

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) 130909-U

NO. 4-13-0909

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

March 26, 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
ROSE V. STARK,)	No. 13CF50
Defendant-Appellant.)	
)	Honorable
)	Patrick W. Kelley,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.

Presiding Justice Pope and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court found the trial court did not err in dismissing defendant's motion to modify probation.

¶ 2 In May 2013, defendant, Rose V. Stark, pleaded guilty to one count of arson pursuant to a fully negotiated plea agreement. The trial court sentenced her to four years of probation and ordered her to pay restitution. In August 2013, defendant filed a motion to modify probation, which the court dismissed.

¶ 3 On appeal, defendant argues the trial court erred in dismissing her motion to modify probation as untimely. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In March 2013, the State charged defendant by information with one count of arson (720 ILCS 5/20-1(a) (West 2012)), alleging she, by means of fire, knowingly damaged a

building of Edward Ware, *i.e.*, his garage, without his consent.

¶ 6 On May 17, 2013, defendant pleaded guilty to one count of arson. The factual basis indicated defendant set fire to a detached garage belonging to her former landlord, Edward Ware. The fire damaged the building and "some personal property belonging to Mr. Ware." The trial court, pursuant to the terms of a fully negotiated plea agreement, sentenced defendant to four years' probation and ordered her to pay restitution in the amount of \$2,364.09. The order of conditions on probation also required defendant to pay a \$250 fee for deoxyribonucleic acid (DNA) coding with the Illinois State Police.

¶ 7 On June 10, 2013, the trial court received a letter from defendant. Therein, defendant indicated she did not desire to change her plea but was "having a hard time understanding some things" with her case. She believed the complainant, Edward Ware, had written a list of items that were never in the garage at the time of the fire.

¶ 8 Sometime in June 2013, the court services department presented a "motion to modify—DNA waiver," requesting modification of defendant's sentencing condition because she already had a DNA sample on file with the State Police. On June 19, 2013, the trial court granted the request for waiver of the DNA probation condition.

¶ 9 On August 2, 2013, defendant's attorney filed a motion to modify probation pursuant to section 5-6-4 of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-6-4 (West 2012)). Therein, defendant argued the restitution amount was "inflated because the victim, Edward Ware, fraudulently misrepresented the extent of his losses." Defendant claimed the \$2,364.09 figure represented a \$1,000 insurance deductible, "in addition to the replacement costs for several items of personal property that were either taken from his property by the Defendant without authorization and/or were damaged by the fire." Attached to her motion was

an estimate from Ware, which listed multiple items that totaled \$1,364.09 with tax, along with the handwritten \$1,000 deductible added in to reach the \$2,364.09 figure. There was also a handwritten figure of \$2,500 for emotional stress based on the fear defendant "would set house on fire or destroy more of my property."

¶ 10 On August 21, 2013, the trial court held a hearing on the motion to modify. Defense counsel alleged Ware made fraudulent representations in asking for reimbursement and asked that the restitution amount be reduced. The State argued the plea had been agreed upon and restitution was a part of defendant's plea. The State also noted defendant was "far beyond her time to vacate her plea."

¶ 11 The trial court denied the motion, noting defendant pleaded guilty on May 17, 2013, and did not seek to withdraw her plea within 30 days. Defendant objected, saying she sent in "a note and I did file a thing on the 10th stating that I wanted to modify this." The following exchange then occurred:

"THE COURT: On the 10th of what?

[DEFENDANT]: The 10th of—let's see, the 10th of June, so it was before my thirty days was *[sic]* up, and then when I called the office to see if you got a copy of it, because they said I had to send you a copy, they told me I had to resend it.

THE COURT: That's not a motion to withdraw your guilty plea.

[DEFENDANT]: But the thing—

THE COURT: I have denied the motion. This case is over. You're back on probation.

[DEFENDANT]: I understand, Your Honor, that I am on probation, the thing I am fighting is the restitution.

THE COURT: You should have—

[DEFENDANT]: I tried to, but Bob told me that it was hogwash, that's why I wanted to come back to court, so in other words, a crook can get away with being a crook.

THE COURT: Have a nice day, [defendant]."

This court granted defendant's late notice of appeal.

