2016 IL App (4th) 140827-U

NO. 4-14-0827

FILED
November 16, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Logan County
TYLER R. BALSLEY,	)	No. 12CF11
Defendant-Appellant.	)	
	)	Honorable
	)	William A. Yoder,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Knecht and Justice Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion when it resentenced defendant after the revocation of his probation.

¶ 2 In December 2012, defendant, Tyler R. Balsley, pleaded guilty to aggravated driving under the influence (DUI) (625 ILCS 5/11-501(a)(6) (West 2010)) and was sentenced to 48 months' probation (625 ILCS 5/11-501(d)(2)(G) (West 2010)). In August 2013, the State filed a petition to revoke probation. In January 2014, defendant admitted violating his probation, and in March 2014, the trial court resentenced defendant to 10 years in the Illinois Department of Corrections (DOC). Defendant appeals, arguing remand for resentencing is appropriate because the trial court (1) erred by improperly punishing defendant for the conduct that led to the revocation of probation, not for the underlying offense; and (2) abused its discretion when it resentenced defendant to 10 years in prison. We disagree and affirm.

¶ 3 I. BACKGROUND

¶ 4 In February 2012, the State charged defendant by information with two counts of aggravated DUI (625 ILCS 5/11-501(d)(1)(F) (West 2010)) (counts I and II) and one count of reckless homicide (720 ILCS 5/9-3 (West 2010)) (count III). Richard Pedota was killed when defendant hit Pedota's motorcycle. In November 2012, the State filed a "Motion to Nolle Pros Cts. II and III."

¶ 5 On December 11, 2012, defendant requested the trial court to engage in a settlement conference pursuant to Illinois Supreme Court Rule 402(d) (eff. July 1, 2012). After admonishing defendant pursuant to Rule 402(d), a settlement conference was held in chambers.

¶ 6 On December 17, 2012, the trial court was advised defendant was willing to enter into a fully negotiated plea agreement whereby he would plead guilty to count I, serve 180 days in the county jail, and be placed on 48 months' probation. The court admonished defendant the sentencing range for this Class 2 felony was a term of not less than 3 years and not more than 14 years, unless the court determined extraordinary circumstances existed which required imposition of probation, which would be a minimum of 48 months. The trial court inquired whether the proposed plea agreement had been "vetted with the victim's family." The State advised the agreement had been "vetted for a significant period of time," Pedota's family was in court, and "[t]hey are in agreement with this [f]ully [n]egotiated [p]lea [a]greement."

¶ 7 The factual basis for the plea stated, on September 16, 2011, at approximately 5:30 a.m., the Illinois State Police (ISP) were dispatched to the southbound lanes of Interstate 55 in Logan County, Illinois, in response to a car versus a motorcycle crash. Responding officer Anthony Maro interviewed defendant at the hospital, where he observed a slight odor of an alcoholic beverage on defendant's breath. Defendant told Maro he had been in Bloomington the

night before and had a couple of drinks. He stopped drinking at approximately 11:30 p.m. He got up to return to Lincoln College with a number of other individuals for wrestling practice. Defendant admitted he was traveling 75 miles per hour. He saw two motorcycles. When he attempted to pass them, he moved into the left lane, lost control, made a sharp right-hand turn, and struck the motorcycle driven by Pedota, resulting in Pedota's death. Defendant submitted to blood and urine samples, during the course of which defendant admitted he had smoked marijuana two weeks prior. Defendant passed all field sobriety tests. The blood sample revealed no alcohol. The urine sample showed the presence of tetrahydrocannabinol (THC) which is a metabolite of cannabis. The other individuals in the vehicle with defendant confirmed being at a party with defendant but stated they had all smoked "resin." During the course of a second interview, defendant admitted having smoked "resin" the night before.

