

NOTICE

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2015 IL App (4th) 131105-U

NO. 4-13-1105

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

November 30, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
ANDRE L. TINSLEY,)	No. 10CF1658
Defendant-Appellant.)	
)	Honorable
)	Heidi N. Ladd,
)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Pope and Justice Appleton concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant's appeal presents no meritorious issues for review. The trial court's judgment is affirmed and OSAD's motion to withdraw as appellate counsel is granted.
- ¶ 2 Defendant, Andre L. Tinsley, pleaded guilty to aggravated battery (720 ILCS 5/12-4(b)(8) (West 2010)) and the trial court sentenced him to probation. Later, his probation was revoked and he was resentenced to five years in prison. Defendant filed a motion to reconsider his sentence, which the court ultimately denied. Defendant then appealed and the office of the State Appellate Defender (OSAD) was appointed to represent him. On appeal, OSAD filed a motion to withdraw as appellate counsel pursuant to *Anders v. California*, 386 U.S. 738 (1967), alleging the case presents no meritorious issues for review. We grant OSAD's motion and affirm the trial court's judgment.

¶ 3

I. BACKGROUND

¶ 4 On September 29, 2010, the State charged defendant with two counts of aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2010)) (counts I and II). On November 12, 2010, it additionally charged him with one count of aggravated battery (720 ILCS 5/12-4(b)(8) (West 2010)) (count III). That same month, defendant pleaded guilty to aggravated battery in exchange for a sentence of 24 months' probation and the dismissal of counts I and II. Conditions of defendant's probation included that he (1) not violate any criminal statute of any jurisdiction, (2) abstain from the use of alcohol, and (3) have no contact with the victim in the case, Jennifer Lott.

¶ 5 On April 8, 2011, the State filed an amended petition to revoke defendant's probation. It alleged defendant violated his probation by (1) committing the offenses of driving under the influence of alcohol (DUI) and under the combined influence of alcohol and drugs (625 ILCS 5/11-501(a)(2), (a)(5) (West 2010)), (2) consuming alcohol, and (3) having in-person contact with Lott at her residence. On April 18, 2011, defendant admitted and stipulated to the allegations contained in the amended petition to revoke in exchange for the State's agreement to cap its sentencing recommendation at five years in prison. The State provided the following factual basis:

"[Defendant] has violated the conditions of his probation, first, Your Honor, in that on April 1st, 2011[,] he was operating a motor vehicle in Champaign County. He was stopped for running a traffic light. Officers noted numerous signs of impairment during field sobriety testing. He did admit to officers that he had con-

sumed alcohol and prescription drugs. Officers believed he was under the influence of both the alcohol and the prescription drugs at the time of the stop and did arrest him for driving under the influence of alcohol and driving under the influence of alcohol and drugs. He did submit to a breath test. His breath alcohol content after he was arrested was .071.

In addition, Judge, on April 8th, 2011, officers were dispatched to a report of a domestic trouble incident at [Lott's residence]. *** Apparently, she had agreed to contact with [defendant]. However, they had gotten into an argument and he was found by officers in that dwelling place in direct violation of the no-contact provision of his sentence in this case."

On June 1, 2011, the trial court resentenced defendant to five years in prison.

¶ 6 On June 3, 2011, defendant filed a *pro se* motion to reconsider his sentence and a notice of appeal. In connection with his motion to reconsider, defendant alleged the trial court improperly used a DUI charge that had been dropped as an aggravating factor at his resentencing. He also maintained that his sentence was excessive.

¶ 7 On June 7, 2011, the trial court made a docket entry, noting defendant's *pro se* filings but finding that he "plead[ed] guilty pursuant to a negotiated plea and may only proceed by filing a motion to withdraw guilty plea." The court denied defendant's *pro se* motion to reconsider his sentence, continued the appointment of his public defender, and gave defendant leave to file a motion to withdraw his guilty plea. On July 27, 2011, an e-mail from defendant's

counsel and directed to the court was filed and stated counsel spoke with defendant and would "not be filing any additional matters on behalf of [defendant] in th[e] matter."

¶ 8 Defendant appealed, arguing he was not required to file a motion to withdraw his guilty plea in the underlying proceedings and was entitled to a hearing on his motion to reconsider his sentence. On review, we reversed the trial court's denial of defendant's *pro se* motion to reconsider and remanded the matter to the trial court with directions that it give defendant the opportunity to replead his motion with the assistance of appointed counsel. *People v. Tinsley*, 2013 IL App (4th) 110483-U.

¶ 9 On remand, the trial court appointed an assistant public defender, Janie Miller-Jones, who had previously acted as defendant's counsel in the underlying proceedings, to represent defendant. On October 4, 2013, the court conducted a hearing in the matter. Miller-Jones asserted she had spoken with defendant, who "was paroled in August" 2013. She stated she had talked with defendant about filing an amended motion but no motion was filed on his behalf because, if the court were to reconsider defendant's sentence, "it would have no bearing or change on the amount of parole time that he would have to serve." Defendant then addressed the court directly, stating he was "misrepresented" by Miller-Jones "at the beginning." He asserted he had sent Miller-Jones letters informing her that the DUI charges against him had been dropped and complained that "she didn't even address the Court with it when [he] came up for sentencing." At defendant's request, the court appointed new counsel to represent him.

