2015 IL App (4th) 130713-U

NO. 4-13-0713

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 23, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
RICHARD J. LAWUARY,	)	No. 11CF728
Defendant-Appellant.	)	
	)	Honorable
	)	Peter C. Cavanagh,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Pope and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court (1) affirmed the trial court's judgment granting the State's petition to revoke defendant's probation, (2) reversed defendant's sentence where the trial court improperly considered dismissed charges in aggravation and remanded for resentencing, and (3) granted defendant an additional 68 days' credit for days actually spent in custody.

¶ 2 In November 2012, defendant, Richard J. Lawuary, pleaded guilty to one count of aggravated battery and was sentenced to two years' probation. In January 2013, the State filed a petition to revoke defendant's probation. The trial court granted the petition and resentenced defendant to 6 ½ years' imprisonment. Defendant appeals, arguing (1) the State failed to prove he violated the terms of his probation, (2) the trial court improperly sentenced him for acts committed while on probation and gave undue weight in aggravation to dismissed charges, and (3) he is entitled to an additional 136 days of credit against his sentence. We affirm in part, reverse in part, and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 In August 2011, the State charged defendant in Sangamon County case No. 11-CF-728 with two counts of aggravated battery (720 ILCS 5/12-3.05(d)(4) (West 2010)) and one count of possession of a controlled substance (720 ILCS 570/402(c) (West 2010)). The following facts of the underlying charges in case No. 11-CF-728 were adduced at a hearing on defendant's motion to suppress prior to the entry of his guilty plea.

¶ 5 In August 2011, Springfield police officers Jason Sloman and Andrew Zander stopped a silver Chevy Impala, driven by defendant, in a grocery store parking lot. A random registration check showed the license plate was registered to a white Chevy Impala. Defendant indicated the vehicle belonged to a friend who had recently purchased the car and allowed defendant to drive it. Sloman spoke to the vehicle's owner on the phone and determined he did not need to issue any citations or further detain defendant. However, Sloman asked defendant to step out of the vehicle because he was a known gang member.

¶ 6 Defendant agreed to exit the vehicle and agreed to allow Sloman to search him. Defendant indicated he had a pocketknife, which Sloman removed and put in the silver Impala. Defendant also indicated he had marijuana in his left sock. Sloman recovered the marijuana and proceeded to search defendant. Sloman testified he felt a hard, rock-like substance, which he believed to be a controlled substance, underneath defendant's shorts near his buttocks.

¶ 7 As Sloman searched defendant's rear, defendant turned around and pushed the officer's hands away. Zander and Sloman tried to detain defendant and advised him he was under arrest for resisting and for pushing Sloman. After securing defendant in handcuffs, defendant continued to struggle. The officers wrestled defendant to the ground and called for backup. Backup arrived and assisted Sloman and Zander in standing defendant up. Sloman

attempted to search defendant again because he was concerned defendant might destroy the suspected controlled substance during transport to the police station. Sloman testified: "[Defendant] began kicking and fighting with officers, turning and twisting his body, to try to prevent me from searching him. At that time, we had to take him back down to the ground. That's when the suspected crack cocaine fell out of his shorts."

¶ 8 In November 2012, defendant pleaded guilty to one count of aggravated battery and, in exchange, the State agreed to dismiss the other count of aggravated battery, the possession of a controlled substance count, and a charge of possession of a controlled substance from Sangamon County case No. 11-CF-491. Further, the negotiated plea deal provided defendant would serve 136 days in county jail, satisfied by the 68 days he spent in presentence custody, and he would be subject to two years of probation. The terms of defendant's probation required he not violate any criminal or traffic statutes of any jurisdiction.

¶ 9 A. Petition To Revoke Probation

¶ 10 In January 2013, the State filed a petition to revoke defendant's probation for, *inter alia*, two charges of obstructing justice. 720 ILCS 5/31-4(a)(1) (West 2012). In April 2013, at the hearing to revoke defendant's probation, the State presented three witnesses. Kent Boyd, defendant's probation officer, testified defendant was placed on probation on November 15, 2012. Boyd further testified new charges were brought against defendant, including two counts of obstruction of justice, one count of possession of a weapon by a felon, and two counts of battery. Boyd testified the two counts of obstructing justice and the count of possession of a weapon by a felon occurred on January 30, 2013, when defendant was on probation.