¶ 8 The trial court found a sufficient factual basis existed to support the plea and defendant's plea was voluntary, and it concurred with the proposed plea agreement. The court further stated:

> "I concurred in this proposed [p]lea [a]greement for a couple of reasons. One is your youth. [Defendant was 18 years old at the time of the accident.] You are a young man. Another is what I see to be a potential for you to do something good here, so that there is perhaps something constructive that can come of this, and the third thing is that you have no prior criminal history.
>
> You are being given a significant second chance here, so make the most of that opportunity. Do it for yourself. Importantly, do it to honor Mr. Pedota's memory."

¶ 9 On August 15, 2013, the State filed a petition to revoke defendant's probation, alleging defendant violated the conditions of his probation when, on June 16, 2013, he had "willfully committed the offense of [u]nlawful [c]onsumption of [a]lcohol by a [m]inor in that said defendant, a person under 21 years of age, knowingly consumed an alcoholic liquor in Sterling, Whiteside County, Illinois," and "willfully failed to refrain from the possession and use of alcoholic beverages." A different judge than the one who issued the original sentence of probation handled the revocation and resentencing hearings.

¶ 10 On January 7, 2014, after the trial court admonished defendant of the potential penalties, including "anything within the range of penalties for [c]ount I," defendant admitted the allegations of the petition to revoke. The factual basis for the admission stated, on June 16, 2013, at approximately 1:30 a.m., Sterling police officer Ryan Potthoff and other officers went to an address in Sterling, Illinois, to investigate a possible underage drinking party. Upon arrival, the officers observed several subjects exit the residence and run. During a scuffle in the street, defendant fell to the ground. Potthoff approached defendant and smelled the odor of alcohol emanating from defendant. Defendant stated he was 20 years old and acknowledged, while in the residence, he drank five 12-ounce beers and a shot of gin. The trial court accepted the admission and set the matter for resentencing.

¶ 11 At the March 17, 2014, sentencing hearing, the trial court had before it the presentence investigation report (PSI), several victim-impact letters, and several letters written on defendant's behalf. The State was allowed to proffer the potential testimony of Sergeant Todd Messer of the Sterling police department. Messer would have testified, on February 13, 2014, at approximately 1:57 a.m., he encountered defendant as the driver of a vehicle in Sterling, Illinois. Defendant did not possess a valid driver's license and was unable to provide proof of valid

insurance. Messer arrested defendant for driving without a valid license. When Messer searched defendant, he found two Ziploc bags, one containing a digital scale and the other containing approximately nine grams of green plant material, which field tested positive for cannabis. Messer also searched the vehicle and found an open bottle of vodka on the front passenger floorboard, which the passenger stated was his. Defendant ultimately admitted the cannabis and scale were his.

¶ 12 Defense counsel proffered facts contained in the ISP investigation reports of the original incident because the resentencing judge was not the original sentencing judge. In reiterating the facts about the accident, counsel noted in particular the battery of tests conducted by ISP, which showed no indication defendant was impaired at the time of the accident. Defendant registered a 0.04 on the portable Breathalyzer machine and admitted he had smoked cannabis "resin" the night before the accident. Defendant was cooperative and submitted to lab tests. He was not arrested for DUI at that time. A couple of months later, the lab results showed "no volatiles were detected in the blood," but the urine samples were positive for THC. No alcohol was detected in the blood samples.

¶ 13 According to the testimony of Larry Balsley and Marcela Dingman, defendant's father and mother, he had been dealing with mental-health issues since he was in high school, and he had attempted suicide in 2009. Defendant was granted a full-tuition scholarship to Lincoln College due to his wrestling abilities. The fatal accident happened during defendant's freshman year in college. After the accident, defendant returned home with Dingman. He continued to struggle with depression and was diagnosed with anxiety. Defendant returned to college in January but was not able to stay more than a month before he returned home. Back home, defendant would sleep all day and would not come out of his room. He would not talk to

Balsley or Dingman. He could not ride in a car for a long time. He went to counseling at Sinnissippi for outpatient treatment once a week, along with narcotics anonymous (NA) meetings two to three times a week. Later, following the filing of the petition to revoke, defendant entered Rosecrance for inpatient treatment for drugs and alcohol. He seemed to improve while at Rosecrance and was successfully discharged. Defendant continued to take medication for depression, attention deficit/hyperactivity disorder (ADHD), and post-traumatic stress disorder (PTSD). After his release from Rosecrance, defendant returned to Sinnissippi for counseling and attended NA meetings again. However, defendant's mental health declined again and he started exhibiting depressive behaviors. He started sleeping excessively again and was very angry. Defendant was arrested for possession of cannabis after his release from Rosecrance. Balsley felt jail was not the answer; rather, defendant needed professional help with his alcohol and drug problem. Dingman saw her son as a broken child since the accident and believed he deserved another chance.

