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2016 IL App (3d) 140758-U

Order filed December 22, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Iroquois County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-14-0758
v.	)	Circuit No. 11-CF-127
NICOLE FISCHER-TURNER,	)	
	)	Honorable Gordon L. Lustfeldt,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justice Holdridge concurred in the judgment.
Justice Wright specially concurred.

ORDER

¶ 1 *Held*: Trial court properly imposed sentence penalizing conduct that gave rise to original conviction, rather than conduct that gave rise to probation revocation.

¶ 2 Defendant, Nicole Fischer-Turner, appeals from her sentencing upon revocation of probation in which the court sentenced her to five years' imprisonment for aggravated battery. She argues that the trial court improperly based its sentence upon the conduct that gave rise to her probation revocation, rather than upon the aggravated battery. We affirm.

¶ 3 FACTS

¶ 4 On February 21, 2012, defendant pled guilty to aggravated battery (720 ILCS 5/12-3.05(d)(4) (West 2010)). A Class 2 felony, the aggravated battery charge carried a potential sentence of between three and seven years' imprisonment. 720 ILCS 5/12-3.05(h) (West 2010); 730 ILCS 5/5-4.5-35(a) (West 2010). As a factual basis for the plea, the State asserted the evidence at trial would show that defendant was in the Iroquois County jail, in the custody of correctional officer Claudio Garcia when she attacked Garcia, kicking him in the jaw and genitals and scratching his arm. The court accepted defendant's guilty plea.

¶ 5 The trial court held defendant's sentencing hearing on May 15, 2012. The State called Garcia in aggravation. Garcia testified that on the date of the incident, fellow correctional officer Kelly Gilbert had taken defendant out of her temporary holding cell to use the restroom. From his position in the booking office, Garcia could hear a verbal dispute arise between Gilbert and defendant. When Garcia went to the scene, he saw defendant attempt to strike Gilbert. Garcia intervened to help Gilbert restrain defendant. In the ensuing struggle, defendant kicked Garcia in the jaw and genitals, then scratched him on his left forearm. Garcia and Gilbert were able to subdue defendant and put her in a padded cell.

¶ 6 The presentence investigation report (PSI) showed that defendant did not have any prior felony convictions and did not have a juvenile record. Her record did show a number of traffic and misdemeanor violations, including convictions for domestic battery and driving under the influence of alcohol in 2009. The PSI showed that defendant had three children under the age of 10, all of whom were living with her.

¶ 7 The PSI further indicated that defendant had been taking one to three prescribed hydrocodone pills per day for the last two years. Defendant explained that her back was injured

when her former husband tried to kill her. Defendant also had a prescription for Ativan to alleviate her anxiety. Defendant previously smoked marijuana on a daily basis, but had stopped for approximately one year. Defendant denied abusing prescription medication. Defendant admitted to drinking occasionally, and felt that she could be an alcoholic. She was intoxicated at the time of the present offense. An attached mental health and substance abuse assessment indicated that defendant did not meet the criteria for dependence, but did recommend treatment for alcohol abuse.

¶ 8 The State acknowledged that because defendant was a first-time felony offender, probation would be appropriate in her case. The State requested the trial court sentence defendant to 90 days in county jail, along with a term of 48 months' probation. Defense counsel argued against jail time, pointing out that defendant was the sole caretaker for three young children.

¶ 9 In imposing the sentence, the trial court began: "Both sides agree that you should get probation and so do I. I don't on the face of this see why a prison sentence ought to be imposed." The court sentenced defendant to three years' probation, and explained that the conditions of probation mandate that defendant not break any laws and not have any illegal drugs in her body. The court further ordered defendant to continue her mental health treatment, and authorized the probation department to monitor her progress. The court also sentenced defendant to 90 days in jail, but suspended that sentence.

