2018 IL App (2d) 160882-U
Nos. 2-16-0882 & 2-16-0883 cons.
Order filed December 17, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOSHUA D. BRINKMEYER, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Boone County. No. 10-CF-454 Honorable C. Robert Tobin III, Judge, Presiding.

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOSHUA D. BRINKMEYER, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Boone County. No. 11-CF-267 Honorable C. Robert Tobin III, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Burke and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court did not abuse its discretion in sentencing defendant to five years' imprisonment upon the revocation of his probation for criminal damage to

> property, as the court did not punish him for his conduct on probation but rather considered that conduct (along with his prior conduct) as it pertained to the legitimate consideration of his rehabilitative potential; (2) the trial court did not abuse its discretion in sentencing defendant to a total of 10 years' imprisonment for criminal damage to property and aggravated domestic battery, as despite the mitigating evidence the sentence was justified by the aggravating factors, most notably his extensive criminal history.

¶ 2 Defendant, Joshua D. Brinkmeyer, challenges his consecutive sentences of five years' imprisonment for criminal damage to property (720 ILCS 5/21-1(1)(a) (West 2010)) (case No. 10-CF-454) (appeal No. 2-16-0883) and aggravated domestic battery (*id.* § 12-3.3(a) (West 2012)) (case No. 11-CF-267) (appeal No. 2-16-0882). We affirm.

¶ 3 On November 19, 2010, defendant was charged in case No. 10-CF-454. On September 9, 2011, while on bond in that case, he was charged in case No. 11-CF-267.

¶ 4 On August 29, 2013, defendant entered an open guilty plea to criminal damage to property. According to the State's factual basis, on October 27, 2010, police reported to the property of Michael and Marcia McCrary in Poplar Grove and found defendant in the garage. Defendant had damaged the window.

¶ 5 The presentencing investigation report (PSIR) revealed the following. Defendant was born June 13, 1983. He was married to Magdalena Mordarska; their son, Seth, was born in January 2012. In January 1997, defendant was adjudicated delinquent, based on domestic battery and possession of cannabis. He received probation, which was extended several times, then revoked in December 1998, when he was committed to the Department of Corrections (DOC). In November 2000, defendant was convicted of domestic battery and received one year of conditional discharge. In 2001, he was convicted in Cook County of aggravated domestic battery and armed violence and sentenced to 14 years in the DOC. He was in the DOC for only 5½ years. On July 1, 2007, he was arrested for driving under the influence (DUI); he received

supervision, but in October 2008 it was revoked and a conviction was entered. In 2008, defendant was arrested for DUI and sentenced to 18 months' probation. In 2009, he was arrested for aggravated DUI and received two years in the DOC. On October 27, 2010, he was arrested in what became case No. 10-CF-454. In January 2011, defendant was arrested for knowingly damaging property, unlawful restraint, and domestic battery; those cases were pending as of the PSIR. In May 2011, he was arrested for resisting a peace officer and criminal trespass to property. On July 22, 2011, he was arrested in what became case No. 11-CF-267.

¶ 6 The PSIR continued as follows. Defendant completed ninth grade in 2000 and received his GED in 2002 in the DOC. He reported first using alcohol at age 15. Between his first DUI arrest and his third, he drank regularly, consuming up to 15 beers on one occasion. Defendant said that all of his offenses were in some way alcohol-related. He said that he smoked cannabis in his teens but used it rarely after his latest release from the DOC and not at all since 2012.

¶ 7 On October 17, 2013, the trial court sentenced defendant to 30 months' probation in case No. 10-CF-454 and ordered him not to consume alcohol or drugs. The court admonished him that, should he violate his probation, he would be eligible for an extended-term sentence of as much as six years, to be served consecutively to any prison sentence imposed in case No. 11-CF-267. See 730 ILCS 5/5-8-4(d)(9) (West 2012).

¶ 8 On October 28, 2014, the State petitioned to revoke defendant's probation in case No. 10-CF-454, alleging that on September 24, 2014, he committed a battery and was intoxicated at the time. On November 25, 2014, per an agreement, defendant pleaded guilty to domestic battery; the trial court sentenced him to 18 months' conditional discharge in case No. 11-CF-267; and the State withdrew the petition to revoke his probation in case No. 10-CF-454. According to the factual basis, on the morning of July 25, 2011, defendant pushed Mordarska down the stairs,

causing her bodily harm. Because the offense violated an order of protection, it was a Class 4 felony. The conditions of the sentence included that defendant have no hostile or abusive contact with Mordarska and that he not consume alcohol or drugs.

