

No. 1-16-1258

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN THE INTEREST OF:)	Appeal from the
)	Circuit Court of
FABIAN O., a minor)	Cook County,
)	Juvenile Justice Division
)	
(The People of the State of Illinois,)	
)	
Petitioner-Appellee,)	No. 16 JD 673
)	
v.)	
)	
Fabian O., a minor,)	Honorable
)	Stuart F. Lubin,
Respondent-Appellant.))	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Connors and Justice Simon concurred in the judgment.

ORDER

¶ 1 **Held:** The record contains no evidence of the services respondent will receive upon commitment. The failure to review evidence concerning the services respondent would receive upon commitment to the Department of Juvenile Justice represented reversible error under the second plain-error prong. Accordingly, we vacate the commitment order and remand back to the trial court for a new sentencing hearing.

¶ 2 Respondent was found guilty of two counts of aggravated unlawful use of a weapon and unlawful possession of a firearm. After being found guilty on those counts, the trial court committed respondent to the Department of Juvenile Justice. On appeal, respondent challenges the sentencing order. Specifically, respondent argues the trial court failed to review the required statutory factors and failed to determine whether incarceration in the Department of Juvenile Justice was the least restrictive alternative. The State counters respondent failed to preserve the issue, so this court may only review it under a plain-error analysis. The State urges that no error occurred and therefore plain-error analysis would be inappropriate.

¶ 3 A review of the record in this case shows the trial court properly considered less restrictive alternatives before committing respondent. However, the trial court could not comply with the requirement to review the type of services respondent would receive upon commitment because it had no evidence before it concerning what those services could or would be. This error was serious enough to deny respondent a fair sentencing hearing and called into question the judicial process concerning the commitment of respondent to the Department of Juvenile Justice. Accordingly, we vacate the order of commitment and remand for a new sentencing hearing.

¶ 4

JURISDICTION

¶ 5 The circuit court entered a final judgment on May 11, 2016. On the same day respondent filed his notice of appeal. Accordingly, this court has jurisdiction over this matter pursuant to Article VI, Section 6 of the Illinois Constitution, and Illinois Supreme Court Rules 660, 603, and 606. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. R. 660 (eff. Oct. 1, 2001); R. 603 (eff. Feb. 6, 2013); R. 606 (eff. Dec. 11, 2014).

¶ 6

BACKGROUND

¶ 7 On March 21, 2016, minor-respondent, Fabian O., while on juvenile probation for unlawful possession of a firearm (15 JD 3608) and possession of a controlled substance (15 JD 3608) was charged with two counts of aggravated unlawful use of a weapon in violation of 720 ILCS 5/24-1.6(a)(1) (West 2012), and one count of unlawful possession of a weapon in violation of 720 ILCS 5/24-3.1(a)(1) (West 2012). He was arraigned before the trial court and a finding of probable cause was entered. The State argued there was an urgent and immediate necessity to detain respondent. The State noted guilty findings for the two 2015 cases had been entered on December 3, 2015, and at sentencing, "[r]espondent was placed on two years of probation, no gangs, no guns, no drugs" by Judge Lubin. The State argued respondent be held in custody because this was respondent's second gun offense and he was "absolutely a danger to himself and the community." Defense counsel requested respondent be placed on electronic monitoring because he was active in school, enrolled in community service, and had done his DNA testing. The trial court found respondent to be a threat to the community and ordered him held in custody. The case was continued to April 19, 2016 for trial.

¶ 8 At trial, Chicago Police Officer Ocampo testified that around 8:15 p.m. on March 19, 2016, he and his partner were on routine patrol in an unmarked Chicago Police vehicle approaching the intersection of Potomac and Karlov Avenues. He observed respondent standing on the southwest corner with at least four other individuals. As the officers' vehicle approached, respondent grabbed his waist band with both hands and began walking eastbound on Potomac Avenue. Then respondent looked at them, stopped, turned around and began walking westbound. Suspecting respondent might be armed with a gun, Officer Ocampo exited the vehicle and identified himself as a police officer. Still holding his waistband with both hands, respondent ran towards the corner of Potomac and Karlov Avenues. Officer Ocampo ran after him and as

respondent reached the corner, Officer Ocampo observed respondent pull a long barreled handgun from his waistband and throw it with his left hand. Respondent continued to run across the street but tripped and fell to the ground.

