2018 IL App (1st) 180331-U

SIXTH DIVISION
Order filed: July 6, 2018

No. 1-18-0331

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

In re PHAZAHN D., a Minor,	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	Cook County
	)	
Petitioner-Appellee,	)	
	)	
v.	)	No. 17 JD 00362
	)	
Phazahn D.,	)	Honorable
	)	Lana Charisse Johnson,
Respondent-Appellant).	)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 *Held*: We vacated those portions of the trial court's sentencing and probation orders prohibiting the respondent from having "gang contact" and engaging in "Gang Posting on Social Media" where those conditions had a valid relationship to his rehabilitation, but were overbroad and thus unreasonable so as to constitute plain error; sentencing and probation orders modified to reflect an award of presentence custody credit and the correct number of community service hours.

¶ 2 Following a bench trial, the respondent, Phazahn D., was adjudicated a delinquent minor

for the offense of armed robbery, and was sentenced to 2 years of probation and 30 hours of community service.[1] On appeal, the respondent argues that the conditions of his probation relating to in-person and online gang contact were unconstitutional because they were overbroad. He also argues that his sentencing order should be modified to reflect credit for the time he served in secure and non-secure custody, and that his probation order should be modified to reflect the correct number of community service hours he was mandated to perform as a condition of his probation. For the following reasons, we affirm in part, vacate in part, and remand. We also modify the respondent's sentencing and probation orders.

¶ 3 In the petition for adjudication of wardship, the State alleged that, on or about February 11, 2017, the respondent committed, *inter alia*, armed robbery (720 ILCS 5/18-2(a)(2) (West 2016)).

¶ 4 Following his arrest in connection with the February 11, 2017, incident, the respondent was held in juvenile detention for two days. On February 14, 2017, he was released on electronic home monitoring, which he remained on until March 17, 2017.

¶ 5 In December 2017, the matter proceeded to a joint bench trial for the respondent and the co-respondent, J'Lavon T.,[2] where the following evidence was adduced. At approximately 10 a.m. on February 11, 2017, the victim, Jonathon Todd, met an acquaintance at a store in Chicago. The acquaintance led Todd to the basement of an abandoned building where the respondent and two other individuals "grabbed" him. The respondent drew a gun and took Todd's cell phone, and one of the other individuals punched Todd in the face. After the four "boys" fled, Todd contacted the police. At 10:30 a.m., the police apprehended the respondent, and Todd identified him as one of

[1] Although the probation order mandates the respondent to perform 40 hours of community service, it should be 30 hours for the reasons we discuss *infra*.

[2] J'Lavon T. is not a party to this appeal.

the individuals who robbed him. Todd also identified the respondent in court. Based upon this evidence, the trial court found the respondent guilty of armed robbery.

¶ 6 At the sentencing hearing, the court received a social investigation report. The report revealed that, when the respondent's probation officer asked him about his neighborhood, the respondent replied that it was "peaceful within his immediate area[;]" however, there were "some activities, such as gang involvement and drug distribution within a [four-to-five block] radius outside of his immediate area." According to the report, although the respondent stated that "he does hang out within his community[,]" he denied that he or "his peers" were part of a gang; his mother confirmed this. The respondent, nonetheless, acknowledged that "most of his free time is spent hanging out with his peers" and "hanging [out] with the wrong individuals has played a major role in his life at this time." He also told the probation officer that "he smokes marijuana on a daily basis."

¶ 7 The trial court sentenced the respondent to two years of probation and "thirty hours of community service[.]" As part of the respondent's conditions of probation, the court prohibited him from being in contact with gangs. The court and the respondent engaged in the following colloquy regarding the gang-related probation conditions:

> "THE COURT: *** [N]o gangs, guns and drugs ***. In terms of gangs, I don't think that's a problem but you can't post things on social media showing your affiliation with any of these knucklehead street organizations; do you understand what I'm saying?
>
> MINOR RESPONDENT: Yes.

THE COURT: You cannot be on social media posting photos of any money that's obtained from some illegal source or related to any gang activity; do you understand what I'm saying?

MINOR RESPONDENT: Yes.

THE COURT: And certainly you cannot be on social media associating with known gang members."

The written sentencing order states, "no gang contact or activity[,] no guns, no drugs[,]" and mandates the respondent to complete 30 hours of community service. The probation order, on the other hand, requires the respondent to perform 40 hours of community service and states, "NO Gang Posting on Social Media *** no gangs[,] guns[,] drugs[.]" At the bottom of the probation order, the respondent signed his name in a space below the following sentence: "By signing, *** you are indicating that you have read and fully understand all of the conditions of your Probation." This appeal followed.