¶ 9 On June 4, 2015, the State petitioned to revoke defendant's conditional discharge in case No. 11-CF-267, alleging that, on January 28, 2015, he had committed a domestic battery and consumed alcohol and that he had had hostile and abusive contact with Mordarska on that date and on several days in April 2015. On June 14, 2015, the State petitioned to revoke defendant's probation in case No. 10-CF-454, based on the allegations pertaining to January 28, 2015.

¶ 10 On June 23, 2015, the trial court held a hearing on both petitions. Mordarska testified as follows. On January 28, 2015, she, defendant, and Seth were in their condominium. She and defendant were drinking beer. They got into an argument over Mordarska's contact with the father of her older son. Defendant threw some glasses against a wall, shattering them. He then threw a cell phone at Mordarska and hit her in the cheek. He apologized. She went into the hallway to calm down. When she tried to reenter the condominium, she discovered that the door was locked. Mordarska then went to a neighbor's home and called the police. Later, she spoke to several officers.

¶ 11 Mordarska testified that, on Friday, April 17, 2015, when she came home from work, defendant and his friend Ivan were drinking beer in the kitchen. She got on the phone in the living room. Defendant got angry and started calling her names. Mordarska left and spent the night at a friend's house. On Saturday morning, she returned, and defendant again got angry and called her names. Mordarska went to her mother's house. That day, she received several angry phone messages from defendant. They spoke by phone several times on Saturday and Sunday. On Sunday, Mordarska returned home. On Monday, she went to work. When she came home,

defendant was standing outside. He got angry at her and asked whose cigarettes were in the car. Mordarska told him that she wanted to leave by herself, but he said that he would not let her. A neighbor called the police, who helped Mordarska leave alone.

¶ 12 Alan Thibeault, a Prospect Heights police officer, testified as follows. On the morning of January 28, 2015, he and several other officers met Mordarska in the foyer of the condominium building. She had obvious injuries to her left cheekbone. The officers knocked on her unit's front door, but defendant did not answer. Firefighters arrived and forced entry. The officers saw broken glass on the kitchen floor. In a back room, defendant was asleep in bed with Seth. Officers shook defendant to wake him up. Thibeault grabbed him and began to handcuff him. Defendant awoke and started to speak. His speech was slurred, he had an odor of alcohol, and he verbally challenged the officers.

¶ 13 Defendant testified as follows. On the evening of January 28, 2015, after Mordarska returned home, they drank beer together. At about 8 p.m., he went to a restaurant with a friend. When he returned at about 10 p.m., he and Mordarska got into an argument. She left the condominium. Defendant consumed about six cans of beer that evening. He drank his first can at about 5 p.m. and his last one at about 10 p.m. He did not throw a phone at Mordarska. When she left the building, she had no cuts on her face. The police never asked him what had happened or allowed him to explain anything.

¶ 14 Defendant testified that on Friday, April 17, 2015, he was outdoors with his friend Ivan, drinking nonalcoholic beer. Mordarska came home. Around midnight, they got into an argument. Mordarska left. She came home the next morning but soon drove away. Between April 18 and 20, she and defendant spoke by phone several times and argued. Mordarska

returned on Monday evening, and they argued over her having left him and Seth at home without the car. Defendant never attempted to stop Mordarska from driving away.

¶ 15 The trial court granted the State's petitions. The court discredited most of defendant's testimony and found that he hit Mordarska with the phone and injured her; that he consumed alcohol on January 28, 2015; and that he tried to stop Mordarska from leaving the condominium.

¶ 16 The cause proceeded to resentencing on both convictions. An updated PSIR, filed August 17, 2015, disclosed the following. In 2013 and 2014, defendant worked for A&M Tool but quit for "No Reason." Between 2013 and 2015 he managed a Marathon service station, and between 2014 and 2015 he was a custodian at a preschool facility. Defendant had adopted Jacob Kwas, Mordarska's son from her previous marriage. Kwas was 17 years old and had cerebral palsy. Mordarska was pregnant and was due in early November. Defendant reported that he did not get along with Mordarska; he had considered seeking a dissolution of marriage but did not want his children to grow up without a father. He said that the family was experiencing financial difficulties; he was working several jobs, and she was working part-time but planned to quit before having her child and not to return until her children were able to go to school.

¶ 17 At the sentencing hearing, defendant introduced a letter from Mordarska, dated November 9, 2015, in which she stated that she had recently given birth to a daughter, Mia. She wrote that defendant's absence had worked a financial hardship on her and her children and that prolonging that absence would worsen the strain. Defendant also filed an "Inmate Worker Evaluation Form" dated August 24, 2015, stating that his performance as a cook in jail had been uniformly excellent and that he had required minimal supervision. Two acquaintances submitted letters praising defendant's responsibility, integrity, and potential to reform.