¶ 9 Officer Ocampo recovered the gun, "a six inch barrel 357 revolver," and ordered respondent to stay on the ground. Respondent screamed "you got me, you got me." He was placed under arrest and taken to the police station, where the officers learned respondent did not have a valid Firearm Owner's Identification Card.

¶ 10 Respondent testified that on the evening of March 19, 2016, he was standing on the northeast corner of Karlov and Potomac Avenues. He saw the officers' car approaching from Karlov Avenue and started walking across the street to the other side of Potomac Avenue. The officers turned eastbound on Potomac Avenue, and Officer Ocampo jumped out of the car and ordered respondent to come to him. Respondent turned around and ran west on Potomac Avenue, past a group of people on the corner. Respondent testified he ran from the police because he had a bottle of liquor in his pocket which he knew violated his probation. Furthermore, he was not suppose to be in the area. He acknowledged the liquor bottle was a pint sized bottle of Remy Martin, about six to eight inches tall, from which he had consumed one shot.

¶ 11 As he was running, respondent took out his phone to call his girlfriend and tell her he was going to jail for violating his probation. He tripped and fell on his stomach, but the bottle of liquor, which was between his stomach and the sidewalk, did not break. Respondent testified he did not have a weapon on him that night, and he only learned a weapon was out there when the officer said a weapon had been recovered. The judge asked what happened to the bottle of liquor, and respondent testified the officer opened up his jacket, pulled out the bottle and threw it, then asked respondent if he had been drinking.

¶ 12 Respondent was found guilty on all three counts. The court ordered an intensive probation services referral for respondent and noted it was respondent's second gun conviction in a short period of time. The court ordered respondent held in custody until sentencing.

¶ 13 At the sentencing hearing, two probation officers, Bravo and Palido, testified Intensive Probation Services had rejected respondent because this was his second gun case, and they "usually reject" on a second gun case. Both probation officers recommended respondent be committed to the Department of Juvenile Justice (DOJJ). Both officers based this on the seriousness of the current offense and respondent's previous criminal behavior. Officer Bravo specifically noted respondent had been on probation less than two months for his first weapons offense when he was arrested on the current weapons charge. The State also requested respondent be sentenced to the DOJJ.

¶ 14 Arguing respondent had not received sufficient services yet, defense counsel suggested intensive probation. In the alternative, defense counsel suggested the court place respondent on a three month bring-back to provide him with the opportunity to receive services to deal with the loss of his unborn child and to give him the opportunity to reach his educational goals. The trial court rejected these two suggestions and committed respondent to the DOJJ.

¶ 15 Respondent timely filed his notice of appeal.

¶ 16 ANALYSIS

¶ 17 On appeal, respondent argues that the trial court erred in failing to comply with section 5-750 of the Juvenile Court Act (the Act). 705 ILCS 405/5-750(1) – (1.5) (West 2016). Specifically, respondent argues the trial court failed to determine whether incarceration was the least restrictive alternative and failed to review the required statutory factors. In response, the State argues respondent has waived review of the claimed error because he failed to object at the trial court and even if respondent had preserved his alleged error, this court should still affirm

because the trial court complied with the Act when sentencing respondent to the DOJJ. In reply, respondent acknowledges he failed to object to the error he now appeals but argues we can address the issues under the plain-error doctrine.

¶ 18 We agree with the State that respondent's failure to object at the trial court results in the waiver of the issue on appeal. Recently, our supreme court explained that "a minor must object at trial to preserve a claimed error for review. However, minors are not required to file a postadjudication motion." *In re Samantha V.*, 234 Ill. 2d 359, 368 (2009) citing *In Re W.C.*, 167 Ill. 2d 307, 327 (1995). Respondent acknowledges he did not object to the alleged error at trial but argues we should address the issue under the plain-error doctrine. *In re M.W.*, 232 Ill. 2d 408, 430 (2009). Before an appellate court can engage in a plain-error analysis, this court must determine whether error occurred. *Id.* at 431. If a clear or obvious error exists, the requested relief will be granted: "(1) if 'the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant,' or (2) if the error is 'so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.'" *Id.* at 431 (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)). Under both prongs, the respondent bears the burden of persuasion. *M.W.*, 232 Ill. 2d at 431.