¶ 8 The respondent's first assignment of error on appeal is that the trial court's imposition of the probation conditions prohibiting "gang contact" as well as "Gang Posting on Social Media" violates his right of association under the first amendments of the Illinois and United States Constitutions (Ill. Const. 1970, art. I, § 4; U.S. Const., amend. I) because the conditions are "overbroad and therefore unreasonable." According to the respondent, the court erred by failing to provide any: (1) "commonsense exceptions" for "legitimate contact" with family members, classmates, or coworkers who might be involved with gangs; and (2) "explanation as to what type of contact, no matter how innocuous, will result in a probation violation." He also argues that, because he lives "within a four or five-block radius of gang activity[,]" there is an "unreasonable risk" that he could unintentionally violate the restrictions.

¶ 9 The State counters that the respondent forfeited this issue by failing to raise it in the proceedings below. Forfeiture aside, the State asserts that the respondent's argument, which amounts to an as-applied constitutional challenge, fails because there is nothing in the record indicating that he required exceptions to the gang-related restrictions, *e.g.*, that he "had family members or school contacts or an otherwise legitimate need to have contact with gang members" or "post gang-related content on his social media." According to the State, the record is also devoid of facts signifying that the respondent "was confused about the scope of [the] probation order" or that he has been accused of violating his probation by engaging in "innocent or innocuous" conduct. Because the respondent "cannot, and does not, point to any evidence in the record to support his claim" and relies "solely on hypothetical examples[,]" the State posits, his as-applied constitutional challenge is not justiciable.

¶ 10 The respondent acknowledges that he did not raise this issue at the sentencing hearing or in a post-sentencing motion, but contends that the plain-error doctrine should apply to excuse his forfeiture. The plain-error doctrine "may be invoked if [(1)] the evidence at a sentencing hearing was closely balanced, or [(2)] if the error was so egregious as to deprive the [responde]nt of a fair sentencing hearing." *People v. Hall*, 195 Ill. 2d 1, 18 (2000). Here, the respondent argues that plain-error review is appropriate under both prongs. The first step in considering whether this doctrine applies, however, is to determine whether any error occurred. *People v. Hudson*, 228 Ill. 2d 181, 191 (2008).

¶ 11 Delinquency proceedings are protective in nature; they are intended to correct and rehabilitate, not to punish. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 94. Section 5-715(2)(s) of the Juvenile Court Act of 1987 (705 ILCS 405/5-715(2)(s) (West 2018)) allows a trial court to impose probation conditions that require a minor to "refrain from having any contact, directly or

indirectly, with certain specified persons or particular types of persons, including but not limited to members of street gangs[.]" Although the trial court has "wide latitude" in imposing probation conditions, its "discretion is limited by constitutional safeguards and must be exercised in a reasonable manner." *In re J.W.*, 204 Ill. 2d 50, 77 (2003). "To be reasonable, a condition of probation must not be overly broad[,]" *i.e.*, "[w]here a condition of probation requires a waiver of precious constitutional rights, the condition must be narrowly drawn[.]" (Internal quotation marks omitted.) *Id.* at 78-79. When assessing the reasonableness of a probation condition, "it is appropriate to consider whether the restriction is related to the nature of the offense or the rehabilitation of the probationer." *Id.* at 79. Other considerations include: (1) whether the public value in imposing the condition "manifestly outweighs the impairment to the probationer's constitutional rights[;]" and (2) "whether there are any alternative means that are less subversive to the probationer's constitutional rights, but still comport with the purposes of conferring the benefit of probation." *Id.* We review *de novo* whether a probation condition violates a respondent's constitutional rights. See *People v. Burns*, 209 Ill. 2d 551, 560 (2004) ("The standard of review for determining whether an individual's constitutional rights have been violated is *de novo*.").

¶ 12 We first decline the State's invitation to view this issue as an as-applied constitutional challenge because "our supreme court has explained that the relevant inquiry is whether the [probation] conditions are reasonable." *In re J'Lavon T.*, 2018 IL App (1st) 180228, ¶ 13 (citing *J.W.*, 204 Ill. 2d at 78); see also *In re Omar F.*, 2017 IL App (1st) 171073, ¶¶ 56-58. In determining whether the gang-related probation conditions were overbroad and thus unreasonable, we examine the co-respondent's case, *J'Lavon T.*, which is directly on point.

