2016 IL App (2d) 141215-U
No. 2-14-1215
Order filed December 16, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ROBERT N. SOMO, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of De Kalb County. No. 11-CF-737 Honorable Robbin J. Stuckert, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Schostok and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in revoking defendant's probation, and therefore, trial counsel was not ineffective.

¶ 2 Defendant, Robert N. Somo, appeals from the revocation of the "first offender" probation (see 720 ILCS 570/410 (West 2010)) and his resentencing to 24 months' "standard probation." Defendant asserts that the court erred when it broadened the scope of the probation revocation proceeding by revoking defendant's probation based on uncharged failures to submit to drug testing. Alternatively, he argues that counsel was ineffective for failing to object to the court's

revocation on a basis not alleged in the petition to revoke. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by complaint with a count of unauthorized possession of less than 15 grams of a substance containing amphetamine (720 ILCS 570/402(c) (West 2010)). He entered a guilty plea to the charge on June 21, 2012, and received a sentence of 24 months' first-offender probation. His order of probation required, among other things, that defendant not violate any criminal statute of any jurisdiction and that he submit to a minimum of three random urine screens.

¶ 5 On February 8, 2013, the State filed a petition to revoke defendant's probation. The petition alleged that defendant was ordered to submit to random urine screens and he violated that condition on January 16, 2013, when he "admitted to using marijuana on several occasions." The probation department's January 28, 2013, violation report stated that, on January 16, 2013, defendant admitted to using marijuana on several occasions and he signed a statement admitting to such use.

¶ 6 On July 19, 2013, the State filed a supplemental petition to revoke probation. The supplemental petition alleged that, as part of his order of probation, defendant was required to submit to random urine screens, and he failed to comply with that condition when he tested positive for tetrahydrocannabinol (THC) on July 16, 2013. Defendant signed a "Positive Drug Test Statement," in which he waived his right to a confirmation test and accepted the positive result of the drug test, thereby admitting to the use of THC. The probation department's July 16, 2013, violation report noted that defendant claimed that he did not violate his probation order,

because he submitted to the urine screen. According to the report, defendant claimed that his probation order did not require that he "refrain from using drugs."

¶ 7 On September 12, 2013, the State filed another supplemental petition to revoke defendant's probation. The petition reiterated that defendant failed to comply with his random drug screens when he tested positive for THC on July 16, 2013. The petition also alleged that defendant failed to comply with the conditions of his probation when he committed the offense of domestic battery. The matter was then continued until defendant's domestic violence case was resolved.

¶ 8 At a status date on April 24, 2014, the State told the court that defendant continued to test positive for THC, but insisted to court services that his probation order did not prohibit marijuana use. The State asked the court to admonish defendant as to the use of illicit substances. The court told defendant that his order of probation required him to not commit any "other offenses," and, as a "standard of probation," defendant was not to consume any illicit drugs. The court then entered a continuance order that also specifically ordered defendant "not to consume any illicit substances including marijuana."'

¶ 9 At a status date on August 20, 2014, the State asked for leave to file a supplemental petition to revoke probation. The State noted that, as alleged in its previous petitions, defendant admitted to using marijuana on several occasions and tested positive for THC. The State noted that its supplemental petition would allege that defendant committed the offense of unlawful possession of cannabis on each of the dates that he tested positive for THC or admitted to using marijuana. The court granted the State leave to file its supplemental petition. The State also dismissed the September 12, 2013, petition insofar as it alleged that defendant violated a criminal statute when he committed domestic battery.

¶ 10 On August 20, 2014, the State filed its supplemental petition to revoke defendant's first-offender probation. The August 20 petition alleged that, as part of his order of probation, defendant was required to not violate any criminal statute of any jurisdiction, as well as to submit to random drug screens. The petition further alleged that defendant failed to comply with the conditions of probation when he committed the offense of unlawful possession of cannabis on January 16, 2013,[1] July 16, 2013, and April 9, 2014. It also alleged that defendant failed to comply with the conditions of probation when he admitted to using cannabis on April 9, 2014. The April 10, 2014, violation report noted that defendant signed a positive drug test statement and admitted that he used marijuana.