¶ 11 The State then called Tericus Mackey. Mackey testified he was at "the Chicken Shack, Mr. Gyro's" at approximately 3 a.m. on January 30, 2013. Mackey testified Oscar

Brown, defendant's cousin, got into an argument with Mackey's cousin. The argument escalated and Brown shot and killed Mackey's cousin. Mackey testified defendant was at the scene of the shooting with Brown and, after the shooting, urged his cousin to get into his vehicle. Mackey testified he had known defendant all his life and was able to immediately recognize him.

¶ 12 On cross-examination, Mackey testified defendant was parked in his Dodge Charger on Kansas Street, near the intersection of Kansas Street and 19th Street in Springfield, Illinois. Mackey testified defendant "was with Lyndsie. He was with Oscar. He was with Shannon, and he was with Bianca." Mackey further testified he never speaks to defendant and only knew him through defendant's older brother. Mackey had been at Mac's Club prior to the shooting, but he had not been drinking and does not drink at all. He reiterated he witnessed a shooting.

¶ 13 Finally, the State called Springfield police detective Michael Flynn. Flynn testified he received a call at 4 a.m. notifying him of a shooting near the intersection of 19th Street and Kansas Street. In conducting the investigation into the shooting, Flynn testified he interviewed Harvey and Joy Hall, Teresa Mackey, Briana Kirkham, Shannon White, and Lyndsie Feher. The following exchange occurred:

> "Q. [Assistant State's Attorney:] Now, Detective, while you're interviewing all of these individuals, was there a common indicator in their testimony to you?
>
> A. [Flynn:] Yes, ma'am.
>
> Q. And did you ask him [*sic*] about the individuals who were involved in this homicide?
>
> A. Yes, I did.

Q. Who were some of the common denominators that were mentioned?

A. All of the witnesses, with the exception of one, identified a person by the name of Richard Lawuary as being present when the shooting occurred.

Q. Okay.

MR. GIGANTI: Judge, I object. Your Honor, I know it's hearsay, it's allowable, but—

THE COURT: Okay, for the record, we will show the objection is overruled."

Flynn testified the Sangamon County Sheriff's office received a call for a disturbance at 142 Wesley Street. Upon arriving at that address, the deputies found a dark-colored Dodge Charger possibly involved in the shooting parked in the front yard. Sergeant Matt Fricke got permission to search the residence and "located a Glock handgun with a 30-round magazine clip in it, in the kitchen, and also a small bag of cocaine."

¶ 14 The State asked who was arrested at the house at 142 Wesley, and Flynn responded Brown, Feher, Kirkham, White, and defendant were brought to the Springfield police department for questioning. Flynn interviewed defendant and asked him about being at the scene of the shooting homicide. Defendant asked Flynn "where he was at," meaning the police department itself, "claimed he did not know how he got there[,] and asked me [(Flynn)] what happened." Flynn informed defendant he had been identified as present at the scene of the shooting, which defendant denied. The State asked Flynn how defendant provided false information and Flynn testified:

> "He told us he didn't know what happened. He explained to him [*sic*] that there was a handgun that was taken into the house over there on Wesley, that he was present at the scene of the shooting, because it was his own cousin who had done the shooting that he was standing next to, and he tried to keep that information from us and that this handgun ended up inside this house.
>
> Everybody that we interviewed denied taking it in there. He was in the kitchen area where this handgun was found when Sergeant Fricke entered the house and found the firearm and the cocaine."

Following this interview, defendant was charged with obstructing justice and possession of a weapon by a felon.

¶ 15 On cross-examination, defense counsel asked whether anyone Flynn interviewed stated defendant possessed the gun recovered from the house on Wesley. Flynn stated White told him defendant had the gun, placed it on her couch, and she told defendant he could not put it there. White was not arrested in connection with the January 30, 2013, shooting. Flynn testified he knew White through contact with her mother, he had never personally arrested White, and he was not aware of White's prior criminal activity. Defendant told Flynn he had been drinking on the night in question and could not recall where he had been in the early hours of the morning on January 30, 2013. Flynn testified he did not believe defendant was intoxicated. Defense counsel asked if defendant denied being at the scene of the shooting. Flynn responded, "He said he didn't know what I was talkin' about."