¶ 13 In *J'Lavon T.*, 2018 IL App (1st) 180228, ¶ 5, the trial court orally pronounced the following probation conditions: "No gangs, guns or drugs *** you can't post anything on social

media related to gangs or any money that might have been attained. *** No illegally attained funds can be shown on Facebook or any social media and anything related to a gang ***." On appeal, this court held that, although there was "a valid connection" between the trial court's restrictions on gang-related contact and the co-respondent's rehabilitation, the probation conditions "constitute[d] overbroad impairments" to his constitutional rights and were thus unreasonable. *Id.* ¶¶ 6, 14-15. In support of our finding, we explained:

> "These conditions allow no exceptions for contact or social media postings related to a legitimate purpose, such as communication with family, classmates, or coworkers. And, although the trial court specified that the [co-]respondent could not post about money 'attained' through gang activity, it offered no guidance as to whether and under what circumstances a social media 'posting' could constitute prohibited 'contact' for purposes of a probation violation." *Id.* ¶ 15.

¶ 14 Like in *J'Lavon T.*, we find that the probation conditions imposed on the respondent in this case are valid because they relate to his rehabilitation. The social investigation report revealed that, although the immediate vicinity of the respondent's neighborhood was "peaceful[,]" there was "gang involvement and drug distribution" just four to five blocks away. The respondent denied that he or "his peers" were part of a gang; however, he acknowledged that he "hang[s] out within his community" and that "hanging [out] with the wrong individuals has played a major role in his life at this time." Based upon these facts, and recognizing the trial court's duty to act as a *parens patriae*, we cannot say that the limitation on the respondent's " 'contact (real or virtual) with gang members' " was not a valid condition of probation. *Id.* ¶ 14 (quoting *Omar F.*, 2017 IL App (1st) 171073, ¶ 62); see also *In re Presley*, 47 Ill. 2d 50, 56 (1970) ("The State, as Parens

patriae, clearly has an interest in safeguarding the lives of delinquent minors, as well as preserving an orderly society").

¶ 15 Having so held, we now move on to determine whether the respondent's gang-related probation conditions are unreasonable for being overbroad. In both this case and *J'Lavon T.*, 2018 IL App (1st) 180228, ¶ 5, the respondent and co-respondent were prohibited from engaging in in-person and online "gang contact[;]" here, however, the trial court provided more specific examples of what constitutes "Gang Posting" on social media. For example, the court stated that the respondent could not: (1) "post things on social media showing [his] affiliation with any of these knucklehead street organizations;" (2) "post[] photos of any money that's obtained from some illegal source or related to any gang activity;" and (3) "be on social media associating with known gang members." We, nonetheless, find that these probation conditions are overbroad because, like in *J'Lavon T.*, 2018 IL App (1st) 180228, ¶ 15, they do not provide any "exceptions for contact or social media postings related to a legitimate purpose, such as communication with family, classmates, or coworkers." Additionally, although the respondent was ordered not to "associat[e] with known gang members" on social media, the trial court provided no guidance as to what constitutes associating with someone on social media. We, therefore, find that the trial court erred by imposing these gang-related probation conditions without exceptions for legitimate purposes.

¶ 16 Because we find that the imposition of these conditions constituted error, we must next consider whether either of the two prongs of the plain-error doctrine has been satisfied, *i.e.*, whether "the evidence at a sentencing hearing was closely balanced, or [whether] the error was so egregious as to deprive the [responde]nt of a fair sentencing hearing." *Hall*, 195 Ill. 2d at 18.

¶ 17 We again turn to *J'Lavon T.* After determining that the trial court erred by imposing unreasonable gang-related probation conditions, we went on to find that the second prong of the plain-error doctrine had been satisfied even though the co-respondent signed his probation order, which, like here, indicated that he had read and fully understood the conditions. *J'Lavon T.*, 2018 IL App (1st) 180228, ¶¶ 5, 20. In so holding, we explained that, because "the trial court made no inquiry as to whether the probation conditions would unreasonably impinge on [the co-respondent's] contact and communication with family, classmates, and coworkers[,]" it "failed to provide a fair process for determining what gang-related restrictions on contact and social media usage were reasonable." *Id.* ¶ 20; but see *In re R.H.*, 2017 IL App (1st) 171332, ¶ 38 (where the second prong of the plain-error doctrine was not satisfied because the respondent was not "deprived of an opportunity to question the probation condition"). Like in *J'Lavon T.*, the trial court in this case failed to inquire whether the gang-related probation conditions would unreasonably impinge upon his contact with family, classmates, and coworkers; we thus find that the respondent was deprived of a fair process during sentencing, which constitutes second-prong plain error. See *J'Lavon T.*, 2018 IL App (1st) 180228, ¶ 20; *Omar F.*, 2017 IL App (1st) 171073, ¶ 68. Consequently, we excuse the respondent's forfeiture of this issue, vacate the portions of the sentencing and probation orders prohibiting "gang contact" as well as "Gang Posting on Social Media[,]" and remand the cause so that the trial court may consider whether such restrictions are still warranted, and, if so, what appropriate exceptions for contacts and social-media posts related to family, school, and employment should be applied. See *J'Lavon T.*, 2018 IL App (1st) 180228, ¶ 21.