¶ 18 Defendant called two witnesses. Allison Thompson testified that defendant's mother was a close friend and that Thompson had known him for about 15 years. Defendant had always interacted well with her and her children, and he had never been aggressive or violent toward her. Defendant's mother, Dawn Brinkmeyer, testified that his incarceration had created a hardship on Mordarska, who was not working and called every day for help caring for Seth and Mia. Mordarska had taken Mia to see defendant several times. He had helped Dawn care for her two young adopted sons.

¶ 19 In allocution, defendant stated that he had made mistakes in the past, especially after leaving prison; but, since having children, he had not "gone out" or "been convicted of a crime or anything since these incidents in 2011 and '10." He expressed regret at the stress that his difficulties had caused his children and Mordarska.

¶ 20 The State recommended five-year sentences that, according to law, would be mandatorily consecutive. The State characterized defendant as "dangerous" and argued that no statutory mitigating factors applied. In contrast, several aggravating factors did apply. Defendant had a lengthy history of delinquency and crime. An affidavit filed by the victim in the 2001 Cook County case stated that he had beaten her several times and tied her up. A substantial sentence was needed to deter others from similar offenses. Finally, defendant had committed the battery, and several DUIs, while he was out on bond on other charges.

¶ 21 Defendant conceded that he had a substantial criminal record and needed to address his drinking problem. However, the offenses for which he was being resentenced were committed in 2010 and 2011. Also, Mordarska wanted him to be there for his children, and he had been a good father. Defendant requested probation or two one-year sentences.

¶ 22 In pronouncing sentence, the court stated as follows. Defendant had "a history of repeated offenses regarding alcohol abuse and domestic violence." He had "never addressed either of these issues, and the only thing that [kept] him from committing more offenses of alcohol abuse and domestic violence [was] to incarcerate him." Therefore, the judge agreed with the State's recommendation and resentenced defendant to consecutive five-year terms.

¶ 23 Defendant moved to reconsider the sentences. He contended that they were excessive given his character and history and that five years was too long for the nonviolent offense of criminal damage to property. At a hearing on the motion, the judge stated that defendant had committed "multiple domestic batteries" and did not have "any substantial history of being able to follow the law." When he was not in custody, he was a danger to others. The court denied defendant's motion, and he timely appealed.

¶ 24 On appeal, defendant argues that (1) his sentence for criminal damage to property was improperly based on his subsequent conduct and not the offense itself and (2) his aggregate sentence of 10 years is excessive under all the circumstances.

¶ 25 On the first issue,[1] defendant observes that a sentence imposed following the revocation of a defendant's probation must be for the original offense and not for his conduct after probation was imposed. *People v. Varghese*, 391 Ill. App. 3d 866, 876 (2009). The court may not treat the defendant's conduct since probation as a separate offense and punish him for it. *Id.* Defendant contends that the record shows that in pronouncing the five-year extended-term sentence for his nonviolent offense, the trial court focused almost exclusively on his domestic battery offenses and his problem drinking and said almost nothing about the circumstances of his offense.

[1] Defendant raises this issue second, but for clarity of discussion we consider it first.

¶ 26 The State notes that defendant forfeited this argument by failing to raise it in his motion to reconsider his sentence. See *People v. Lewis*, 234 Ill. 2d 32, 42 (2009). While we agree with the State, we choose to address defendant's argument and explain why, forfeiture aside, it is not persuasive.

¶ 27 Although a trial court may not treat a defendant's conduct while on probation as a separate offense and punish him for it, the court may consider that conduct as it bears on his potential for rehabilitation. *Varghese*, 391 Ill. App. 3d at 876. A defendant's criminal history is a proper factor in aggravation, and that he committed some of that criminal conduct relatively recently is no less reason to consider it.

¶ 28 Here, it is true that the trial court said little about defendant's original offense of criminal damage to property. However, although the court did emphasize defendant's substantial history of both alcohol abuse and domestic violence—and the connection between the two—it clearly did so to explain why a lengthy sentence was justified by his limited potential to obey the law and the need to protect others. Notably, the court's comments comprehended more than crimes; defendant's drinking was not a punishable offense *per se* but rather a violation of a condition of probation that was imposed because his drinking had facilitated his violent and unlawful behavior. Moreover, the court did not restrict itself to defendant's postprobation conduct but considered his entire history. That history included alcohol abuse and domestic violence that long predated the offenses here.