¶ 16 Defendant did not present any evidence. Following argument, the trial judge stated:

> "The [c]ourt, having heard the testimony here today and applying the burden necessary for the State to prevail on this motion, and I've judged the credibility of the witness. There was testimony from an individual associated with the [d]efendant, that he was, in fact, in possession of this Glock gun, that it was located by the police department in an area in which he was also taken into custody.
>
> The [c]ourt does find by a preponderance of the evidence the State has proven its petition with regard to that instance.
>
> I also, having judged the credibility of the witnesses, find that he did attempt to obstruct justice, so the petition on behalf of the State is granted."

¶ 17 B. Sentencing

¶ 18 The matter proceeded to a sentencing hearing in June 2013. Neither party presented evidence in aggravation or mitigation. The State argued defendant acted as though the rules of society did not apply to him. The State pointed out defendant was there for sentencing on a Class 2 felony and had numerous arrests. The State highlighted defendant's criminal charges, including "the additional drug charges[,] Battery, Obstruction, two Driving Under the Influence of Drugs, all while he was under the age of 21; numerous Driving While License Revoked, weapons charges, Battery charges, besides the Aggravated Battery." The State

requested the trial court sentence defendant to six years' imprisonment, followed by two years of mandatory supervised release, and stated defendant would have credit for 281 days.

¶ 19 Defendant argued the aggravated battery charge he pleaded guilty to was his first felony offense. His prior criminal history consisted mostly of traffic matters stemming from never having a driver's license. Defendant successfully completed probation on a possession of marijuana conviction as a juvenile. Besides the juvenile possession-of-marijuana offense and one plea of guilty on a driving under the influence of drugs charge, the other charges referenced by the State were pending matters. Defendant indicated he wished to get into a substance abuse program while incarcerated. Defendant was 21 years old at the time of the aggravated battery, had obtained his high school diploma, and had a four-year-old daughter. Defendant asked for a minimum sentence of three years' imprisonment based on his age, his potential for rehabilitation, and the fact the aggravated battery was his first felony offense.

¶ 20 Defendant made a brief statement in allocution, apologizing for his actions and accepting responsibility. He stated his intention to take college courses and enroll in drug treatment while in prison. He expressed a desire to begin a career and stay off drugs once released from prison.

¶ 21 The presentence investigation report (PSI) shows four misdemeanor counts of driving on a suspended license and two misdemeanor counts of reckless driving, all of which were dismissed or withdrawn, and one misdemeanor count of driving on a suspended license, on which no disposition was entered in the Sangamon County Circuit Clerk's records. The PSI also reflects the charges dismissed pursuant to his guilty plea in case No. 11-CF-728 on one felony count of aggravated battery—namely, the other felony count of aggravated battery, the felony possession of a controlled substance count, and a felony charge of possession of a controlled

substance in Sangamon County case No. 11-CF-491. The PSI shows defendant pleaded guilty to two charges of driving under the influence of drugs prior to the charges in case No. 11-CF-728. After the charges in case No. 11-CF-728, defendant pleaded guilty to a misdemeanor charge of driving on a suspended license and a misdemeanor charge of attempting to elude a police officer. In exchange for that plea, the State dismissed a charge of obstructing a peace officer.

¶ 22 The trial court noted defendant had two criminal charges brought against him while on felony probation. The trial judge stated, "You've got a ridiculous driving record. *** You're getting picked up for driving over and over and over, and that record accumulates, and you're stuck with your record, so I have to look at the record and pronounce a sentence." The court noted the underlying offense defendant faced sentencing on was for fighting with police officers while in possession of crack cocaine. The court declined to impose a maximum sentence and instead sentenced defendant to 78 months' imprisonment. The court stated defendant had credit for 281 days, recommended drug treatment as part of the sentence, and denied defendant's request for a boot camp recommendation.