¶ 11 On September 23, 2014, the court held a hearing on the State's August 20, 2014, petition to revoke. At the beginning of the hearing, the State noted that, while the hearing was on the August 20, 2014, petition, the State filed that petition to "consolidate all the petitions into one pleading." Therefore, the State argued, defendant was on notice of the respective dates at issue because of the petitions filed before the August 20 petition. The State then called Peggy Carey, defendant's probation supervisor, as its sole witness.

¶ 12 Carey testified that defendant was required to submit to drug drops on three occasions. She testified that, at the first drug drop on January 16, 2013, defendant was unable to provide a urine sample, admitted to using THC, and signed a "positive drug test statement." Carey also testified that the second drug drop occurred on July 16, 2013, at which he tested positive for THC. Defendant admitted to using marijuana, waived his right to a confirmatory test, and signed a statement with his admission. Carey also testified that, at defendant's third drug drop on April

[1] The State alleged January 6, 2013, in the petition, but was later allowed to amend the petition to reflect the correct date.

9, 2014, he did not provide a urine sample but instead admitted to using marijuana. Defendant again waived his right to any confirmation and signed the positive drug test statement.

¶ 13 On cross-examination, Carey testified that the positive drug test statements that defendant signed did not indicate how THC entered his body. As to the January 16, 2013, and April 9, 2014, statements, defendant only acknowledged that he would test positive on a drug test because there was a substance in his system. Carey then testified that defendant verbally admitted to using marijuana.

¶ 14 On redirect examination, Carey testified that the positive drug test statements showed that defendant admitted to using marijuana. Specifically, the January 16, 2013, and April 9, 2014, forms stated: "I understand that I have admitted that I have used marijuana." Carey also testified that, on all three dates, defendant insisted that his probation order did not require him to abstain from drug use, but only required him to submit to testing. Carey testified that she told defendant on all three occasions that smoking marijuana was against the law.

¶ 15 On re-cross, Carey testified that defendant never informed her as to how the THC got into his system. Defense counsel then unsuccessfully attempted to elicit testimony that defendant could have tested positive for THC simply by being in "an environment where that was in the air."

¶ 16 Following the close of the State's evidence, defendant moved for a directed finding on the basis that the State failed to prove possession "or even ingestion." The colloquy related in part to defendant's claim that nothing in the probation order required him to abstain from marijuana. The court denied defendant's motion. Defendant asked the court to reconsider. In the discussion of that request, the State admitted that it could not say whether anyone in the probation department had ever advised defendant of the prohibition on using illicit substances.

The court declined to change its decision. Defendant did not present any witnesses and adopted his earlier argument in favor of a directed finding as his final argument.

¶ 17 The court ruled that the State had met its burden to show that defendant was in violation of his probation:

> "Further reading the terms of the first-offender probation [statute] it states that when a person is placed on probation, the Court shall enter orders specifying a period of probation of 24 months. It also indicates that the conditions shall be that he submit to periodic drug testing at a time and in a manner as ordered by the Court.
>
> By the preponderance of the evidence the State has met its burden that he was requested to submit to a drug test. He did not on two occasions but, rather, admitted the use of THC.
>
> Therefore, the State has met its burden by the preponderance of the evidence that he failed to submit to the test as requested, made an admission and then pursuant to all terms of probation is in violation of probation."

Defendant's only response was to request a presentencing report. He did not file a motion to reconsider.

¶ 18 A sentencing hearing took place at which Carey again testified. Defendant made a statement in allocution in which he suggested that he used marijuana to avoid legal use of benzodiazepine. The court sentenced defendant to an additional 24 months of standard probation. Defendant did not file a motion to reconsider his sentence but did file a timely notice of appeal.