¶ 10 On February 24, 2014, the State filed a petition to revoke defendant's probation. The State attached to the petition a signed admission from defendant dated February 7, 2014, in which defendant admitted to using marijuana, Adderall, and Xanax without a prescription. She admitted to smoking marijuana on a daily basis for the previous two weeks, and had taken the

Adderall and Xanax within the month. She also explained that she was undergoing methadone treatment for opiate addiction.

¶ 11 On July 22, 2014, defendant made the same admissions in open court. Before accepting defendant's admission the trial court admonished her: "When you violate your probation you expose yourself to those same possible punishments because when you violate your probation you are re-sentenced for the original crime."

¶ 12 On August 20, 2014, defendant's probation officer, Julie Schippert, compiled a new PSI in anticipation of defendant's resentencing. Though the second PSI was substantially similar to the original PSI, it indicated that defendant's three children had been placed in foster care in 2013 as "the result of the mother's continued drug addiction and repeated DCFS contacts." Defendant stated that she had not seen her children in "like 6 months" and "may sign them over in August." Schippert also reported that she had seen defendant smoking a substance from a glass pipe. Schippert urged defendant to enroll in inpatient care, but defendant elected to continue with methadone treatment. Defendant was later admitted into inpatient rehabilitation in Chicago for one month. The PSI indicated that defendant had not followed through on any recommended aftercare.

¶ 13 The trial court held defendant's sentencing hearing on September 25, 2014. Defendant appeared in the custody of Kankakee County. The State called Schippert in aggravation. Schippert testified that she supervised defendant's felony probation, and that defendant reported regularly, but "struggle[d] to maintain her sobriety." Schippert explained that defendant abused alcohol and drugs, describing defendant as "strung out constantly." Presumably regarding defendant's substance abuse, Schippert opined: "There's going to be a bad end to [defendant's] life and it's probably going to be sooner than later." Schippert testified that defendant had

participated in inpatient rehabilitation, but that "it just didn't stick." Schippert stated that defendant had admitted to using drugs numerous times while on probation, aside from the admissions giving rise to the petition to revoke.

¶ 14 The defense called Brittany Cotter in mitigation. Cotter testified that she was a case management supervisor at Duane Dean Behavioral Health Center. She managed defendant's case. Cotter testified that defendant had made some progress; she was no longer using opiates, but continued to struggle "with sobriety with marijuana." With the exception of the last month, defendant had maintained regular attendance at group and individual counseling sessions. Cotter continued: "[W]e've not had any problems with her prescription medication in that since then, it's just been marijuana that she struggles with." Cotter testified that if defendant was willing, Cotter could arrange for her to participate in an inpatient program within two weeks. Upon further examination, Cotter testified that defendant regularly received methadone "to help her get off the opiates." Defendant's methadone dosage had increased since May of 2013.

¶ 15 During arguments, the State posited that defendant needed "some type of intensive intervention here." The State continued to emphasize defendant's struggles with addiction in its argument, stating: "[W]e just want her to stay with the program and get clean. Well, she's not doing that." The State also referenced the original offense, reminding the court: "That's [why] we are here today to talk about sentencing." The State concluded:

> "The court has tried a suspended sentence and a sentence of probation over the State's previous recommendation of a short term in [Department of Corrections (DOC)]. At a very minimum, your Honor, I would ask that the court impose the prior 90 day suspended sentence, but frankly given the testimony of the

> probation officer I don't know what that would do at this point. I don't know that there's really any hope for her on probation and that leads me to the only conclusion of standing here before you and asking for a sentence to the [DOC]. *** So we are talking about a sentence of 3 to 7 years. Thank you."

¶ 16 Defense counsel stressed that this was defendant's first felony. Counsel conceded that defendant's conduct that gave rise to the original conviction was "[i]ndeed very offensive," but pointed out that there was no lasting physical or financial harm to Officer Garcia. Argued counsel: "Perhaps [this] is not something to indicate she is a major danger to the community or the peace of society at large if she's free and on probation." Counsel also pointed out that defendant had completed two years and four months of her three-year probation without committing any "major criminal offenses." Counsel agreed that defendant had a drug problem. He argued that the methadone treatments had helped, and that defendant's primary problem was with marijuana. Counsel argued that inpatient rehabilitation would benefit defendant more than a term in county jail or the DOC.