¶ 19 Generally, a trial court's sentencing disposition is reviewed for an abuse of discretion. *In re Ashley C.*, 2014 IL App (4th) 131014, ¶ 22. However, questions of whether the court complied with the statutory requirements or relied on improper factors are questions of law which we will review *de novo*. *Id.* The Juvenile Court Act states in relevant part:

[W]hen any delinquent has been adjudged a ward of the court under this Act, the court may commit him or her to the Department of Juvenile Justice, if it finds that (a) * * * it is necessary to ensure the protection of the public from the consequences of criminal activity of the delinquent; and (b) commitment to the Department of Juvenile Justice is the least restrictive alternative based on

evidence that efforts were made to locate less restrictive alternatives to secure confinement and the reasons why efforts were unsuccessful in locating a less restrictive alternative to secure confinement. Before the court commits a minor to the Department of Juvenile Justice, it shall make a finding that secure confinement is necessary, following a review of the following individualized factors:

- (A) Age of the minor.
- (B) Criminal background of the minor.
- (C) Review of results of any assessments of the minor, including child centered assessments such as the CANS.
- (D) Educational background of the minor, indicating whether the minor has ever been assessed for a learning disability, and if so what services were provided as well as any disciplinary incidents at school.
- (E) Physical, mental and emotional health of the minor, indicating whether the minor has ever been diagnosed with a health issue and if so what services were provided and whether the minor was compliant with services.
- (F) Community based services that have been provided to the minor, and whether the minor was compliant with the services, and the reason the services were unsuccessful.
- (G) Services within the Department of Juvenile Justice that will meet the individualized needs of the minor. 705 ILCS 405/5-750(1) (West 2014).

The language of the statute provides a trial court may commit a juvenile defendant to the DOJJ only if it finds commitment to the DOJJ is the least-restrictive alternative. *In re Raheem M.*, 2013 IL App (4th) 130585, ¶ 45 (citing 705 ILCS 405/5-750(1)(b) (West 2014)). Further, the trial court must give reasons why efforts were unsuccessful in locating a less restrictive alternative to secure confinement. 705 ILCS 405/5-750(1)(b) (West 2014). However, "a judge need not enumerate all possible alternatives when making a disposition and the remarks of the trial judge can illustrate a consideration of alternatives." *In re J.C.*, 163 Ill. App. 3d 877, 888 (1987).

¶ 20 Respondent first argues the trial court failed to consider the least restrictive alternative before sentencing him to incarceration. Respondent relies exclusively on *In re Raheem M.*, 2013

IL App (4th) 130585, to support his argument. In *Raheem M.*, this court reversed a commitment order after "no evidence was presented to the court about any efforts made to find possible alternatives." 2013 IL App (4th) 130585, ¶ 49. Unlike, *Raheem M.* there is evidence the trial court considered and rejected less restrictive alternatives. On the order of commitment form, the trial court checked the box indicating "reasonable efforts were made to locate less restrictive alternatives to secure confinement and were unsuccessful." Although the form does not indicate the reasons why efforts were unsuccessful, the record from the sentencing hearing indicates the trial court was presented with alternatives but decided against them.

¶ 21 At the sentencing hearing, the trial court heard about respondent's criminal past. The respondent's probation officer informed the court respondent was currently serving two terms of probation for unlawful use of a weapon and possession of a controlled substance with intent to deliver. Respondent had only been on probation two months. The probation officer told the trial court respondent's high school would be willing to have him back and he is respectful at home. However, the probation officer stated intensive probation services would not accept respondent given his criminal background, especially given his second gun charge. Respondent's attorney noted respondent had suffered from depression since his girlfriend's miscarriage. Respondent's attorney suggested intensive probation or in the alternative a three-month bring back. However, in light of respondent's criminal history and his commission of the current offense while on probation, the trial court considered him a continuing danger to society. The trial court found it necessary to commit respondent to the DOJJ to protect society from respondent's criminal actions.

¶ 22 The above facts distinguish this case from *Raheem M.*, where no evidence was presented concerning a less secure confinement. Here, the trial court adequately inquired into less restrictive alternatives for respondent. The trial court could have let respondent remain on

probation, sentenced him to intensive probation (over the objection of the probation officer), or even allow for a three-month bring back. Instead, given respondent's recent criminal activity, the trial court sentenced respondent to the DOJJ. This met the statutory requirements and no error occurred. Since, no error occurred; there can be no plain error. *People v. Sargent*, 239 Ill. 2d 166, 189 (2010).