¶ 23 Defendant filed a timely motion to reconsider his sentence, arguing the State did not present sufficient evidence to prove he violated his probation and the sentence imposed was excessive based on his lack of criminal history. The court asked the State to refresh his memory of defendant's criminal history. The State responded as follows:

> "Your Honor, what we have got here is he has nine driving on suspendeds [*sic*]. He has Fleeing and Eluding, two Reckless. He had a previous felony for Possession, and he's currently got three pending felony charges. We have got numerous contacts, eight referrals when he was a minor, all starting between [*sic*] the

ages of 13, for Retail Theft, Aggravated Assault, Battery, Disorderly Conduct, Mob Action. He's pretty much been in the system since—for eight years."

Defense counsel pointed out several of the cases the State referenced did not result in convictions. The court stated his sentence was based on defendant's criminal history. The judge went on to say, "I also recognize and understand your position that in terms of a felony history, he did not have a lot, a great amount of felony history at the time of sentence, but the totality of the circumstances, I believe, made it incumbent upon me to issue the sentence in which I did, so that's why I've acted the way in which I have." The court denied defendant's motion to reconsider his sentence.

¶ 24 This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 On appeal, defendant argues this court should (1) reverse the revocation of his probation because the State failed to prove he violated the terms of his probation; (2) reverse his sentence and remand for resentencing because the trial court improperly sentenced defendant for acts he committed while on probation and gave undue weight in aggravation to dismissed charges; and (3) award defendant an additional 136 days of sentencing credit.

¶ 27 A. Revocation Of Probation

¶ 28 Defendant argues this court should reverse the revocation of his probation because the State failed to prove by a preponderance of the evidence he committed two counts of obstruction of justice and one count of unlawful possession of a firearm by a felon. Defendant contends he is innocent of the first count of obstruction of justice (furnishing false information) because he did not have the requisite intent to avoid his apprehension when he denied being

present at the scene of a crime. Defendant further contends the State failed to prove defendant committed the second count of obstruction of justice (concealing evidence) because the State presented no evidence whatsoever he hid a gun in an oven. Finally, defendant contends the evidence presented regarding his possession of a firearm consisted of inadmissible hearsay, admitted over objection, and cannot support the revocation of his probation. Alternatively, defendant argues his trial counsel was ineffective in failing to properly object to the hearsay evidence and this court should reverse and remand for a new revocation hearing with effective assistance of counsel.

¶ 29 "[A] person obstructs justice pursuant to section 31-4(a) of the Code when he or she knowingly furnishes false information with intent to prevent the apprehension or obstruct the prosecution of any person." (Emphasis omitted.) *People v. Ellis*, 199 Ill. 2d 28, 39, 765 N.E.2d 991, 997 (2002). Intent is an essential element of obstructing justice by providing false information. *People v. Jenkins*, 2012 IL App (2d) 091168, ¶ 27, 964 N.E.2d 1231. "State of mind or intent need not be proved by direct evidence, but can be inferred from the proof of surrounding circumstances." *People v. Jackiewicz*, 163 Ill. App. 3d 1062, 1065, 517 N.E.2d 316, 318 (1987).

¶ 30 Defendant argues he did not have the intent to avoid his own apprehension as a matter of law because he was already apprehended when he supplied false information to the police. In pertinent part, the obstructing justice statute provides:

> "(a) A person obstructs justice when, with intent to prevent the apprehension or obstruct the prosecution or defense of any person, he or she knowingly commits any of the following acts:

(1) Destroys, alters, conceals or disguises physical evidence, plants false evidence, [or] furnishes false information[.]"

720 ILCS 5/31-4(a)(1) (West 2012).

To support his argument, defendant relies on the Third District case *In re Q.P.*, 2014 IL App (3d) 140436, 20 N.E.3d 516.

¶ 31 *Q.P.* involved a juvenile defendant detained during a vehicular burglary investigation. *Q.P.*, 2014 IL App (3d) 140436, ¶ 4, 20 N.E.3d 516. While handcuffed in the backseat of a patrol car, Q.P. provided a police officer with a fake name and later provided an incorrect spelling of his name. *Q.P.*, 2014 IL App (3d) 140436, ¶¶ 6-8, 20 N.E.3d 516. Q.P. admitted giving the false name and misspelling of his name intentionally to prevent the officers from locating his juvenile warrant. *Q.P.*, 2014 IL App (3d) 140436, ¶ 9, 20 N.E.3d 516. The State charged Q.P. with obstructing justice, alleging Q.P. furnished false information to a police officer to prevent his own apprehension. *Q.P.*, 2014 IL App (3d) 140436, ¶ 3, 20 N.E.3d 516.