¶ 14 Defendant testified he was on medication for PTSD, major depression, ADHD, and narcolepsy. He stated he started feeling there was something wrong with him in fifth grade. He was constantly picked on and made fun of because he was in special education classes. As a result, he was angry and felt he needed to defend himself. In his sophomore year in high school, he began having depressive issues, feeling he was not loved. Because of issues with his girlfriend, he attempted suicide in 2009.

¶ 15 After the accident, defendant lost the love of his life—wrestling. He felt like "garbage to the world," like a "murderer." Defendant stated he slept for a whole week, showered only twice, and barely ate. He did not want to talk to anyone. Defendant returned to school for a short while but could not stay there. When he returned home, he felt everyone looked at him

differently. He eventually went to outpatient counseling two times a week at Sinnissippi for mental-health treatment and alcohol classes. He also went to inpatient treatment at Rosecrance. There, he learned how he was self-medicating with alcohol and drugs because of his mental-health issues. He admitted he had been using drugs before the accident.

¶ 16 Defendant testified after the accident, his drug and alcohol use increased. After he was released from jail in May 2013, he started going to NA and Alcoholics Anonymous meetings. However, he continued to use drugs and alcohol because he felt that was the only way he could get through the day without thinking about suicide. After he got out of Rosecrance, defendant did well, but he declined again a couple of weeks later when a friend committed suicide. He started self-medicating again, which explained the positive cannabis tests.

¶ 17 Defendant apologized to Pedota's family. He stated he understood they were suffering but assured them he did not mean for the accident to happen. He stated he did not understand what was wrong with him. He thought he could get it right the first time, but he felt his addiction was too strong. He asked for their forgiveness.

¶ 18 On cross-examination, defendant admitted while the original case was pending, he was using cocaine on a daily basis. He did not go out of the house to obtain the cocaine; he had it delivered there. Upon release from the county jail, he started outpatient therapy at Sinnissippi but was arrested in June 2013 for unlawful consumption of alcohol. He was at an underage drinking party. Although he rarely left the house, he heard about the party from a friend, and he did leave the house that night. In November 2013, defendant went to Rosecrance. The day before, he consumed alcohol, cannabis, and cocaine. He was successfully discharged on December 27, 2013. In February 2014, knowing the petition to revoke his probation was pending, defendant drove on a revoked license and possessed cannabis.

¶ 19 The PSI reflected, in addition to the June 16, 2013, incident involving possession and use of alcohol, which resulted in the petition to revoke his probation, defendant further violated the terms of his probation on several subsequent occasions while the revocation proceedings were pending. These included (1) testing positive for the presence of cannabis on August 21, 2013; (2) admitting he smoked cannabis on October 17, 2013; (3) testing positive for the presence of alcohol on January 15, 2014; (4) his arrest on February 13, 2014, for driving while his license was revoked, operating an uninsured vehicle, unlawful possession of cannabis (2.5 to 10 grams), and unlawful possession of drug paraphernalia; and (5) testing positive for the presence of cannabis on March 7, 2014.

¶ 20 The State recommended a 12-year sentence to DOC, not because of one technical violation in 12 months, but because of the nature of the offense and the repeated violations of the probation order, despite the opportunities defendant was given to turn his life around and become a productive citizen.

