2016 IL App (1st) 143376-U

SIXTH DIVISION
March 18, 2016

No. 1-14-3376

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	Nos. 13 CR 1893
	)	13 CR 2617
	)	
DENNIS WOODS,	)	Honorable
	)	Diane Gordon Cannon,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Hall concurred in the judgment.

O R D E R

¶ 1 *Held*: We affirmed the revocation of defendant's probations where he failed to affirmatively demonstrate error on appeal, but corrected the mittimus as to presentence custody credit.

¶ 2 In March 2013, defendant Dennis Woods entered pleas of guilty to possession of a controlled substance in case number 13 CR 1893, and to possession of a controlled substance with intent to deliver in case number 13 CR 2617. Defendant was sentenced to two years' intensive probation "to run concurrently on both cases." The State later filed a petition for revocation of probation based on the commission of subsequent criminal offenses. Following a

hearing on the petition, the trial court found a violation of the concurrent probations, revoked defendant's probations, and resentenced defendant to 9 years' imprisonment in case number 13 CR 2617 and to a consecutive one-year sentence in case number 13 CR 1893.

¶ 3 On appeal, defendant contends the trial court's order in case number 13 CR 1893, which revoked his probation and resentenced him to one year in prison, should be vacated because the State did not file a petition for violation of probation in that case. We affirm, but correct defendant's mittimus.

¶ 4 On March 8, 2013, after a Rule 402 (Ill. S. Ct. R. 402 (eff. July 1, 2012)) conference, defendant waived his jury rights and subsequently pled guilty to Class 4 felony of possession of a controlled substance in case number 13 CR 1893, and to Class 1 felony of possession of a controlled substance with intent to deliver in case number 13 CR 2617.

¶ 5 Prior to accepting defendant's guilty plea, the circuit court told defendant that he could receive up to 15 years on the Class 1 felony, a consecutive sentence of 3 years on the Class 4 felony, and two years' probation.

¶ 6 The stipulated factual basis for the guilty plea in case number 13 CR 2617 was as follows. Chicago police officer Loaiza would testify that on November 27, 2012, he was part of a group of officers participating in narcotics surveillance at 3912 West Roosevelt Road, where he observed defendant conduct two separate narcotics transactions with unknown individuals. As the officers approached defendant, he dropped three Ziploc baggies containing suspect heroin. It was later determined that the contents of the baggies consisted of 1.02 grams of heroin. The officers also recovered $107 in currency from defendant's pants.

¶ 7 The stipulated factual basis for the plea in case number 13 CR 1893 was as follows. Chicago police officer Cox would testify that on December 20, 2012, defendant, while free on bond in case number 13 CR 2617, was found to be in possession of 1.3 grams of heroin.

¶ 8 The circuit court sentenced defendant to the terms discussed in the Rule 402 conference: "two years intensive probation, to run concurrently on both cases."

¶ 9 Ten days later, on March 18, 2013, the State filed a petition for violation of defendant's probation (petition) alleging that on March 17, 2013, defendant had "committed the offenses of PCS or UUW" (case number 13 CR 7807). The petition in the record lists case numbers 13 CR 2617 and 13 CR 1893 in the caption, but case number 13 CR 1893 was crossed out.

¶ 10 Defendant appeared in court on March 25, 2013. The State informed the court that defendant had "two violations of probation" and related that defendant had new criminal charges. The court set a bond of "no bail on violations" and a date of April 17, 2013. Defendant's counsel filed an appearance listing case numbers 13 CR 2617 and 13 CR 1893. At the next date, the court told defendant he was in court on two violations of probation and the matter was continued.

¶ 11 At a May 23, 2013, court date, defense counsel requested a continuance and informed the circuit court that "two of the matters are probation violations, and one is a substantive case."

¶ 12 At the next court date, June 14, 2013, the circuit court stated that defendant had two violations of probation pending. An order entered that day which continued the matter lists case numbers 13 CR 1893, 13 CR 2617, and 13 CR 7807, as did the next three continuance orders.

¶ 13 On October 3, 2013, defendant, represented by counsel, informed the circuit court that the parties agreed to a continuance for a bench trial on case number 13 CR 7807, and that case numbers 13 CR 1893 and 13 CR 2617 were violations of probation. The circuit court then

reiterated that defendant was on probation in two matters and that the State had elected to proceed on the substantive case. An order, which continued the case to October 16, 2013, listed case numbers 13 CR 1893, 13 CR 2617, and 13 CR 7807.

¶ 14 On October 16, 2013, defense counsel stated that the matter was set for a bench trial on the "substantive case," and agreed that defendant was on probation for two cases. The matter was then passed.

¶ 15 When the matter was recalled, defense counsel stated, and the State confirmed, that the State now had elected to proceed on the violations of probation in two cases: numbers 13 CR 1893 and 13 CR 2617. The circuit court then informed defendant that the State had to prove, by a preponderance of the evidence that he had violated "both" of his probations. The circuit court then asked defendant if he understood that he had been on electronic home monitoring as a condition of bond for case number 13 CR 2617 when he was charged in case number 13 CR 1893. The court stated that defendant could be sentenced to "fifteen on one case and consecutive three years on the other" if he was found in violation of probation. Defendant said that he understood. The matter then proceeded to a probation revocation hearing.