¶ 32 The Third District addressed the meaning of the term "apprehension" as used in the obstruction of justice statute. *Q.P.*, 2014 IL App (3d) 140436, ¶ 15, 20 N.E.3d 516. Relying on the definition of "apprehension" from Black's Law Dictionary and this court's decision in *People v. Smith*, 337 Ill. App. 3d 819, 786 N.E.2d 1121 (2003), the Third District held "apprehension" was not limited to formal arrest and included a seizure. *Q.P.*, 2014 IL App (3d) 140436, ¶ 20, 20 N.E.3d 516. Black's Law Dictionary defines "apprehension" as "the seizure, taking, or arrest of a person on a criminal charge." Black's Law Dictionary 92 (5th ed. 1979). A more recent edition of Black's defines "apprehension" as "seizure in the name of the law; arrest." Black's Law Dictionary 110 (8th ed. 2004).

¶ 33 The *Q.P.* court further found, "for the purposes of the obstruction of justice statute, a person already apprehended cannot act with the intent to prevent his own apprehension on other charges. The plain meaning of 'apprehension' or 'seizure' warrants this outcome: one who is presently seized by the police cannot be seized again." *Q.P.*, 2014 IL App (3d) 140436, ¶ 26, 20 N.E.3d 516. The court held Q.P. could not have the intent to prevent his apprehension on his juvenile warrant because he was apprehended when he was handcuffed and placed in the patrol car on the vehicular burglary charge. *Q.P.*, 2014 IL App (3d) 140436, ¶ 28, 20 N.E.3d 516.

¶ 34 Justice Holdridge dissented, arguing the majority ignored the latter part of the definition of apprehension: "the seizure, taking, or arrest of a person *on a criminal charge*." (Emphasis added.) *Q.P.*, 2014 IL App (3d) 140436, ¶ 35, 20 N.E.2d 516 (Holdridge, J., dissenting). Justice Holdridge highlighted the distinction, stating: "Unlike 'seizure' or 'detention,' which simply denote that one's liberty is restrained in some manner [citation], 'apprehension' is by definition connected to a particular criminal charge or offense. Thus, a defendant may act to evade 'apprehension' on one criminal charge even after he has been apprehended, seized, or detained on another charge." *Q.P.*, 2014 IL App (3d) 140436, ¶ 33, 20 N.E.2d 516 (Holdridge, J., dissenting).

¶ 35 This court addressed the definition of apprehension in *People v. Smith*, 337 Ill. App. 3d 819, 786 N.E.2d 1121 (2003). Defendant argued she could not be found guilty of obstructing justice where she destroyed evidence by swallowing suspected crack cocaine when "she had been 'apprehended' in the sense that she would not have felt that she was free to leave." *Smith*, 337 Ill. App. 3d at 823, 786 N.E.2d at 1124. The majority found "[d]estroying evidence would appear to prevent apprehension up until the time of apprehension; after that time,

destroying evidence would appear to obstruct prosecution. *** The same intent that would prevent apprehension would obstruct prosecution." *Smith*, 337 Ill. App. 3d at 824, 786 N.E.2d at 1125. Although the State charged the defendant with the intent to avoid apprehension, and not to obstruct prosecution, the majority found this variance in the charging instrument nonfatal and upheld her conviction. *Smith*, 337 Ill. App. 3d at 824-25, 786 N.E.2d at 1125.

¶ 36 Justice Turner specially concurred:

> "I fully concur in the majority opinion and add the following. '[I]n the context of the criminal statute involved, the established, plain[,] and ordinary meaning of "apprehension" is a "seizure, taking, *or* arrest of a person on a criminal charge." ' (Emphasis added.) [Citation.] Here, defendant had been seized when she swallowed the substance but the officer had not placed her under arrest. In fact, by swallowing the substance, she destroyed evidence that may have led to her arrest for possession of a controlled or look-alike substance. Accordingly, the State proved defendant swallowed the substance with the intent to prevent her arrest." *Smith*, 337 Ill. App. 3d at 825-26, 786 N.E.2d at 1126 (Turner, J., concurring).