¶ 21 Defense counsel noted this case involved a fatal accident caused by defendant, an unimpaired driver. Only through defendant's cooperation with the investigation did it come to light he had a trace amount of THC in his urine. The DUI statute under which defendant was charged allowed for a sentence of probation. Defense counsel argued his client had suffered from mental illness for many years, and his abuse of alcohol and drugs was closely tied to his mental illness. Counsel pointed out defendant had never been violent and had no prior record, not even a speeding ticket. (Defendant's PSI reflects convictions for disregarding a stop sign in 2010 and speeding 21-25 miles per hour over the speed limit in June 2011.) Counsel recommended three years in DOC, which would be served at 85%.

¶ 22 In allocution, defendant stated he was sorry for the situation. He stated he was a

"broke human being." He felt he had a grasp on his addiction, but he later realized he did not. He indicated he had "full remorse for the family." He felt 12 years in DOC would just serve to make him "more crazy."

¶ 23 The trial court indicated it had considered the evidence, the PSI, the letters in mitigation, the victim-impact statements, the testimony given at the hearing, the statutory factors in aggravation and mitigation, the proffers of the State and defense counsel, and defendant's statement in allocution. The court stated:

> "The bottom line in a case like this is that there are two devastated families here. There is the family of the victim who no matter what happens, no matter if this [c]ourt imposes the maximum or the minimum sentence, is not going to have [Pedota] back, and that's the tragedy of this type of an offense.
>
> And we have the Balsley family who no matter if I impose the maximum or the minimum sentence, has testified that [defendant] is not the person that he was prior to the offense. It would be hopeful that someday he could, through some counseling or other treatment, return to the same young man that his family knew and knows. But this is an offense where neither side is getting what they want when I impose sentence in this case. And it's an absolute tragedy. *** And the drug use in this case is extensive, both prior and after [the incident].
>
> And if I have called this an accident, I apologize. This is not an accident in the [c]ourt's eyes. Since Richard Pedota's death

there has been extensive drug use, and prior to his death there was extensive drug use. There may be some psychological issues, and *** there is certainly a need, obvious need, in this [c]ourt's eyes for some form of mental[-]health treatment.

*** And it's really a shame because if you think about it, you had a family of a person whose death was a result of your actions. And they had not maybe forgiven you, but they had given you a chance to do some good. *** But this is what comes from illegal drug use, from alcohol use, from not abiding by the law. And you could have taken this really tragic event and turned it into a positive that could have been—and that's the only silver lining that I can see coming from any of this, that could have come from any of this. You could have done that, and you might have been able to prevent some other young kid from following and making the same mistakes that you made and not having to live with them. ***

And what you did from that point forward was anything but. You continue to use. Apparently continued to drive. And the combination of those two things is a deadly combination."

¶ 24 The trial court found a period of probation would deprecate the seriousness of the offense and be inconsistent "with the means of justice." The court further found a term in DOC was necessary for the protection of the public and a significant sentence was necessary due to the nature of the offense. The court resentenced defendant to 10 years in DOC, including alcohol

and drug treatment, as well as mental-health treatment, given his stated suicidal ideations.

¶ 25 The trial court ended by stating, "This is the first sentence I have ever imposed where I don't see a silver lining at all, period. *** A young man with no prior record makes bad decisions and ends up in this situation is just—it's a shame. And a family ends up without a husband, father, grandfather, friend."

¶ 26 On April 17, 2014, defendant filed a *pro se* motion for a reduction of his sentence. He argued his sentence should be reduced because, "I have major depression and PTSD due to the car accident I am serving time for. Also I am young. I needed a little time to think about my actions, not to mature in [DOC]. I think the amount of time I received for my age and crime commited [*sic*] was unfair."

¶ 27 At the September 18, 2014, hearing on the motion to reduce his sentence, defense counsel noted, at a resentencing hearing for a violation of probation, the offender is being punished for the underlying offense, not the probation violation. Because this case went from "essentially zero to almost a top end of the sentencing range," counsel argued, "there was a commingling of rationale as to the initial offense conduct and then the offense conduct that occurred while [defendant] was on probation and did, in fact, violate his probation." Counsel argued the sentence was "extreme" in light of the fact defendant was only 20 years old, had no criminal history beyond two traffic violations, and the underlying offense was essentially a strict-liability offense. Counsel further argued one of the goals of sentencing, deterrence of others, would not be accomplished because of the unique nature of the offense, *i.e.*, defendant was not impaired at the time of the incident but was guilty of aggravated DUI simply because of the presence of cannabis in his urine. Counsel also argued resentencing defendant to 10 years in DOC did not cater to the sentencing goal of rehabilitation. Counsel also noted defendant's

positive attributes. Defendant had been attending college and was a talented athlete with incredible drive and self-discipline. But defendant also had monumental addiction problems.