¶ 19 II. ANALYSIS

¶ 20 Defendant argues that his right to due process was denied when the trial court revoked his probation on the basis of acts not alleged in the petition. Specifically, defendant claims that the August 20, 2014, petition to revoke alleged only that he admitted to using cannabis and unlawfully possessed cannabis, but the trial court "broadened" the scope of the proceeding by revoking his probation based on his failure to submit to drug testing. He alternatively argues that his trial counsel was ineffective for failing to object to the court's enlargement of the revocation proceeding.

¶ 21 The State responds that defendant was not prejudiced by the court's rationale for revoking his probation, as he was given notice of the claimed violations. It also contends that it proved those violations by a preponderance of the evidence.

¶ 22 As an initial matter, defendant acknowledges that he did not raise this issue below, but argues that we should review it under the second prong of the plain-error doctrine because the trial court's actions affected his "substantial rights" and denied him a fair trial. The plain-error doctrine allows a reviewing court to consider an unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to affect the outcome of the case, 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 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 (2007). Under either prong, the defendant has the burden of persuasion. *People v. Garcia*, 2012 IL App (1st) 103590, ¶ 121. To find plain error, however, we must first find that the trial court committed some error. *Garcia*, 2012 IL App (1st) 103590, ¶ 121.

¶ 23 "The Due Process Clause of the Fourteenth Amendment imposes procedural and substantive limits on the revocation of the conditional liberty created by probation." *Black v. Romano*, 471 U.S. 606, 610 (1985). These limits are not the full range of rights associated with a criminal trial. *People v. Bedenkop*, 252 Ill. App. 3d 419, 421 (1993). Still, the Supreme Court has identified at least five procedural requirements for revocation proceedings that satisfy due process requirements:

> "The probationer is entitled to written notice of the claimed violations of his probation; disclosure of the evidence against him; an opportunity to be heard in person and to present witnesses and documentary evidence; a neutral hearing body; and a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation." *Black*, 471 U.S. at 612.

In a probation revocation proceeding, the State must prove a violation of probation by a preponderance of the evidence, using only competent evidence. *Bedenkop*, 252 Ill. App. 3d at 422.

¶ 24 Here, defendant's claim that he lacked notice that he was accused of violating the testing requirement is without merit. The De Kalb County petition form was structured to notify a defendant first *which probation provision* was it issue in the revocation proceedings and then of *the specific violation* of the provision at issue. The first part of the August 20, 2014, petition informed defendant that the *provisions* at issue were: (1) "Not violate any criminal statute of any jurisdiction," and (2) "Submit to Random Drug Testing." The second part of the petition informed him that the corresponding *specific violations* that the State alleged were: (1) "On or before July 16, 2013, January [1]6, 2013, and April 9, 2014, Defendant committed the offense of Unlawful Possession of Cannabis," and (2) "Defendant admitted to using cannabis on April 9,

2014." Hence, in addition to his possession of marijuana, the August 20, 2014, petition clearly put defendant's compliance with the random drug screens at issue, which he violated by admitting to the use of cannabis.

¶ 25 Additionally, the State made clear at the beginning of the hearing (as well as in responding to defendant's motion for directed verdict) that three total petitions were filed, and the August 20, 2014, petition was an attempt to consolidate them. The February 8, 2013, petition explicitly stated that defendant was required to submit to random screens and that he failed to comply with that condition when he admitted to using marijuana on several occasions. The July 19, 2013, petition similarly stated that defendant failed to comply with his random screens when he tested positive for THC on July 16, 2013. Thus, all three petitions made clear that the State was alleging that defendant violated the requirements for the screens when he tested positive for and admitted to the use of marijuana.

¶ 26 Based on the above, the court did not err in revoking defendant's probation, as it did not "broaden" the scope of the proceeding by adding a new violation. All of the testimony and evidence centered on defendant's failed drug test and refusal to submit to the other two, based on his admissions to using marijuana. While defendant attempted to elicit testimony on cross-examination of his probation officer as to whether he actually possessed or ingested marijuana, such attempts were futile, speculative, and did nothing to contradict the clear evidence that defendant did not comply with the random drug screens.