¶ 29 *Varghese*, on which defendant relies, is distinguishable. There, the trial court cited highly controverted evidence that the defendant had committed an uncharged offense while on probation. The court called the conduct " 'intolerable' " and " 'dangerous' " and immediately thereafter pronounced the sentence. *Varghese*, 391 Ill. App. 3d 872. We held that the court's

comments demonstrated that it had "improperly commingled uncharged conduct with [the defendant's] original conduct." *Id.* at 877. Thus, the court had essentially held an impromptu criminal trial, found the defendant guilty, and punished him for the uncharged crime. *Id.*

¶ 30 Here, by contrast, the trial court relied on offenses of which defendant had been adjudicated guilty, in some instances long ago, and on its previous finding after an evidentiary hearing that he had engaged in wrongful conduct that also violated the conditions of his probation. Moreover, the court did not imply that defendant's sentence was the product of its desire to penalize defendant for that conduct. Defendant's reliance on *Varghese* is unavailing.[2]

¶ 31 We hold that defendant has failed to establish that the trial court improperly punished him for a separate offense instead of criminal damage to property. Although his sentence was toward the high end of the extended-term range, it was based on legitimate factors in aggravation.

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[2] *Varghese* stated that, on review, "the record must clearly demonstrate that the trial court considered [the] defendant's original offense when fashioning [the] sentence." *Id.*; see *People v. Gaurige*, 168 Ill. App. 3d 855, 869 (1988); *People v. Clark*, 97 Ill. App. 3d 953, 956 (1981). We note that, by placing the burden on the State as appellee to show that the court did not commit error, these opinions turn on its head the well-established rule that we presume that the trial court considered only proper factors in sentencing and that it is the burden of the defendant as appellant to establish that the court did not follow the law. See, *e.g.*, *People v. Burnette*, 325 Ill. App. 3d 792, 809 (2001); *People v. Thompson*, 234 Ill. App. 3d 770, 777 (1991). We leave to another day the resolution of whether these opinions' unconventional allocation of the burden on appeal is sound. Even granting such an anomalous rule, the State met its burden. This is especially so given that defendant's failure to raise his claim of error at the trial level denied the court the opportunity to address the claim.

¶ 32 We turn to defendant's other argument on appeal: that the court abused its discretion in sentencing him to a total of 10 years' imprisonment for his two offenses. Defendant acknowledges that the sentences were mandatorily consecutive because he committed the aggravated domestic battery while he was on bond on the charge of criminal damage to property (see 730 ILCS 5/5-8-4(d)(9) (West 2010)). Also, he was eligible for an extended-term sentence of three to six years on each offense (see *id.* § 5-4.5-45(a) (West 2014)). However, he contends that his sentences, which were each one year less than the maximum extended term, slighted several mitigating factors. These include defendant's long-standing difficulties with alcohol and his need for effective treatment; his good relationship with his son and stepson; and his demonstrated employability, including his stint in prison work.

¶ 33 A trial court's sentencing decision is entitled to great deference on appeal, and we will not disturb a sentence that is within the statutory range unless the court abused its broad discretion. *People v. Cox*, 82 Ill. 2d 268, 281 (1980).

¶ 34 The trial court weighed both the aggravating factors and the mitigating ones and decided that the balance favored the former. We may not disturb its decision merely because we would have weighed the pertinent considerations differently. *People v. Streit*, 142 Ill. 2d 13, 18-19 (1991). The court emphasized defendant's long-standing and extensive record of offending, which began when he was a juvenile and included several domestic batteries, one of which resulted in a lengthy prison sentence, and several DUIs. Defendant had had several opportunities at probation and had taken little advantage of them. The court reasonably concluded that defendant had been persistently unable to control his alcohol abuse or his violent tendencies.

¶ 35 Defendant emphasizes his alcohol abuse as a factor in mitigation, noting that the DOC is not a drug- or alcohol-rehabilitation facility. While this is true, it is equally true that a person

confined in the DOC is less likely to abuse alcohol and, at the least, less able to visit the effects of his alcohol abuse on the general public. A defendant's history of substance abuse is not necessarily a factor in mitigation and can even be one in aggravation, especially when it is substantial and he has failed to treat the problem successfully. See *People v. Shatner*, 174 Ill. 2d 133, 160 (1996); *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009). The court rightly noted both defendant's persistent abuse of alcohol, including his failure to abstain from drinking even though it was a condition of his probation, and the connection between his drinking and his propensity toward domestic violence. Thus, the court reasonably considered his alcohol abuse as an aggravating factor.

¶ 36 Defendant's other arguments against his sentence are not compelling, given the deference that we must accord the trial court's decision. There was evidence that defendant had a positive relationship with his son and stepson, although the same cannot be said of his relationship with Mordarska, their other parent. Also, defendant had been able to hold down employment when he was not incarcerated. We have no reason to suspect that the trial court ignored these considerations, and we cannot say that they required the court to impose more lenient sentences.

¶ 37 In sum, we cannot say that the trial court abused its discretion in sentencing defendant to a total of 10 years in the DOC. Therefore, we shall not disturb his sentences.

¶ 38 The judgment of the circuit court of Boone County is affirmed. 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 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 39 Affirmed.