¶ 28 The State argued defendant's probation violations were appropriate for the trial court to consider even though he was not being resentenced for the probation violations. These included eight violations after defendant was released from the county jail in May 2013, including attending an underage drinking party within one month of his release to probation. The State argued the sentence was necessary to protect the public from defendant and for deterrence.

¶ 29 The trial court noted it had considered all the relevant factors at the time of resentencing. Although the original sentence was to probation, that sentence was the exception to the rule and reached after the victim's family acquiesced and the parties reached a negotiated disposition. However, the court determined defendant's conduct after the imposition of probation, almost daily use of various drugs, as well as alcohol consumption and driving, put the public at serious risk. Further, the court noted the extraordinary opportunity given to defendant when he was placed on probation and how he failed to take advantage of that opportunity. The court stated, "His conduct put him in the situation that he's in, and this [c]ourt believes [it] considered all the relevant factors, all the relevant evidence, considered the original conduct in this case." Therefore, the court found it "made the appropriate considerations as far as protection of the public, deprecation of the seriousness of this offense should a lesser sentence be imposed." The court then denied the motion to reduce the sentence.

¶ 30 This appeal followed.

¶ 31 II. ANALYSIS

¶ 32 A. Forfeiture

¶ 33 Initially, we note the parties acknowledge defendant's *pro se* motion to reconsider his sentence did not preserve the claim the trial court improperly resentenced him for his conduct while on probation. However, the parties agree, during the hearing on the motion to reconsider, defense counsel noted the "wildly divergent pendulum swing [from probation] to the upper threshold of the sentencing range" and argued, on resentencing, defendants "are not being punished by the [c]ourt for the violations of the probation." The State did not object to such an argument, but it argued defendant was not being punished for the probation violations. Defendant maintains, if this court finds he did not properly preserve the issue, we should address it as plain error.

¶ 34 In *People v. Reed*, 177 Ill. 2d 389, 393, 686 N.E.2d 584, 586 (1997), the supreme court held section 5-8-1(c) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-8-1(c) (West 1996)) "require[s] sentencing issues be raised in the trial court in order to preserve those issues for appellate review." Section 5-8-1(c) of the Unified Code is now codified under section 5-4.5-50(d) of the Unified Code (730 ILCS 5/5-4.5-50(d) (West 2014)) and states as follows: "A defendant's challenge to the correctness of a sentence or to any aspect of the sentencing hearing shall be made by a written motion filed with the circuit court clerk within 30 days following the imposition of sentence." The *Reed* court explained the rationale behind the statute as follows:

> "Requiring a written post-sentencing motion will allow the trial court the opportunity to review a defendant's contention of sentencing error and save the delay and expense inherent in appeal if they are meritorious. Such a motion also focuses the attention of the trial court upon a defendant's alleged errors and gives the

appellate court the benefit of the trial court's reasoned judgment on those issues." *Reed*, 177 Ill. 2d at 394, 686 N.E.2d at 586.

¶ 35 Here, the trial court was apprised of defendant's alleged errors at resentencing and the court was afforded an opportunity to review those contentions of error. Therefore, defendant has preserved the issues for appeal and there is no need to undertake a plain-error analysis.

¶ 36 B. Conduct Considered in Resentencing

¶ 37 Defendant first argues the trial court abused its discretion when, after revoking his probation, the court resentenced him to 10 years in DOC. Defendant contends the court improperly punished him for conduct while on probation rather than resentencing him for the initial, underlying offense. The State argues defendant's conduct on probation may be considered during sentencing as illustrative of defendant's rehabilitative potential. We agree with the State and find no error occurred.

