertion as to the nature of the domestic battery charge because the charging instrument indicated defendant grabbed the victim's breast sufficiently hard to cause a bleeding abrasion. The court found, although the defendant was a caregiver for his grandmother, he disregarded

those duties when he violated the basic terms of his probation sentence. Therefore, the court resentenced defendant to 364 days' incarceration, with credit for 62 days served, and reimposed all previously assessed fines, fees, and costs, with credit for payments previously made. It further granted defendant a credit of \$310 for 62 days served in custody to be applied to the fines imposed.

¶ 14 That same month, defendant filed a motion to reconsider his sentence, alleging the (1) sentence was excessive and did not consider his rehabilitative potential, (2) trial court improperly considered defendant was initially charged with a felony, (3) court improperly considered the harm caused to the victim, (4) court gave too much weight to factors in aggravation, and (5) court gave too little weight to factors in mitigation. The court conducted a hearing on defendant's motion. Defendant stood on his written motion. The court reiterated the factors in aggravation and mitigation, finding the factors in aggravation substantial and mitigation minimal. As to the reference to the previous felony charge, the court clarified it referenced the charge to demonstrate defendant's failure to take advantage of the opportunity of a lesser charge, reflecting negatively on his rehabilitative potential. As to the harm caused, defendant admitted he grabbed the victim's breast to the point of causing a bleeding abrasion. Therefore, the court denied defendant's motion. After the court's ruling, defendant moved to file a notice of appeal, which the court allowed. OSAD was appointed to represent defendant.

¶ 15 In December 2014, OSAD moved to withdraw, attaching to its motion a brief in conformity with the requirements of *Anders v. California*, 386 U.S. 738 (1967). The record shows service of the motion on defendant. On its own motion, this court granted defendant leave to file additional points and authorities by January 12, 2015, but defendant has not done so.

After examining the record and executing our duties in accordance with *Anders*, we grant OSAD's motion and affirm the trial court's judgment.

¶ 16

II. ANALYSIS

¶ 17

OSAD contends the record shows no meritorious issues can be raised on appeal. Specifically, OSAD asserts the following: (1) the probation revocation admonishments comported with due process; (2) the State proved the probation violation by a preponderance of the evidence; (3) defendant's 364-day jail sentence was not an abuse of discretion; and (4) defendant's guilty plea is not void.

¶ 18

A. Probation Revocation Admonishments

¶ 19

OSAD first concludes no colorable argument can be made whether the probation revocation admonishments given by the trial court comported with due process. We agree.

¶ 20

Illinois Supreme Court Rule 402A(a) (eff. Nov. 1, 2003) requires a court to address the defendant in open court, informing him and determining he understands the following:

"(1) the specific allegations in the petition to revoke probation, conditional discharge or supervision;

(2) that the defendant has the right to a hearing with defense counsel present, and the right to appointed counsel if the defendant is indigent and the underlying offense is punishable by imprisonment;

(3) that at the hearing, the defendant has the right to confront and cross-examine adverse witnesses and to present witnesses and evidence in his or her behalf;

(4) that at the hearing, the State must prove the alleged violation by a preponderance of the evidence;

(5) that by admitting to a violation, or by stipulating that the evidence is sufficient to revoke, there will not be a hearing on the petition to revoke probation, conditional discharge or supervision, so that by admitting to a violation, or by stipulating that the evidence is sufficient to revoke, the defendant waives the right to a hearing and the right to confront and cross-examine adverse witnesses, and the right to present witnesses and evidence in his or her behalf; and

(6) the sentencing range for the underlying offense for which the defendant is on probation, conditional discharge or supervision."

Substantial compliance with these requirements is sufficient to satisfy due process. *People v. Ellis*, 375 Ill. App. 3d 1041, 1046, 874 N.E.2d 980, 983 (2007). Whether a trial court substantially complied with the admonishment requirements presents a legal question, which we review *de novo*. *People v. Bowens*, 407 Ill. App. 3d 1094, 1104, 943 N.E.2d 1249, 1261 (2011).

¶ 21 In this case, the trial court substantially complied with Rule 402A(a) and thus due process. The court informed defendant of the allegations in the petition, his right to a hearing,

where the State would be required to prove the allegations by a preponderance of the evidence, the right to confront and cross-examine witnesses as well as present his own defense, ensured defendant understood the rights he was giving up by admitting the allegations in the petition, and notified him of the applicable sentencing range. Although the court did not specifically admonish defendant he had a right to be represented by counsel at a revocation hearing, the circumstances surrounding defendant's admonishments demonstrate the oversight was harmless. See Ill. S. Ct. R. 402A(a)(2) (eff. Nov. 1, 2003). At the hearing, defendant was represented by appointed counsel. The court stated, "If you admit the probation violations charged *** [t]here will be no opportunity for your lawyer to cross[-]examine the witnesses, that is ask them questions about their testimony." Defendant did not waive his right to counsel, never indicated confusion about the procedure at a revocation hearing, never moved to withdraw his admission to violating the terms of his probation, and never indicated he was unaware of his right to counsel. Thus, no colorable argument can be made the probation revocation proceedings failed to comport with due process.