¶ 17 Defendant began her allocution by declaring that she could pass a drug test that day. Defendant stated that she wanted to go to rehabilitation because she knew she had a problem with drugs. While her last rehabilitation stint lasted 30 days, defendant felt a 60 or 90-day program would be more helpful for her.

¶ 18 Before delivering the sentence, the trial court declared that it had considered the evidence, the PSI, the evidence in aggravation and mitigation, the arguments, and defendant's statement. It did not considering any pending or unresolved charges. The court continued:

> "We are not punishing a drug problem or an addiction. We are not punishing a drug offense today. When you are on probation and you violate your probation you are re-sentenced on the original crime. So what we are doing today is re-sentencing you for the Class 2 felony of aggravated battery, okay.
>
> Now, we've heard a lot of testimony about drug addiction because that is a central issue in this case. But I don't go along with this argument, well, it's only marijuana. Marijuana is illegal at least for now. The other thing about it is it's a violation of your probation in 2 different ways. One, because I said no illegal drugs in your body. And two, because you can't get it in your body without breaking the law. You have to possess it before you can use it so it's a repeated violation of probation."

¶ 19 The court also explained why it felt probation was no longer a viable option. Specifically, the court stated that the integrity of the probation program would be eroded if it "let people violate their probation and nothing happens, why should anybody do what I tell them when I put them on probation?" The court also declared that the probation department's limited resources were best spent on people for whom it could make a difference—a category which the court felt defendant did not fit.

¶ 20 Throughout its exposition, the court made multiple references to defendant's addiction. At one point, the court stated: "You are going to die just like your husband. Just like several other people around this town, you are going to die. And we've been trying to save your life and you've been fighting us the whole time." The court continued:

> "This is not the first drug case I've seen in court. It may be one of the top 10 in terms of the wreck a person makes of their life with drugs. There is no good way out of this. You are either going to stop or you are going to die. In the meantime all the people that count on you and care about you they pay, too.
>
> You know, it's bad enough you make a wreck of your own life with drugs, worse yet what you do to your kids. You know, when we started this case back in 2012 they wanted me to send you to prison then and we had a hearing and I listened to you and I didn't do it. I put you on probation even though the State wanted you to go to prison. *** One of the conditions [was] not use illegal drugs. Right out the window and I'm not going to excuse it because it's an addiction. ***
>
> Drugs are your problem. You are the solution. Not me, not probation, not Duane Dean ***."

¶ 21 The court further told defendant: "I'm not in the drug business. I'm in the motivation business ***. And the thing I'm thinking about is what is the best way to finally motivate you to kick the drug habit." The court concluded:

> "I'm going to find that having regard to the nature and circumstances of the crime and considering the history, character and condition of the offender that imprisonment is necessary to protect the public and to save your life and that if I gave you probation it would deprecate the seriousness of this crime. We are

> going to try something different. We are going to try something serious to try and salvage this wreck that you've made of your life. 5 years in the [DOC] is my sentence and I'm going to order substance abuse treatment for you. Now we will see if you really want to do it or not."

¶ 22 Immediately upon announcement of the sentence, defendant declared: "I want to appeal it." The trial court then explained to defendant her appeal rights. Following those instructions, defendant asked: "Where do I get the piece of paper to appeal?" The court advised defendant that she should first consult with defense counsel "about whether he wants to file any motions about the sentencing hearing."

¶ 23 The court then asked defense counsel if he wished to speak with his client about the appeal and postsentencing motions. Counsel responded: "Judge, to cut to the chase I was going to take her back and explain to her, however I don't think I would bother to file any post hearing motions here." The court then directed the clerk to file a notice of appeal.