¶ 38 A trial court has wide latitude in fashioning a sentence and that sentence will not be reversed absent an abuse of discretion. Once the court finds a defendant has violated a condition of probation, it "may impose any other sentence that was available *** at the time of initial sentencing." 730 ILCS 5/5-6-4(e) (West 2012)); *People v. Risley*, 359 Ill App. 3d 918, 920, 834 N.E.2d 981, 983 (2005). "[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, 485 N.E.2d 443, 450 (1985). The trial court's remarks "must be taken in context, and read in their entirety, including arguments of counsel." *Id*.

¶ 39 Defendant was originally charged with aggravated DUI, a Class 2 felony "for which the defendant, unless the court determines that extraordinary circumstances exist and require probation, shall be sentenced to: (i) a term of imprisonment of not less than 3 years and not more than 14 years if the violation resulted in the death of one person" (625 ILCS 5/11-501(d)(2(G) (West 2010)). Thus, the court was authorized to resentence defendant to 10 years' imprisonment.

> "Misdeeds occurring up to the time of sentencing, whether before the finding of guilty or subsequent, are relevant *** to the defendant's 'history and character' ***. [Citations.] An analysis which suggests that the trial court (1) cannot consider the conduct which resulted in the probation being revoked, or (2) cannot consider such conduct past a certain point in the sentencing hearing, or (3) that thereafter a sentencing judge must specifically state that he nevertheless is sentencing the defendant solely on the basis of the original offense—and has considered the conduct which was the basis for the revocation only to the extent of the defendant's rehabilitative potential—is not only without merit but reflects a head-in-the-sand attitude. When the trial court originally imposed the sentence of probation, it made that determination on the basis of all of the records and reports available. Conduct which leads to revocation of probation has been regarded as a 'breach' of the court's trust, or as otherwise causing the court to lose confidence in the defendant's rehabilitative potential." *Young*, 138

Ill. App. 3d at 140, 485 N.E.2d at 448-49.

¶ 40 Here, when defendant was originally sentenced, no PSI was compiled. The trial court participated in the Rule 402(d) settlement conference, the specifics of which were not recorded, and agreed to impose a sentence of probation. It is unknown if the original sentencing judge was made aware of defendant's history of drug and alcohol abuse prior to the fatal incident and prior to agreeing to a sentence of probation. However, the judge made it clear to defendant he was "being given a significant second chance" and should "make the most of that opportunity," not only for himself, but "to honor Mr. Pedota's memory."

¶ 41 At the revocation proceedings, the PSI and defendant's own admissions reflected the following. Defendant self-reported smoking cannabis on a daily basis and drinking alcohol every weekend during his junior and senior years of high school, but he refrained from smoking cannabis during the wrestling season. However, he also reported he smoked crack cocaine two to three times a week during wrestling season of his junior year to help cut his weight. He also snorted cocaine twice a month during his junior year and every weekend during his senior year of high school. He self-reported smoking cannabis three times a week and drinking alcohol four to five times a week during the fall semester at Lincoln College. He also used "ecstasy" (methylenedioxymethamphetamine (MDMA)).

¶ 42 In the three months between the fatal incident on September 16, 2011, and the probation sentence on December 17, 2012, defendant admitted he was using cocaine daily and drank alcohol three times a week. He was in the county jail from December 28, 2012, to May 19, 2013. On June 16, 2013, he was arrested for underage drinking. The petition to revoke his probation was filed on August 15, 2013. He tested positive for cannabis on August 21, 2013. Defendant self-reported the last time he had used "molly," the crystallized form of MDMA, was

in September 2013. On October 17, 2013, he admitted smoking cannabis.

¶ 43 On November 7, 2013, the day of a status hearing, defendant admitted cannabis use two to three times in the past month and cocaine use weekly. On November 13, 2013, he reported he was smoking cannabis and "spice" daily, using cocaine occasionally, and using ecstasy and acid occasionally. On November 18, 2013, defendant underwent an evaluation at Rosecrance. He self-reported he used alcohol, cocaine, and cannabis on November 19, 2013. On November 20, 2013, he was admitted to Rosecrance, where he self-reported smoking as much cannabis as possible right after meeting with his probation officer in an attempt to avoid failing the next drug test. On December 27, 2013, defendant was successfully discharged from Rosecrance.