¶ 18 The respondent next contends that we should modify his sentencing order to reflect 34 days of presentence credit for the time he served in secure and non-secure custody; namely, the date of

his arrest (1 day), the 2 days that he was detained in juvenile detention, and the 31 days he was on electronic home monitoring (from February 14, 2017, until his release on March 17, 2017). He acknowledges that he did not raise this issue below, but contends that issues related to sentencing credit cannot be forfeited. We agree. See *In re Justin L.V.*, 377 Ill. App. 3d 1073, 1088 (2007) ("A claim for additional presentence credit cannot be forfeited by a defendant's failure to raise the issue in the trial court."). When considering a challenge to the amount of sentencing credit awarded, we employ the *de novo* standard of review. *People v. Williams*, 239 Ill. 2d 503, 506 (2011).

¶ 19 Initially, the State concedes that the respondent should receive three days of credit for the time he was held in secure custody—*i.e.*, one day for his arrest date and two days for the time that he was detained in juvenile detention—and we accept its concession. See *In re Jabari C.*, 2011 IL App (4th) 100295, ¶ 35 (where the respondent was entitled to one day of credit for the day he was arrested although he had not yet been admitted to the Juvenile Detention Center); see also *In re Montrell S.*, 2015 IL App (4th) 150205, ¶ 63 (quoting 705 ILCS 405/5-710(1)(a)(v) (West 2014)) ("The minor shall be given credit on the sentencing order *** for time spent in detention *** as a result of the offense for which the sentencing order was imposed"). Therefore, we need only address whether the respondent is entitled to sentencing credit for the time he was on electronic home monitoring.

¶ 20 The State does not dispute that electronic home monitoring is a form of non-secure custody that may entitle a respondent to presentence custody credit (see *Montrell S.*, 2015 IL App (4th) 150205, ¶¶ 59, 64-65 (holding that electronic home monitoring constitutes "custody")); rather, it posits that the respondent in this case is not entitled to such credit pursuant to section 5-4.5-100 of the Unified Code of Corrections (Code) (730 ILCS 5/5-4.5-100 (West 2018)). We agree.

¶ 21 Section 5-710(1)(b) of the Juvenile Court Act of 1987 (705 ILCS 405/5-710(1)(b) (West 2018)), in relevant part, provides that a trial court "shall include in the sentencing order any pre-custody credits the minor is entitled to under [s]ection 5-4.5-100 of the" Code. See also *In re Darius L.*, 2012 IL App (4th) 120035, ¶ 35 (citing *In re J.T.*, 221 Ill. 2d 338, 352 (2006)) ("the supreme court has applied the broader adult sentencing credit requirements of *** section 5-4.5-100(b)*** to juveniles."). Pursuant to section 5-4.5-100(b) of the Code (730 ILCS 5/5-4.5-100(b) (West 2018)), not only is a respondent entitled to credit for time spent in secure custody, but he is also entitled to credit "for time spent in home detention" unless it is "prohibited by subsection (d)[.]" "Home detention" is defined as "the confinement of a person *** charged with an offense to his *** place of residence under the terms and conditions established by the supervising authority." 730 ILCS 5/5-8A-2(C) (West 2018). Section 5-4.5-100(d) of the Code provides as follows:

> "NO CREDIT; SOME HOME DETENTION. An offender sentenced to a term of imprisonment for an offense listed in paragraph (2) of subsection (c) of section 5-5-3 (730 ILCS 5/5-5-3) *** shall not receive credit for time spent in home detention prior to judgment." 730 ILCS 5-4.5-100(d) (West 2018).

Section 5-5-3(c)(2) of the Code includes Class X felonies. See 730 ILCS 5/5-5-3(c)(2)(C) (West 2018).