¶ 24 ANALYSIS

¶ 25 On appeal, defendant argues that the trial court improperly based its sentence upon the conduct that gave rise to her probation revocation, rather than upon the underlying offense of aggravated battery. Defendant concedes that she failed to preserve this issue for review, but argues that relief should be granted under either the plain-error doctrine or ineffective assistance of counsel. Each of those arguments turns on whether any error was actually committed, so we will proceed directly to defendant's substantive argument.

¶ 26 In sentencing a defendant following the revocation of probation, a trial court must base its sentence on the original offense. *People v. Mitchell*, 53 Ill. App. 3d 1002, 1004 (1977).

However, the conduct causing the revocation of probation may be considered as evidence probative of a defendant's rehabilitative potential. *E.g.*, *People v. Vilces*, 186 Ill. App. 3d 983, 987 (1989). Thus, though our supreme court has never addressed the issue, the consensus among the appellate courts is that while the sentence must ultimately be imposed as a penalty for the original offense, the trial court may consider the probation conduct as a factor in its decision. A full examination of the record is necessary to determine if the trial court has erred in this regard. *Id.* at 986-87.

> "[A] sentence within the statutory range for the original offense will not be set aside on review *unless* the reviewing court is strongly persuaded that the sentence imposed after revocation of probation was *in fact* imposed as a penalty for the conduct which was the basis of revocation, and *not* for the original offense." (Emphases in original.) *People v. Young*, 138 Ill. App. 3d 130, 142 (1985).

¶ 27 Acknowledging the prevailing case law, defendant does not contend that the trial court's references to her drug use alone constitute error. That is, defendant concedes that references to the conduct giving rise to the probation revocation are not *per se* errors by the trial court. Instead, defendant argues, essentially, that the trial court went too far in its comments, that its persistent and passionate remarks about her drug use indicate that the basis for the sentence imposed was, in fact, her drug use. The trial court's repeated, explicit statements that the sentence was being imposed for aggravated battery undermine defendant's argument. Moreover, the court's comments on defendant's drug use was plainly invited by defendant herself, as they came only

after defendant had made drug use and recovery the main issue at the sentencing hearing through her mitigation witness and her allocution.

¶ 28 On two separate occasions, the trial court told defendant that the sentence imposed upon probation revocation would be for the original offense, and not the conduct giving rise to that revocation. The court explained this originally on July 22, 2014. Before delivering the sentence, the court explained it again, stating unequivocally:

> "We are not punishing a drug problem or an addiction. We are not punishing a drug offense today. When you are on probation and you violate your probation you are re-sentenced on the original crime. So what we are doing today is re-sentencing you for the Class 2 felony of aggravated battery, okay."

While the trial court obviously considered defendant's drug use at length, the record makes clear that the court was well-versed in the law concerning sentencing upon revocation of probation.

¶ 29 Defendant argues that while the trial court correctly recited the law, it nevertheless imposed a sentence for the conduct that gave rise to the probation revocation. In defendant's words: "Saying something does not make it so ***." We reject this argument. While it is often cited that the trial court is presumed to know the law, here no such presumption is necessary. The trial court explicitly stated the correct law. The record is clear that the trial court knew it was not sentencing defendant for drug offenses. It would strain credulity to believe that the trial court, knowing the law accurately, would—mere moments later—willfully misapply the law. We also note that at sentencing, defendant was in the custody of neighboring Kankakee County. The trial judge stated he did not even want to know what offense she was charged with in Kankakee.