¶ 44 On January 7, 2014, he admitted the allegations of the petition to revoke. On January 9, 2014, he underwent a clinical assessment at Sinnissippi. He tested positive for alcohol on January 15, 2014, and admitted drinking alcohol on January 13, 2014, while he was undergoing outpatient treatment at Sinnissippi. On February 13, 2014, defendant was arrested for driving on a revoked license, driving an uninsured vehicle, unlawful possession of cannabis, and unlawful possession of drug paraphernalia. On February 23, 2014, he admitted cannabis use. On February 25, 2014, defendant was unsuccessfully discharged from Sinnissippi for failure to maintain contact. He tested positive for cannabis on March 4, 2014, just a few days before his resentencing hearing.

¶ 45 "[A] defendant whose conduct on probation reflects poorly on his rehabilitative potential may be given a sentence more severe than the one which the court initially imposed." *People v. Turner*, 233 Ill. App. 3d 449, 456-57, 599 N.E.2d 104, 110 (1992). Here, the resentencing judge was faced with a defendant who had a significant substance-abuse history

while in high school and college and was involved in an incident resulting in someone's death. Despite that tragedy, and despite being involved with a multitude of treatment programs for alcohol and drugs, defendant continued abusing drugs and alcohol right up to the time of resentencing. These are not facts the court could or should have ignored in fashioning a sentence which addressed the seriousness of the original offense, defendant's history and character, and defendant's rehabilitative potential.

¶ 46 Although the trial court discussed defendant's substance-abuse history, his mental-health issues, and the various violations of his probation, it did so within the context of the opportunity defendant was given to stay out of trouble and his inability to take advantage of that opportunity. The court also noted, despite the opportunity given to defendant by Pedota's family to turn this tragic event into a positive by honoring the memory of Pedota, defendant failed to do so. The court stated a period of probation would deprecate the seriousness of the offense and be inconsistent with the ends of justice. The court further stated a term in DOC was necessary to protect the public, and a significant DOC sentence was necessary due to the nature of the offense.

¶ 47 Considering the trial court's comments in their entirety, the record demonstrates the court considered the original offense as the crime for which the sentence was imposed. See *People v. Varghese*, 391 Ill. App. 3d 866, 877, 909 N.E.2d 939, 948 (2009). Therefore, this court is not persuaded the sentence was in fact imposed to punish defendant for his conduct while on probation. The record reveals ample evidence to support the trial court's resentencing determination, and, accordingly, this court will not disturb the trial court's exercise of its discretion.

¶ 48 Further, with regard to defendant's argument his sentence should be reviewed as

to whether "the proportionality of the offense to the sentence was consistent with that of other defendants with similar criminal backgrounds," our supreme court has emphasized "[t]he fact that a lesser sentence was imposed in another case has no bearing on whether the sentence in the case at hand is excessive *on the facts of that case*." (Emphasis in original.) *People v. Fern*, 189 Ill. 2d 48, 56, 723 N.E.2d 207, 211 (1999). Thus, the sentences received by other offenders cannot serve as a basis for finding this defendant's sentence excessive. *Id.*; see also *People v. Terneus*, 239 Ill. App. 3d 669, 677, 607 N.E.2d 568, 573 (1992) (rejecting the "comb the books" approach to find a handful of cases presenting lesser sentences for the same statutory offense). Therefore, we decline to participate in a comparison of defendant's sentence to that of other defendants.

¶ 49 C. Excessive-Sentence Claim

¶ 50 Defendant also argues the trial court abused its discretion in resentencing him to 10 years' imprisonment. Specifically, defendant contends his sentence (1) was disproportionate to the nature of the offense and "failed to achieve the deterrence goal of punishment," and (2) did not comport with the overwhelming mitigating evidence of his potential for rehabilitation.