¶ 10 On November 21, 2013, defendant, with the aid of counsel, filed an amended motion to reconsider his sentence. He argued his sentence was excessive and Miller-Jones provided ineffective assistance of counsel at the time of his sentencing. With respect to his ineffective-

assistance claims, defendant specifically complained that Miller-Jones failed to notify the trial court that the DUI charges against him—upon which the allegations in the State's petition to revoke were based—had been dismissed. Defendant also alleged that, at his sentencing hearing, Miller-Jones informed the court that she had expected Lott to be present and testify that she wanted "the no-contact provision dropped." He argued Miller-Jones was ineffective for failing to subpoena Lott to testify and failing to request a continuance of the sentencing hearing when Lott failed to appear.

¶ 11 On December 16, 2013, the trial court conducted a hearing on defendant's amended motion to reconsider. Defendant testified that he did not believe Miller-Jones provided him with effective representation. He noted he contacted her by letter and spoke with her by telephone to inform her that the DUI "they revoked [his] probation for had been dropped" and that the victim in his case, Lott, did not want a no-contact order. Defendant stated Lott sent him a letter asserting that she did not want a no-contact order and that he learned through his sister that Lott would come to his sentencing hearing. Defendant stated he thought Lott would be present to testify at his sentencing hearing but she did not appear. He did not think Lott had been subpoenaed. Defendant further testified that he expected Miller-Jones to ask for a continuance once Lott failed to appear at the hearing.

¶ 12 Lott testified she was the victim in the case and recalled signing papers to "[k]eep [defendant] away from [her]." However, she later wanted the no-contact order vacated. Lott testified that, toward the end of 2010 and into 2011, she called the public defender's office, the circuit clerk's office, and the State's Attorney's office stating she "wanted to drop the charges and *** the no contact." She further stated she informed defendant's sister that she wanted the no-

contact order dropped. According to Lott, defendant's sister told her about defendant's sentencing hearing but not until it was "ready to happen" and it was "too late." She asserted she was not given advance notice of the hearing. Lott also asserted she tried to contact Miller-Jones but never got to talk to her.

¶ 13 Miller-Jones testified that the day before defendant's sentencing hearing, defendant informed her he wanted Lott to testify. He also expressed that he wanted to withdraw his stipulation to the State's petition to revoke because the DUI charges against him had been dismissed. Miller-Jones explained to defendant that proceedings to withdraw his stipulation would be premature until after he was resentenced. She also explained that "even though they were dismissed they were still a basis for the [petition to revoke], so it didn't really matter that they were dismissed because they were still part of the record."

¶ 14 Miller-Jones further recalled that, approximately six or seven days before sentencing, her office received contact from Lott, who expressed that she wanted the no-contact order dropped and had contacted the State's Attorney's office about it. Miller-Jones testified she did not subpoena Lott and testified as follows:

"I don't subpoena people if I think they are going to come in willingly and testify because it just costs my clients more money. I only subpoena police officers or people who I don't think will show up. But I didn't subpoena [Lott]. I have no exact recollection why, unless I expected her to be here willingly."

¶ 15 Following argument by the parties, the trial court denied defendant's amended motion to reconsider his sentence.

¶ 16 This appeal followed. As stated, OSAD was appointed to represent defendant on appeal and filed a motion to withdraw, alleging there are no meritorious issues for review. It has attached a brief to its motion and the record shows service on defendant. On May 4, 2015, this court granted defendant leave to file additional points and authorities, but he did not respond.

¶ 17 II. ANALYSIS

¶ 18 On appeal, OSAD identified two potential issues for review: whether (1) defendant's sentence was an abuse of discretion and (2) defense counsel's performance was ineffective. OSAD maintains both issues are without merit and we agree.

¶ 19 Initially, OSAD maintains any alleged sentencing error is moot because defendant has completed his sentence, including the applicable mandatory supervised release (MSR) period. "A question is moot when no actual controversy exists or where events occur which render it impossible for the court to grant effectual relief." *People v. Lieberman*, 332 Ill. App. 3d 193, 195, 772 N.E.2d 876, 878 (2002). "A sentencing challenge is moot where defendant has completed serving his sentence." *People v. Shelton*, 401 Ill. App. 3d 564, 582, 929 N.E.2d 144, 162 (2010).

¶ 20 Here, the record shows that, in June 2011, defendant was resentenced to five years in prison and a one-year period of MSR. At the initial hearing conducted in the matter on remand, defendant's counsel noted defendant "was paroled in August" 2013. Thus, the record indicates he has now completed his sentence. As a result, this court is unable to grant defendant effectual relief from any alleged sentencing error and such issues are moot.