¶ 30 The trial court's repeated statements that it was sentencing defendant for aggravated battery are particularly compelling given the broad latitude afforded to trial courts in sentencing. *E.g.*, *People v. Gutierrez*, 402 Ill. App. 3d 866, 900 (2010) ("[A] trial court has wide latitude in determining and weighing factors in mitigation or aggravation in imposing a sentence."). It is well-settled that "reliable evidence of serious uncharged offenses is also a proper, nonstatutory aggravating factor that must be taken in account in determining the appropriate sentence." *People v. Mertz*, 218 Ill. 2d 1, 85 (2005). The record shows that the trial court in the present case did exactly that, imposing a sentence for aggravated battery while finding defendant's constant drug abuse while on probation to be a factor in aggravation. Given all of the evidence presented regarding defendant's drug use, one would expect the trial court to do no less. A court's mention of a certain aggravating factor—whether upon revocation of probation or at original sentencing—does not mean that the court is actually imposing a sentence for the conduct that constituted that factor, rather than for the actual conviction. Accordingly, this court is not "strongly persuaded" that the trial court imposed its sentence as a penalty for defendant's probation conduct. *Young*, 138 Ill. App. 3d at 142.

¶ 31 Furthermore, we are compelled to point out the irony in defendant's argument on appeal. The one witness called by defendant at her sentencing hearing was her case manager at Duane Dean Behavioral Health Center. Cotter's testimony regarded defendant's drug addiction, continued usage, efforts to get clean, and potential for rehabilitation. Cotter insisted that defendant was no longer using opiates, and that her biggest problem was with marijuana. Yet Cotter also testified that not only was defendant receiving methadone—an opiate itself—but defendant's dosage of that opiate had been increasing over time. In her own allocution, defendant emphasized her desire to overcome her addictions and discussed what treatment programs she

believed she would most benefit from. Even defense counsel repeatedly referenced defendant's drug problems, arguing that the methadone treatment had been successful and that defendant only needed rehabilitation for her marijuana addiction. Thus, defendant and her attorney clearly played a significant role in putting her own drug use and rehabilitation at the forefront of her sentencing hearing. The record makes clear that the trial court simply responded to her arguments for leniency, all based upon her drug addiction.

¶ 32 Because we find that the trial court committed no error, we need not engage in plain-error analysis. *E.g.*, *People v. Hillier*, 237 Ill. 2d 539, 549 (2010) (defendant cannot meet burden of showing plain error where "the face of the record shows no error, let alone a clear and obvious one.").

¶ 33 The lack of any error similarly undermines defendant's claim of ineffective assistance of counsel. Defendant maintains that counsel was ineffective for failing to file a postsentencing motion that would have preserved the present issue for appeal. However, having already found that defendant's sentencing issue is of no merit here, it follows that the issue would have been similarly meritless if brought in a postsentencing motion. It is axiomatic that counsel is not constitutionally ineffective for failing to bring a meritless motion. *E.g.*, *People v. Easley*, 192 Ill. 2d 307, 329 (2000) ("[I]t is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong."); see also *People v. Ivory*, 217 Ill. App. 3d 619, 625 (1991) (finding no ineffective assistance of counsel because there was no error).

¶ 34 CONCLUSION

¶ 35 For the foregoing reasons, we affirm the judgment of the circuit court of Iroquois County.

¶ 36 Affirmed.

¶ 37 JUSTICE WRIGHT, specially concurring.

¶ 38 By statute, I recognize that probation "shall" be imposed unless contraindicated by two statutory considerations, namely, the nature of the offense *and* the history, character, and condition of this offender. See 730 ILCS 5/5-6-1(a) (West 2010). As defendant correctly points out, the nature of the offense did not change between the time of the first and second sentencing hearings. However, defendant ignores the reality that the trial court had more information about defendant's character and condition at the time of the second sentencing hearing.

¶ 39 I respectfully observe the trial court carefully considered defendant's most recent history before imposing the sentence in this case. I agree that the trial court correctly concluded that defendant's most recent pattern of misconduct was destined to produce injurious consequences to the public, in spite of the rehabilitative court services she was offered while on probation.

¶ 40 For this reason, I would affirm the trial court's decision.