¶ 51 The sentence for a defendant convicted of aggravated DUI resulting in the death of one person is 3 to 14 years in prison "unless the court determines that extraordinary circumstances exist and require probation." 625 ILCS 5/11-501(d)(2)(G) (West 2012). The State requested a sentence of 12 years' imprisonment. The trial court imposed a 10-year prison sentence, which is well within the statutorily permissible range for the offense. "A sentence within statutory limits will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense." *Fern*, 189 Ill. 2d at 54, 723 N.E.2d at 210. A reviewing court must afford great deference to the trial court's

judgment regarding sentencing because the sentencing judge, having observed the defendant and the proceedings, is in a far better position to consider factors such as the defendant's credibility, demeanor, general moral character, mentality, social environment, and habits. In contrast, the reviewing court must rely on a "cold" record. *People v. Romero*, 387 Ill. App. 3d 954, 978, 901 N.E.2d 399, 420 (2008) "Thus, '[i]n considering the propriety of a sentence, the reviewing court must proceed with great caution and must not substitute its judgment for that of the trial court merely because it would have weighed the factors differently' [citation], and it may not reduce a defendant's sentence unless the sentence constitutes an abuse of the trial court's discretion [citation]." *Id.* (quoting *Fern*, 189 Ill.2d at 53, 723 N.E.2d at 207).

¶ 52 Defendant contends the sentence was excessive considering the nature of the offense because he was not impaired by the cannabis detected in his urine and, therefore, the accident was one he "would not have been able to avoid even if his urine was completely free of THC." However, the circumstances of this incident show otherwise. Defendant was partying the night before in Bloomington, Illinois, consuming alcohol and smoking cannabis. He went back to his girlfriend's residence between 11:30 p.m. and 12:30 a.m. and left Bloomington between 4:45 and 5:15 a.m. to hurry back to Lincoln, Illinois, for wrestling practice at 6 a.m. He admitted he was driving 75 miles per hour when he tried to pass two motorcycles, went off onto the soft shoulder of the left lane, overcorrected by making a sharp right-hand turn, and struck Pedota's motorcycle, killing him. This incident was certainly avoidable had defendant not been speeding on little sleep.

¶ 53 Defendant further argues the trial court failed to give proper weight to the mitigating factors, *i.e.*, his (1) age, (2) status as a college athlete, (3) lack of impairment, (4) full cooperation with the police, (5) lack of a criminal record, (6) expressed remorse, and (7) life-

long struggle with mental-health and substance-abuse issues. When mitigating factors are presented, the trial court is presumed to have considered them absent an explicit indication in the record to the contrary. *People v. Halerewicz*, 2013 IL App (4th) 120388, ¶ 42, 2 N.E.3d 333. Further, a trial court need not articulate the process by which it determined the appropriateness of a given sentence or set forth every reason or the weight it gave each factor considered in determining a defendant's sentence. Nor does the existence of mitigating factors require the trial court to reduce a sentence from the maximum allowed. *Id.*

¶ 54 Here, the trial court was made aware of the above-cited mitigating factors. In sentencing defendant, the trial court stated it considered "the evidence in this case, the [PSI], the letters both in mitigation and victim-impact statements that have been submitted along with the [PSI], *** the evidence of witnesses that have testified today, *** statutory factors in aggravation and mitigation, *** the proffers of both counsel, * * *along with the defendant's statement in allocution." The court noted defendant's mental-health issues and the fact he had no prior serious record. However, the court also noted defendant's extensive drug and alcohol use both before and after the fatal incident, which the court specifically stated it did not see as an "accident." The court indicated the sentence it imposed was to protect the public from defendant and to deter him and others from driving under the influence of alcohol and/or drugs. But the court also found "the nature of the offense" required "a significant sentence." Keeping in mind the great deference afforded to the trial court, we find the court did not abuse its discretion in sentencing defendant to 10 years in prison.

¶ 55 III. CONCLUSION

¶ 56 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this

appeal.

¶ 57 Affirmed.