¶ 22 B. Sufficiency of the Evidence

¶ 23 OSAD next concludes no colorable argument can be made as to whether the State met its burden of proving defendant violated his probation by a preponderance of the evidence. *People v. Crowell*, 53 Ill. 2d 447, 451, 292 N.E.2d 721, 723 (1973); 730 ILCS 5/5-6-4.1(c) (West 2010). We agree.

¶ 24 At a probation revocation hearing, the State has the burden of proving a violation of probation by a preponderance of the evidence. *People v. Renner*, 321 Ill. App. 3d 1022, 1025, 748 N.E.2d 1272, 1276 (2001). If a defendant admits a charged probation violation after being

sufficiently admonished pursuant to Rule 402A(a), this removes the State's burden to provide further proof of the violation. *People v. Hall*, 198 Ill. 2d 173, 181, 760 N.E.2d 971, 976 (2001); *People v. Speight*, 72 Ill. App. 3d 203, 214, 389 N.E.2d 1342, 1350 (1979).

¶ 25 Here, in its petition to revoke defendant's probation, the State alleged defendant violated his probation by failing to (1) report to probation appointments; (2) pay certain fines, fees, and costs; and (3) enroll in a partner-abuse-intervention program. Defendant admitted these violations and the court accepted defendant's admission after defendant was sufficiently admonished pursuant to Rule 402A(a). Based on this evidence, no colorable claim can be made the State failed to state a sufficient factual basis or the court's judgment in accepting defendant's admission was in error.

¶ 26 C. Defendant's Sentence Was Not Excessive

¶ 27 OSAD asserts no colorable argument can be made the trial court abused its discretion in sentencing defendant to 364 days' incarceration. We agree.

¶ 28 "A trial court is given great deference when making sentencing decisions, and if a sentence falls within the statutory limits, it will not be disturbed on review unless the trial court abused its discretion and the sentence was manifestly disproportionate to the nature of the case." *People v. Thrasher*, 383 Ill. App. 3d 363, 371, 890 N.E.2d 715, 722 (2008). "When a sentence of probation has been revoked, the trial court 'may impose any other sentence that was available *** at the time of the initial sentencing.'" *People v. Somers*, 2012 IL App (4th) 110180, ¶ 21, 970 N.E.2d 606 (quoting 730 ILCS 5/5-6-4(e) (West 2008)).

¶ 29 In this case, after revoking defendant's probation, the trial court sentenced him to 364 days' incarceration. Defendant pleaded guilty to domestic battery (720 ILCS 5/12-3.2(a)(2)

(West 2010)), a Class A misdemeanor. A Class A misdemeanor may be punishable by a term of incarceration of less than one year. 730 ILCS 5/5-4.5-55 (West 2010). Nothing in the record indicates the trial court considered improper factors when sentencing defendant, nor does the record support a claim the sentence was disproportionate to the offense.

¶ 30 D. Defendant's Guilty Plea Was Not Void

¶ 31 Last, OSAD asserts no colorable argument can be made defendant's guilty plea is void. We agree.

¶ 32 "When no direct appeal is taken from an order of probation and the time for appeal has expired, a reviewing court is precluded from reviewing the propriety of that order in an appeal from a subsequent revocation of that probation, unless the underlying judgment of conviction is void." *People v. Johnson*, 327 Ill. App. 3d 252, 256, 762 N.E.2d 1180, 1183 (2002).

¶ 33 Here, defendant did not file a direct appeal from his guilty plea and the time to file such an appeal has expired. See Ill. S. Ct. R. 604(d) (eff. July 1, 2006). As a result, defendant can only challenge his guilty plea if it is void. The record does not support such an argument. Defendant was thoroughly admonished pursuant to Rule 402(a). The trial court found defendant understood his rights and knowingly and voluntarily waived those rights and persisted in his offer to plead guilty. The State presented a factual basis supporting a finding of guilt beyond a reasonable doubt. Defendant confirmed the State could present sufficient evidence to sustain the charge of domestic battery. Having found a factual basis for the guilty plea and the plea to be knowing and voluntary, the court accepted defendant's guilty plea and dismissed the charge of unlawful restraint. The court concurred in the sentencing recommendation

incorporated in the plea agreement. Defendant was advised of his appellate rights pursuant to Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001). Thus, no colorable argument can be made defendant's guilty plea is void.

¶ 34

III. CONCLUSION

¶ 35 After reviewing the record consistent with our responsibilities under *Anders*, we agree with OSAD no meritorious issues can be raised on appeal, and we grant OSAD's motion to withdraw as counsel for defendant and affirm the trial court's judgment.

¶ 36 Affirmed.