¶ 12

II. ANALYSIS

¶ 13 Initially, we note the State argues in its brief that this court lacks jurisdiction to consider defendant's appeal because she failed to file a timely notice of appeal or request an extension of time to file a late notice of appeal. However, as defendant notes in her reply brief, this court granted defendant's motion for leave to file a late notice of appeal. Thus, we have jurisdiction over defendant's appeal.

¶ 14 In her brief on appeal, defendant argues this court should remand for a hearing on her motion to modify probation because the trial court improperly dismissed it as untimely where (1) she was challenging a void portion of a sentencing order, (2) the trial court has continuing jurisdiction to modify probation for the entire probation term, and (3) she brought the void restitution amount to the court's attention within 30 days of her plea.

¶ 15 Section 5-6-4(f) of the Unified Code provides "[t]he conditions of probation *** may be modified by the court on motion of the supervising agency or on its own motion or at the request of the offender after notice and a hearing." 730 ILCS 5/5-6-4(f) (West 2012); see also *People v. Dinger*, 136 Ill. 2d 248, 257, 554 N.E.2d 1376, 1379 (1990) (stating "modification of

probation may be made upon the petitioner's showing that there are sufficient reasons to warrant modification of the sentence").

¶ 16 "Generally, if no motion directed against the judgment is filed within 30 days, the trial court loses jurisdiction." *People v. Terefenko*, 2014 IL App (3d) 120850, ¶ 15, 18 N.E.3d 550; see also Ill. S. Ct. R. 606(b) (eff. Feb. 6, 2013). However, our supreme court has noted "the trial court clearly has specific authority to modify conditions of probation under section 5-6-4(f)," and "[t]his specific authority controls over the general prohibition against altering felony sentences after 30 days have elapsed." *People v. Tipton*, 88 Ill. 2d 256, 264-65, 430 N.E.2d 1023, 1027 (1981); see also *People v. Rymut*, 216 Ill. App. 3d 920, 923, 576 N.E.2d 1208, 1210 (1991) (finding the "defendant could ask for a modification of his terms of probation after 30 days had passed from the sentencing order").

¶ 17 In the case *sub judice*, the requirement that defendant pay restitution constituted a part of the order of conditions of probation. Although defendant filed her motion to modify probation more than 30 days after her guilty plea, the trial court's jurisdiction over her probation continues until the probationary period expires. Thus, the motion was properly before the court.

¶ 18 On appeal, the State agrees the trial court retained jurisdiction to address the restitution issue and concedes the court erred in dismissing the motion to modify probation on the basis that it was untimely. Despite the error, the State argues this court should affirm the court's dismissal. We note this court may affirm a trial court's judgment on any ground appearing in the record. *People v. Johnson*, 208 Ill. 2d 118, 128-29, 803 N.E.2d 442, 449 (2003).

¶ 19 Section 5-5-6 of the Unified Code allows a court to order a defendant to pay restitution to a victim who sustained personal injury or property damage as a result of the

defendant's criminal act. 730 ILCS 5/5-5-6 (West 2012). In determining the amount of the restitution, the court is to assess "actual out-of-pocket expenses, losses, damages, and injuries suffered by the victim named in the charge and any other victims" which were proximately caused by the defendant's conduct. 730 ILCS 5/5-5-6(b) (West 2012).

¶ 20 In this case, defendant pleaded guilty to the offense of arson. At the plea hearing, the State indicated the amount of restitution was \$2,364.09. Defendant did not raise an objection to this amount. Moreover, she signed the order of conditions of probation listing the amount.

¶ 21 Here, the order requiring restitution comprised "an essential term of defendant's plea agreement." *People v. Lawrence*, 206 Ill. App. 3d 622, 625, 565 N.E.2d 322, 324 (1990). "Under such circumstances, if legal consideration is present and both parties have in fact entered into an agreement, then both parties will be bound by such agreement." *Lawrence*, 206 Ill. App. 3d at 625, 565 N.E.2d at 324. The State's legal consideration consisted of giving up the right to seek the maximum sentence allowed for defendant's conviction on the Class 2 felony of arson, while defendant's legal consideration was giving up her right to a jury trial. Defendant received the benefit of her bargain, agreed to the restitution amount, and is bound by the terms of the agreement. Thus, the trial court's dismissal of defendant's motion to modify probation will be affirmed.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 24 Affirmed.