Justice Myerscough dissented, arguing "defendant would not have felt that she was free to leave and, therefore, she had been apprehended at the time she" destroyed evidence. *Smith*, 337 Ill. App. 3d at 826, 786 N.E.2d at 1127 (Myerscough, P.J., dissenting).

¶ 37 In the instant case, officers took defendant to the police station to interview him. At the probation revocation hearing, the State asked the detective if anyone was arrested at the

residence at 142 Wesley. Sloman testified defendant and the other four individuals were "taken in for questioning." Defendant argues the State's use of the term "arrest" during the hearing shows defendant was already under arrest and, therefore, could not have lied about his presence at the murder scene in order to prevent his arrest. Defendant further argues the State failed to prove defendant intended to avoid his arrest for a particular criminal charge. We disagree.

¶ 38 Defendant and four others were brought to the police station for questioning after being found in a residence where officers recovered a controlled substance and a firearm. While the State used the term "arrest," the record shows defendant was not yet under arrest when he denied his presence at the murder scene. Sloman testified at least one of the other individuals brought to the station for questioning was not arrested in connection with the murder or for the possession of a controlled substance or firearm. The individuals were "seized" and not free to leave while being questioned, but they were not yet formally arrested for anything.

¶ 39 We disagree with the Third District that someone "seized" and subject to questioning by law enforcement cannot act with the intent to avoid "apprehension" in the form of arrest on a criminal charge. *Q.P.*, 2014 IL App (3d) 140436, ¶ 20, 20 N.E.3d 516. The Third District's broad construction of the term "apprehension" would allow a person subject to questioning by law enforcement to lie to avoid arrest with impunity. This does not add language to the statute. This construction takes into account all parts of the definition: "seizure, taking, *or* arrest of a person *on a criminal charge*." (Emphases added.) Black's Law Dictionary 92 (5th ed. 1979). See *Smith*, 337 Ill. App. 3d at 825-26, 786 N.E.2d at 1126 (Turner, J., concurring); *Q.P.*, 2014 IL App (3d) 140436, ¶ 33, 20 N.E.2d 516 (Holdridge, J., dissenting). We conclude the legislature did not intend the absurd result the Third District's construction demands—insulating a person who provides false information to avoid arrest simply because they are subject to

questioning by law enforcement and did not feel free to leave. We find a person detained for questioning can furnish false information with the intent to avoid apprehension in the form of formal arrest on a criminal charge. See *Smith*, 337 Ill. App. 3d at 825-26, 786 N.E.2d at 1126 (Turner, J., concurring) (a person, already seized, can act with the intent to prevent their arrest).

¶ 40 Defendant's intent to avoid apprehension can be inferred from the surrounding circumstances. *Jackiewicz*, 163 Ill. App. 3d at 1065, 517 N.E.2d at 318. In this case, defendant and four others were brought to the police station for questioning after police found a gun and a controlled substance at the house on Wesley. His presence in the home, coupled with denying his presence at the scene of the shooting, indicates his intent to avoid arrest for his involvement in the shooting and homicide. The State's case was sufficient to show, by a preponderance of the evidence, defendant violated the terms of his probation by engaging in criminal behavior—namely, obstructing justice by providing false information to avoid arrest.

¶ 41 Because we find the State met its burden in proving defendant violated the terms of his probation by obstructing justice, we need not address his arguments regarding the sufficiency or competency of the evidence on the other charge of obstructing justice or possession of a firearm. We affirm the trial court's judgment granting the State's petition to revoke defendant's probation.

¶ 42 B. Sentencing

¶ 43 Defendant argues the trial court committed error in (1) improperly punishing him for the conduct leading to the revocation of his probation and considering charges dismissed in exchange for his guilty plea, and (2) improperly considering in aggravation arrests and charges for which defendant was never convicted. Defendant acknowledges these errors were not properly preserved before the trial court and asks this court to review his sentence under the

plain-error doctrine. Defendant asserts these errors were "so egregious as to deny the defendant a fair sentencing hearing," warranting reversal for a new sentencing hearing. *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184, 1187 (2010).