¶ 16 Probation officer Tom Dibiase testified that on March 17, 2013, Deputy Chief Loizon of the probation department, and probation officer Doody conducted a curfew check at defendant's residence. Defendant, his mother, and his stepfather were present. During a discussion of the rules of intensive probation, defendant asked his mother: "did you take care of that thing?" Thereafter, defendant directed Officer Dibiase to his bedroom. A search of defendant's bedroom revealed an envelope addressed to defendant. In the top drawer of a dresser, Officer Dibiase found a "Crown Royal bag" inside of which were seven live rounds of ammunition and a small

scale. Defendant's probation papers were found in the same drawer. Deputy Chief Loizon informed defendant of his *Miranda* rights. Officers Dibiase and Doody searched the residence and, in another bedroom, two bags containing suspect narcotics were recovered. Defendant was then taken into custody and transported to the police station.

¶ 17 The State asked the trial court to take judicial notice of the fact defendant entered guilty pleas in case numbers 13 CR 1893 and 13 CR 2617 on March 8, 2013, and that he was on intensive probation on March 17, 2013. The trial court asked if the parties stipulated to these facts and defense counsel replied: "So stipulated." At the close of the State's case, the defense made a motion for directed finding as to any violation of probation which was based on the narcotics as the drugs were not found in defendant's bedroom. The trial court granted the motion.

¶ 18 Defendant testified that, on March 8, 2013, he was released from jail and moved into his mother's residence. When he began to place his clothes into the bedroom closet, he found "shells." Defendant gave the shells to his mother, told her that he could not be around ammunition, and asked her to get rid of them. He admitted that he was living in the bedroom where the bullets were found. Defendant stated that he did not use the dresser.

¶ 19 Defendant could not recall having seen a Crown Royal bag. He also could not recall placing his probation papers inside the dresser drawer, but he "probably" did open the drawer and place them in there. However, defendant testified he remembered placing the probation paperwork on top of the dresser. Defendant admitted that he asked his mother, in front of the probation officer, if she had removed the ammunition.

¶ 20 During cross-examination, defendant acknowledged that he was on probation in two matters and that he knew that he should not be around ammunition.

¶ 21 The trial court found that the State had proven, by a preponderance of the evidence, that defendant, "a twice convicted felon," had violated intensive probation by residing in a room which contained ammunition.

¶ 22 The circuit court ordered a presentence investigation, and continued the matter for sentencing and posthearing motions.

¶ 23 Defendant filed a motion for a new hearing or for a judgment of acquittal. The trial court denied the motion and proceeded to a sentencing hearing.

¶ 24 The State *nolle prossed* case number 13 CR 7807 and asked that it be considered as aggravation. The State asserted that "defendant was found guilty of violation of probation in regards to a class one delivery, but he got concurrent probation on his class four possession of a controlled substance." The State argued the sentences would need to be consecutive and asked for a "substantial" prison sentence.

¶ 25 In sentencing defendant, the circuit court stated that, because defendant had quickly violated intensive probation in two matters, that it was sentencing him to nine years' imprisonment in case number 13 CR 2617, and to a consecutive one-year sentence in case number 13 CR 1893. Defendant filed a motion to reconsider his sentences, listing both cases in the caption, arguing only that the sentences were excessive, which the circuit court denied. Defendant now appeals.

¶ 26 On appeal defendant argues the State was required to file a petition to revoke the probation in each of the cases: case number 13 CR 1893 and case number 13 CR 2617.

Defendant argues that, because case number 13 CR 1893 on the petition had been crossed out, the petition did not apply to that case and no other petition was filed.

¶ 27 Pursuant to section 5-6-4(a) of the Unified Code of Corrections (Code), a probation revocation proceeding begins "when a petition is filed charging a violation of a condition" of probation. 730 ILCS 5/5-6-4(a) (West 2012). The statute requires: notice to the defendant of a petition charging a violation of probation; a court hearing on the alleged violation; that the defendant be heard, and confront and cross-examine witnesses; that the defendant be represented by counsel; and the State prove the violation by a preponderance of the evidence. 730 ILCS 5/5-6-4(a), (b), (c) (West 2012). Therefore, pursuant to section 5-6-4(a) of the Code, a petition charging that a defendant has violated his probation must be filed in order to begin a probation revocation proceeding. 730 ILCS 5/5-6-4(a) (West 2012).

¶ 28 Although defendant is correct that case number 13 CR 1893 was crossed out on the caption of the petition, at no point did defendant or his counsel raise any objection to that fact or challenge the applicability of the petition to both probations. To the contrary, defendant, the State, and the court proceeded with the understanding that the petition applied to both cases. Defendant challenges the sufficiency of the petition for the first time on appeal and, thus, has forfeited this issue.