¶ 23 Next, respondent argues the trial court failed to consider the individualized factors listed in the Act before committing him to the DOJJ. 705 ILCS 405/5/750(1)(b)(A)-(G) (West 2014). The trial court heard evidence concerning respondent's age, criminal background, and educational background. The trial court also heard respondent had not had an opportunity to comply with probation and parole services because his arrest on the current charge prevented him from taking advantage of them. The record also includes several assessments of respondent. These reports discuss respondent's home life, school situation, relationships, drug and alcohol use, and mental and physical health.

¶ 24 The record thus contains some evidence of all the statutory factors except "(G) services within the [DOJJ] that will meet the individualized needs of the minor." 705 ILCS 405/5/750(1)(b)(G) (West 2014). While the trial court checked the box indicating it had reviewed evidence concerning the services within the DOJJ which would meet respondent's needs, there is nothing in the record before this court indicating what those services might be. This information is not contained in either the assessments or the transcript from the sentencing hearing. The Act requires a trial court to review this factor before commitment to the DOJJ. The trial court's failure to conform its commitment order to the Act in this respect represents error.

¶ 25 Even though an error occurred, we can only grant respondent's relief under the plain-error analysis "(1) if the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) if the error is so serious that it affected the fairness of

defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *M.W.*, 232 Ill. 2d at 431. In this case, the second factor has been satisfied.

¶ 26 The purpose and policy of the Act is to secure for each minor "such care and guidance, * * *, as will serve the safety and moral, emotional, mental, and physical welfare of the minor and the best interests of the community." 750 ILCS 405/1-2(1) (West 2014). Continuing on, the Act provides, "[i]n all procedures under this Act, the following shall apply: (b) every child has a right to services necessary to his or her safety and proper development, including health, education, and social services." *Id.* at (3)(b). The statutory factors listed in section 5-750 "ensure trial courts are treating the DOJJ sentences as a last resort." *Raheem M.*, 2013 IL App (4th) 130585, ¶ 53. Further, our supreme court has noted, "[d]elinquency proceedings are * * * protective in nature and the purpose of the Act is to correct and rehabilitate, not to punish." *In re Rodney H.*, 223 Ill. 2d 510, 520 (2006) (citing *In re W.C.*, 167 Ill. 2d 307, 320 (1995)).

¶ 27 In both *In re Raheem M.* and the more recent *In re Justin F.*, 2016 IL App (1st) 153257, this court reversed commitment orders where the record contained no evidence about one of the factors a trial court is required to review before committing a minor to the DOJJ. In reversing the commitment order in *Raheem M.* the court found no evidence, either in the reports or at the sentencing hearing, a less restrictive alternative was considered before the court committed the juvenile. 2013 IL App (4th) 130585, ¶ 47. The *Justin F.* court found the record before it, like the record in this case, contained no evidence concerning the availability of services for Justin in the DOJJ, despite the trial court having checked off the appropriate box on the commitment order. 2016 IL App (1st) 153257, ¶ 31. The *Raheem M.* court found the failure to consider any evidence represented a serious error under the second prong of the plain-error analysis. 2013 IL App (4th) 130585, ¶ 52.

¶ 28 The lack of evidence concerning the services respondent would receive upon commitment to the DOJJ prevented the trial court from fulfilling its statutorily required duties under the Act and denied respondent a fair sentencing hearing. "The goal of developing delinquent minors into productive adults," cannot be met if the juvenile is never given the appropriate services to help make that happen. *In re Rodney H.*, 223 Ill. 2d 510, 520 (2006). Without knowing the services a juvenile will receive in the DOJJ, the trial court's order committing the respondent suggests it was given as punishment and not to rehabilitate, in direct contravention of the Act. Accordingly, we vacate the order for commitment and remand these proceedings for full compliance with the Act. *In re Raheem M.*, 2013 IL App (4th) 130585, ¶¶ 50, 55; *In re Justin F.*, 2016 IL App (1st) 153257, ¶ 31.

¶ 29

CONCLUSION

¶ 30 For the following reasons we vacate the order of commitment and remand for the trial court to comply fully with section 5-750 of the Act by hearing evidence and taking into consideration the services available through the DOJJ to assist respondent.

¶ 31 Vacated and remanded.