¶ 21 OSAD additionally argues that, even if sentencing issues were not moot, the sentence imposed by the trial court in the instant case was proper and not an abuse of discretion. A

trial court is granted great deference when imposing a sentence "because the court is generally in a better position than a reviewing court to weigh factors such as the defendant's credibility, demeanor, general moral character, mentality, social environment, and habits." *People v. Brunner*, 2012 IL App (4th) 100708, ¶ 40, 976 N.E.2d 27. The sentence imposed by the trial court "should not be overturned absent an abuse of discretion." *People v. Crenshaw*, 2011 IL App (4th) 090908, ¶ 22, 959 N.E.2d 703. "A sentence that is within statutory limits is excessive and, thus, an abuse of the court's discretion only when it is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Brunner*, 2012 IL App (4th) 100708, ¶ 40, 976 N.E.2d 27.

¶ 22 In this case, defendant pleaded guilty to aggravated battery (720 ILCS 5/12-4(b)(8) (West 2010)), a Class 3 felony, and was eligible for an extended-term sentence. A Class 3 felony carries a sentencing range of 2 to 5 years' imprisonment, or 5 to 10 years' imprisonment when the defendant is extended-term eligible. 730 ILCS 5/5-4.5-40(a) (West 2010). The State agreed to cap its sentencing recommendation at five years in prison and that was the sentence ultimately imposed by the trial court. Thus, defendant's sentence was well within the applicable statutory range. The record also shows the court considered relevant sentencing factors, including defendant's "extensive criminal history that commenced 33 years ago," and which included four burglary convictions, three residential burglary convictions, as well as convictions for theft, battery, and aggravated battery. Defendant's convictions resulted in six previous terms of imprisonment in the Illinois Department of Corrections. Given the facts presented, the record fails to reflect the court abused its discretion in sentencing defendant.

¶ 23 As stated, as a second potential issue for review, OSAD notes defendant's ineffec-

tive-assistance-of-counsel claims. "To support a claim of ineffective assistance of counsel, a defendant must allege facts demonstrating that his attorney's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *People v. Patterson*, 192 Ill. 2d 93, 107, 735 N.E.2d 616, 626 (2000) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To prevail on an ineffective-assistance claim, a defendant must satisfy both *Strickland* prongs. *Patterson*, 192 Ill. 2d at 107, 735 N.E.2d at 626.

¶ 24 On appeal, OSAD characterizes defendant's ineffective-assistance claims as follows:

"[Defendant's] complaints were that his attorney failed to ask for a continuance to secure the presence of *** Lott to testify at the *** sentencing hearing that she no longer wanted the no-contact order and for agreeing to the stipulation to [defendant] ingesting alcohol and drugs in the face of the State's dropped DUI charges."

Initially, we note that defendant's amended motion to reconsider his sentence challenged only his counsel's performance at his sentencing hearing. He did not argue his counsel provided ineffective assistance at his probation revocation hearing, during which he admitted and stipulated to the allegations in the State's amended petition to revoke his probation. In any event, we agree with OSAD that defendant's ineffective-assistance claims are without merit.

¶ 25 At the hearing on defendant's amended motion to reconsider, Lott testified she wanted contact with defendant and inquired about having the "no-contact order" dropped. Evidence also indicated Lott had been willing to testify similarly at defendant's sentencing hearing

but was not subpoenaed by Miller-Jones to testify and did not appear at the hearing. In this case, even if we were to conclude defense counsel's performance was in some way deficient based on her failure to subpoena Lott, the record fails to reflect defendant suffered prejudice. Specifically, defendant was clearly ordered to have no contact with Lott as a condition of his probation and he admitted violating that condition during probation-revocation proceedings. Under the circumstances, Lott's wishes were not controlling. We find no merit to this ineffective-assistance claim.

¶ 26 We similarly find no merit to assertions that defendant's counsel was ineffective for (1) "agreeing to the stipulation to [defendant] ingesting alcohol and drugs in the face of the State's dropped DUI charges" (OSAD's characterization of defendant's claim on appeal) or (2) failing to inform the trial court at sentencing that the DUI charges which formed a basis for the revocation of defendant's probation had been dismissed (defendant's claim in the underlying proceedings). First, "[a] probation revocation proceeding is not a criminal adjudication of the defendant's guilt or innocence [citation] and the defendant need not be indicted, prosecuted, or convicted of the offense supporting the petition for revocation [citation]." *People v. Woznick*, 278 Ill. App. 3d 826, 828, 663 N.E.2d 1037, 1038 (1996). As OSAD argues, it was not necessary for the State to pursue criminal charges against defendant to establish that he violated his probation. Second, the DUI charges against defendant were not the sole basis upon which the State sought to revoke his probation and the record also shows defendant violated his probation by having contact with Lott. Finally, as discussed, the sentence imposed by the trial court was not an abuse of discretion. Defendant received a sentence that was well within the applicable sentencing range, the court considered relevant sentencing factors, and the record showed he had an extensive criminal history.

¶ 27

III. CONCLUSION

¶ 28 For the reasons stated, we affirm the trial court's judgment and grant OSAD's motion to withdraw as appellate counsel.

¶ 29 Affirmed.