> "[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007).

However, "[t]o obtain relief under this rule, a defendant must first show that a clear or obvious error occurred." *Hillier*, 237 Ill. 2d at 545, 931 N.E.2d at 1187. See also *People v. Herron*, 215 Ill. 2d 167, 187, 830 N.E.2d 467, 480 (2005).

¶ 44 Defendant argues the trial court improperly punished him for the conduct leading to the revocation of his probation and not the underlying offense of aggravated battery. Defendant further argues the court should not have considered the dismissed charge of possession of a controlled substance. The State asserts the court properly punished defendant for the underlying charge of aggravated battery and properly considered evidence of the charges dismissed in exchange for defendant's guilty plea.

¶ 45 When sentencing a defendant following the revocation of probation, the trial court may consider defendant's conduct while on probation as evidence of rehabilitative potential.

People v. Varghese, 391 Ill. App. 3d 866, 876, 909 N.E.2d 939, 947-48 (2009). However, the court may not punish a defendant for the conduct leading to the probation revocation. *Varghese*, 391 Ill. App. 3d at 876, 909 N.E.2d at 948. While the court did mention defendant had criminal charges brought against him while on felony probation, the court did not mention any particulars about those charges. The court was well aware of the charge defendant was sentenced for, noting "the underlying offenses is [*sic*] for fighting with police officers at the time that you were in possession of crack cocaine." Defendant contends this statement shows the court improperly sentenced defendant on the dismissed charge of possession of a controlled substance. The facts underlying charges dismissed in exchange for a guilty plea may be considered at sentencing so long as those facts are proved by a preponderance of the evidence. *People v. La Pointe*, 88 Ill. 2d 482, 498, 431 N.E.2d 344, 351 (1981); see also *People v. Glass*, 144 Ill. App. 3d 296, 301, 494 N.E.2d 886, 889 (1986).

¶ 46 The trial court considered hearsay evidence of the drug possession from the PSI, which came from a police report. Hearsay evidence based upon an official investigation may be considered under the relaxed evidentiary rules at the sentencing stage. See *People v. Aleman*, 355 Ill. App. 3d 619, 627, 823 N.E.2d 1136, 1143 (2005). "The only requirement for admission is that the evidence be reliable and relevant, and this is a decision left to the discretion of the sentencing court." *People v. Tigner*, 194 Ill. App. 3d 600, 607, 551 N.E.2d 304, 308 (1990). Information compiled during an official investigation is reliable and evidence of other charges arising from the same incident to which defendant pleaded guilty is relevant. See *People v. Williams*, 181 Ill. 2d 297, 332, 692 N.E.2d 1109, 1127 (1998). We find the trial court did not abuse its discretion in considering the evidence defendant possessed crack cocaine at the time he committed the aggravated battery against a police officer.

¶ 47 Defendant also argues the trial court improperly considered evidence of dismissed charges in aggravation. The State concedes the trial court committed reversible error by expressly considering defendant's criminal history, which included at least six dismissed driving-related offenses. The State further concedes defendant's sentence should be vacated and the matter should be remanded for a new sentencing hearing. We accept the State's concession.

¶ 48 In sentencing a defendant, the trial court must not utilize bare arrests or pending charges in aggravation of a sentence. *People v. Johnson*, 347 Ill. App. 3d 570, 575, 807 N.E.2d 1171, 1176 (2004). Prior to the aggravated battery charges, defendant had pleaded guilty to two misdemeanor driving under the influence of drugs charges. The record shows defendant also had four driving on a suspended license charges dismissed and two reckless driving charges dismissed, as well as a driving on a suspended license charge with no disposition on the record. The court stated "You've got a ridiculous driving record. *** You're getting picked up for driving over and over and over, and that record accumulates, and you're stuck with your record, so I have to look at the record and pronounce a sentence."