¶ 29 Recognizing the forfeiture, defendant argues that, because the State never filed a petition which alleged that defendant violated his probation in case number 13 CR 1893, the circuit court was not authorized to revoke his probation or to sentence him to one year imprisonment in that case, and that, therefore, the sentence on that case was void. He asserts that a void sentence may be challenged at any time. In the alternative, defendant argues that, because it is a fundamental

denial of due process to convict a defendant of a charge that was never made, this court may review this claim under the plain-error doctrine. Defendant makes no argument regarding the probation revocation hearing itself.

¶ 30 We first address the voidness argument.

¶ 31 Previously our supreme court recognized the "void sentence rule" which was "a challenge to a sentence that did not conform to the applicable sentencing statute." See *People v. Thompson*, 2015 IL 118151, ¶ 33 (citing *People v. Arna*, 168 Ill. 2d 107, 113 (1995)). However, in *People v. Castleberry*, 2015 IL 116916, our supreme court abolished the void sentence rule. *Id*. ¶ 19 "Consequently, that type of challenge is no longer valid." *Id*. ¶ 33.

¶ 32 Under the plain-error doctrine, this court may reach an unpreserved issue 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." See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) Under both prongs, a defendant bears the burden of persuasion. *Id.*

¶ 33 In this case, there is no dispute that a petition to revoke defendant's probation was filed which listed case numbers 13 CR 1893 and 13 CR 2617. At some point, case number 13 CR 1893 was crossed out. However, there is no information contained in the record as to who may have crossed out that case number, when it was crossed out, or why this was done. In that defendant has not provided a complete record to decide this issue, we must presume the trial court acted properly. *Foutch v. O'Bryant*, 99 Ill. 3d 389, 391 (1984); see also *People v. Carter*,

2015 IL 117709, ¶¶ 23, 25 (a defendant must affirmatively demonstrate the alleged error in proceedings in the circuit court and absent an adequate record preserving the claimed error, a reviewing court must presume the circuit court's order conforms with the law).

¶ 34 Nonetheless, defendant does not explain what prejudice, if any, his defense suffered as to the sufficiency of the petition. See, *e.g.*, *People v. Benitez*, 169 Ill. 2d 245, 257-58 (1996) (citing *People v. Gilmore*, 63 Ill. 2d 23, 29 (1976)) (when the sufficiency of an indictment or information is attacked for the first time on appeal, the indictment is sufficient if it apprised the accused of the precise offense charged with sufficient specificity to prepare his defense and to allow him to plead a resulting conviction as a bar to future prosecutions arising from the same conduct). To the contrary, the record, as a whole, reveals that defense counsel, the State, and the trial court treated the probation revocation proceedings as applicable to both cases, and all parties understood that they were proceeding on both cases.

¶ 35 Defendant entered pleas of guilty in case numbers 13 CR 1893 and 13 CR 2617, and was sentenced to "two years intensive probation, to run concurrently on both cases." At each court date after the State filed the petition, the trial court and the parties consistently stated that defendant had two pending probation violations. Prior to the probation revocation hearing itself, the trial court, and defendant's counsel both indicated that there were two violations of probation and the ASA specifically stated that the State was proceeding on case numbers 13 CR 1893 and 13 CR 2617. Additionally, defendant was informed by the trial court that the State had the burden of proving he had violated "both" probations and, if the State sustained this burden, he was subject to consecutive sentences on the two cases. Defendant told the court that he

understood. Defendant was notified by the court throughout the revocation proceedings that he was charged with violating probation in two cases and defendant never objected nor complained.

¶ 36 In summary, we conclude that defendant's failure to make any objection to the sufficiency of the petition before the trial court has resulted in forfeiture of this issue on appeal. See *People v. Shadowens*, 10 Ill. App. 3d 450, 452 (1973) (even if the defendant had no notice of the charges against him, "the proper place for objection is the revocation hearing and the issue cannot be raised for the first time on appeal"); *State v. Headrick*, 54 Ill. App. 2d 44, 48-49 (1964) (because defendant failed to raise the issue of knowledge of the charges against him at the probation revocation hearing, he could not raise that issue on appeal). Furthermore, because defendant has failed to affirmatively demonstrate on appeal that he was denied due process or prejudiced during the probation revocation proceedings, we reject defendant's plain-error argument.

¶ 37 Defendant next contends, and the State concedes, that his mittimus must be corrected to reflect an additional 88 days of presentence custody credit for time served for a total of 351 days. Therefore, pursuant to Supreme Court Rule 615(b)(1) (Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999)), and our ability to correct a mittimus without remand (*People v. Rivera*, 378 Ill. App. 3d 896, 900 (2008)), we order the clerk of the circuit court to correct the mittimus to reflect a total of 351 days of presentence custody credit for time served.

¶ 38 In all other respects, the judgment of the circuit court is affirmed.

¶ 39 Affirmed; mittimus corrected.