¶ 27 We reject defendant's reliance on *Bedenkop*. In *Bedenkop*, the State filed a petition to revoke the defendant's probation based on her alleged failure to "appear and report" on two specific dates. *Bedenkop*, 252 Ill. App. 3d at 420. At the revocation hearing, however, the probation officer testified, without objection, that medical reports indicated that the defendant

gave birth to an infant addicted to cocaine; the court also questioned the defendant, without objection, about her drug use and whether she did, in fact, give birth to a child addicted to cocaine. *Bedenkop*, 252 Ill. App. 3d at 421. The court also called and questioned a second witness, a child-welfare worker, about the same issue. *Bedenkop*, 252 Ill. App. 3d at 421. After the testimony, the court *sua sponte* allowed the State to enlarge the grounds for revocation to include the fact that the defendant used cocaine and gave birth to a child addicted to cocaine. *Bedenkop*, 252 Ill. App. 3d at 422.

¶ 28 The appellate court reversed the trial court's revocation of probation, holding that the defendant was denied due process when the court, on its own motion, broadened the scope of the proceedings without providing notice. *Bedenkop*, 252 Ill. App. 3d at 423. The court noted that the petition to revoke referred only to defendant's failure to report, but the trial court required her to answer to charges for which she had no notice and to give information that was self-incriminating. *Bedenkop*, 252 Ill. App. 3d at 423. The court also reasoned that the trial court failed to state its reasons for finding defendant in violation of her probation, and thus it was unable to determine whether the trial court based its decision to revoke on the defendant's failure to report, her cocaine use, or her infant's cocaine addiction. *Bedenkop*, 252 Ill. App. 3d at 423-24. Finally, the appellate court further held that the defendant was denied a fair hearing when the trial court "assumed the role of the prosecutor" by calling the State's witnesses and conducting examinations of the witnesses. *Bedenkop*, 252 Ill. App. 3d at 424.

¶ 29 Here, unlike in *Bedenkop*, the trial court did not *sua sponte* broaden the scope of the revocation proceeding. As explained above, defendant had clear, written notice that his failure to comply with the random drug screens was at issue. Moreover, as the State properly suggests, here, the requirement for drug testing and the allegation of admission of use were always two

facets of the same claim, whereas in *Bedenkop* the charged failure-to-report violation was unrelated to the cocaine charge. Furthermore, whereas in *Bedenkop* the court's deviation from a position of neutrality to assume a prosecutorial role produced serious error, nothing of the sort happened here. In particular, the court did not raise any new matter and certainly did not push defendant into self-incriminating testimony. Finally, the court here made the basis for its judgment transparent, so that we have no concern that the decision was based on anything other than issues that had been properly raised. It explicitly found that defendant failed to submit to two drug tests—defendant could not have reasonably believed that his admission to the use of THC was a substitute for the testing. The court's finding on this point was consistent with the petition's specific allegation that defendant's admission to cannabis use was linked to his failure to submit to drug screenings and that he not violate any criminal statute. Indeed, defendant did not *ever* deny that he possessed marijuana; he tested positive for its use, admitted to its use, and attempted to justify its use. His attempt to claim that no prohibition on marijuana use was set out in the probation order defies logic, as does his suggestion that he could have used marijuana without possessing it. Thus, the State proved by a preponderance of the evidence the allegations as set forth in its August 20, 2014, supplemental petition to revoke.

¶ 30 Defendant received the minimum due process guarantees at the revocation proceeding. He received notice of the claimed violations, had the opportunity to be heard, had the opportunity to present evidence and confront witnesses, and was represented by counsel. Accordingly, we hold that the trial court did not commit error when it revoked defendant's probation, and, therefore, no plain error occurred. As no error occurred, trial counsel was not ineffective.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we affirm the revocation of defendant's probation. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 33 Affirmed.