¶ 49 At the hearing on defendant's motion to reconsider his sentence, the trial judge asked the State to refresh his recollection of defendant's criminal history. The State indicated defendant had nine violations of driving on a suspended license, two reckless driving charges, a felony possession, three pending felony charges, and numerous juvenile charges. As discussed above, many of these charges were dismissed. Nonetheless, the court stated, "I'm also reminded with a recital of his prior criminal history of where the Court imposed the sentence that it did." The court's reliance on defendant's "ridiculous" driving record (the majority of which consisted of dismissed charges) constituted reversible error. *People v. Bourke*, 96 Ill. 2d 327, 332, 449 N.E.2d 1338, 1340 (1983) ("Where the reviewing court is unable to determine the weight given

to an improperly considered factor, the cause must be remanded for resentencing."). Accordingly, we reverse defendant's sentence and remand for a new sentencing hearing.

¶ 50 C. Sentence Credit

¶ 51 Finally, defendant contends he is entitled to a total of 281 days of credit against his sentence. The written sentencing order provides for 145 days' credit for the time spent in custody leading up to the revocation of defendant's probation. Defendant contends he is entitled to an additional 136 days' credit for the time spent in custody prior to his guilty plea. As part of his guilty plea, defendant received 24 months' probation and 136 days in jail. Defendant received credit for the 68 actual days he spent in custody and day-for-day credit for that time, so no additional time in custody remained to be served after defendant pleaded guilty. See 730 ILCS 130/3 (West 2012). The State concedes defendant is entitled to additional days of credit but argues he is entitled only to the 68 actual days spent in custody, not the additional day-for-day credit his plea agreement reflects. The State argues the sentence allowing defendant the additional 136 days of credit is void because defendant may only receive credit for time actually spent in custody. See 730 ILCS 5/5-4.5-100(b) (West 2012).

¶ 52 Defendant counters, arguing the sentence is not void because the trial court had the discretion to award credit for noncustodial time spent on probation: "The term on probation *** shall not be credited by the court *** unless the court orders otherwise." 730 ILCS 5/5-6-4(h) (West 2012). Defendant argues the sentence cannot be void because this statute authorizes the court to use its discretion in crediting time spent on probation. To support his argument, defendant erroneously relies on *People v. Sweeney*, 2012 IL App (3d) 100781, 967 N.E.2d 876. The court in *Sweeney* did acknowledge trial courts have the discretion to award credit for time on probation, but went on to hold: "by failing to comment or award the defendant credit for time

spent on probation, the court exercised its discretion to deny this credit." *Sweeney*, 2012 IL App (3d) 100781, ¶ 42, 967 N.E.2d 876.

¶ 53 Here, the trial court made no mention of credit for time spent on probation and relied on the State's representation defendant was entitled to 281 days of credit, despite the fact defendant spent only 213 days actually in custody: 68 days prior to his guilty plea and 145 days prior to the revocation of his probation. Moreover, defendant spent 75 days on probation before he returned to custody. We refuse to infer the trial court exercised its discretion to award defendant credit for all but one week of his time spent on probation, especially where the court never mentioned credit for time served on probation. The statute mandates time on probation "*shall not be credited* by the court *** *unless* the court *orders otherwise*." (Emphases added.) 730 ILCS 5/5-6-4(h) (West 2012). The court did not order otherwise.

¶ 54 Because the trial court exercised its discretion in denying credit for time spent on probation, we agree with the State the sentence is void because it awards double credit for the 68 days defendant spent in custody prior to his guilty plea. Section 5-4.5-100(b) of the statute only authorizes credit for time spent actually in custody. 730 ILCS 5/5-4.5-100(b) (West 2012). "Defendants must be given credit for all the days they actually served, but no more." *People v. Latona*, 184 Ill. 2d 260, 272, 703 N.E.2d 901, 907 (1998) (declining to award double credit on consecutive sentences for each single day served in custody). Defendant is entitled to additional days of credit but only in the amount of 68 days. Following defendant's resentencing, we order the trial court to award defendant 213 days of credit for days spent in actual custody.

¶ 55 III. CONCLUSION

¶ 56 For the reasons stated, we affirm in part, reverse in part, and remand with directions. As part of our judgment, we grant the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 57 Affirmed in part, reversed in part, and remanded with directions.