¶ 22 The respondent here was adjudicated delinquent based upon armed robbery, which is a Class X felony. See 720 ILCS 5/18-2(b) (West 2018). Consequently, pursuant to section 5-4.5-100(d) of the Code, he is precluded from receiving credit for the 31 days that he was on electronic home monitoring. We, therefore, modify his sentencing order to reflect an award of only three days of presentence custody credit—one day for his arrest date and two days for the time that

he was detained in juvenile detention. See Ill. S. Ct. R. 615(b)(1) (eff. Jan. 1, 1967) ("the reviewing court may*** modify the judgment or order from which the appeal is taken").

¶ 23 In support of his contention that he is entitled to presentence custody credit for the time he was on electronic home monitoring, the respondent relies on *Montrell S.* We find that his reliance is misplaced, however, because *Montrell S.* is distinguishable from this case.

¶ 24 In *Montrell S.*, 2015 IL App (4th) 150205, ¶ 40, the respondent was convicted of: (1) aggravated robbery, a Class 1 felony (see 720 ILCS 5/18-1(c) (West 2014)); (2) robbery, a Class 2 felony (see 720 ILCS 5/18-1(c) (West 2014)); and (3) mob action, a Class 4 felony (see 720 ILCS 5/25-1(b)(1) (West 2014)). The relevant issue on appeal was whether the respondent should be awarded presentence custody credit for the time he spent on electronic home monitoring. *Montrell S.*, 2015 IL App (4th) 150205, ¶ 59. In concluding that he was entitled to such credit, the reviewing court's analysis focused on whether electronic home monitoring constitutes custody (it determined that it did). *Id.* ¶¶ 64-65.

¶ 25 Unlike this case, in *Montrell S.*, section 5-4.5-100(d) of the Code was not at issue, so the court never addressed it. Even if it had, however, it is unlikely that the respondent in that case would have been precluded from receiving presentence custody credit based upon the nature of his convictions. At the time of the respondent's sentencing in *Montrell S.*, section 5-5-3(c)(2) of the Code included Class 2 or greater felonies, but only "if the offender had been convicted of a Class 2 or greater felony*** within 10 years of the date *** [of] the offense for which he *** is being sentenced[.]" 730 ILCS 5/5-5-3(c)(2)(F) (West 2014). Section 5-5-3(c)(2) also included forcible felonies "if the offense was related to the activities of an organized gang." 730 ILCS 5/5-5-3(c)(2)(J) (West 2014). The court in *Montrell S.* did not mention whether the respondent had been convicted of a Class 2 or greater felony within the past 10 years, so we are unable to

determine whether his aggravated robbery and robbery convictions would have barred him from receiving credit under section 5-5-3(c)(2)(F). However, section 5-5-3(c)(2)(J) would not have precluded an award of credit because, although aggravated robbery, robbery, and mob action constitute forcible felonies (see 720 ILCS 5/2-8 (West 2014)), the offense in *Montrell S.* was not related to an "organized gang" where only two offenders were involved, not three. *Montrell S.*, 2015 IL App (4th) 150205, ¶¶ 16, 18-19; see 740 ILCS 147/10 (West 2014) (an organized gang involves "[three] or more persons with an established hierarchy[.]").

¶ 26 The respondent's final contention is that the probation order, which requires him to perform 40 hours of community service as a condition of probation, should be corrected to reflect 30 hours of community service because that is the sentence that the trial court orally imposed at the sentencing hearing. The State concedes error and we accept its concession. "It is the oral pronouncement of the judge which is the judgment of the court. *** When the oral pronouncement of the court and the written order are in conflict, the oral pronouncement of the court controls." *People v. Smith*, 242 Ill. App. 3d 399, 402 (1993). Not only did the trial court in this case orally pronounce that the respondent was to perform 30 hours of community service, but the sentencing order mandates the same, which further evinces the court's intent. Accordingly, we hereby modify the respondent's probation order to reflect that he is required to perform 30 hours of community service. See Ill. S. Ct. R. 615(b)(1) (eff. Jan. 1, 1967).

¶ 27 For the foregoing reasons, we vacate those portions of the trial court's sentencing and probation orders that prohibit the respondent from having "gang contact" and engaging in "Gang Posting on Social Media[.]" We remand the cause so that the trial court may consider whether such restrictions are still warranted, and, if so, what appropriate exceptions for contacts and social media postings related to family, school, and employment should be applied. Additionally, we

modify the respondent's: (1) sentencing order to reflect an award of 3 days of presentence custody credit; and (2) probation order to reflect that he must perform 30 hours of community service. The judgment of the trial court is affirmed in all other respects.

¶ 28 Affirmed in part, vacated in part, and cause remanded; sentencing and probation orders modified.