2018 IL App (4th) 180274-U

NO. 4-18-0274

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
August 28, 2018
Carla Bender
4th District Appellate
Court, IL

In re K.E., a Minor	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	Macon County
Petitioner-Appellee,	)	No. 14JD169
v.	)	
K.E.,	)	Honorable
Respondent-Appellant).	)	James R. Coryell,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Steigmann and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err by revoking respondent's supervision, and respondent failed to show the court erred by imposing a probation search condition that did not require reasonable suspicion of criminal activity.

¶ 2 In August 2014, the State filed a petition for an adjudication of wardship, alleging respondent, K.E. (born in 2001), was a delinquent minor because he committed one count of attempt (criminal sexual assault) (720 ILCS 5/8-4(a), 11-1.20(a)(1) (West 2014)), one count of criminal sexual abuse (720 ILCS 5/11-1.50(a)(1) (West 2014)), one count of aggravated kidnapping (720 ILCS 5/10-2(a)(2) (West 2014)), one count of unlawful restraint (720 ILCS 5/10-3(a) (West 2014)), and one count of theft (720 ILCS 5/16-1(a)(1)(A) (West 2014)). The State later amended the petition to allege the following: one count of aggravated kidnapping (720 ILCS 5/10-2(a)(2) (West 2014)), one count of unlawful restraint (720 ILCS 5/10-3(a) (West 2014)), one count of theft (720 ILCS 5/16-1(a)(1)(A) (West 2014)), and three counts of

aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(2)(ii) (West 2014)). In September 2015, the respondent admitted he committed one count of aggravated criminal sexual abuse, and the other counts in the amended petition were dismissed. After a February 2016 sentencing hearing, the Macon County circuit court ordered respondent be placed on continuance under supervision for 48 months.

¶ 3 In August 2017, the State filed its first petition to revoke respondent's supervision, which was denied after a December 2017 hearing. In October 2017, the State filed a second petition to revoke respondent's supervision. A third petition to revoke respondent's petition was filed in December 2017. After a January 2018 hearing, the circuit court granted the State's second and third petitions to revoke respondent's supervision. In March 2018, the court sentenced defendant to three years' probation.

¶ 4 Respondent appeals, asserting (1) the circuit court erred by revoking his supervision and (2) the court's probation condition requiring him to submit to warrantless searches without reasonable suspicion is unconstitutional. We affirm.

¶ 5 I. BACKGROUND

¶ 6 Respondent admitted that, on July 22, 2014, he committed aggravated criminal sexual abuse, in that he or one for whose conduct he was legally accountable, being under the age of 17, knowingly and using force placed his hand on the breast of B.L., who was at least 9 years of age but under 17 years of age when the act was committed. The circuit court's February 2016 order of continuance under supervision contained numerous conditions, including requiring respondent to undergo a sex-offender evaluation and counseling and to refrain from possessing a firearm or other dangerous weapon. The order also required him to "[h]ave no contact directly or indirectly with B.L. *** and/or (2) not go upon or around a property located at B.L. [*sic*]

residence or any school she attends."

¶ 7 In August 2017, the State filed its first petition to revoke supervision, alleging respondent failed to comply with the condition of not violating any criminal statute of any jurisdiction by committing the offense of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1)(3)(A) (West 2016)), unlawful possession of firearms (720 ILCS 5/24-3.1(a)(2) (West 2016)), and unlawful possession of firearm ammunition (720 ILCS 5/24-3.1(a)(2) (West 2016)), as alleged in Macon County case No. 17-JD-173. In December 2017, the circuit court held a hearing on the State's first petition to revoke supervision. At the close of the State's evidence, respondent made a motion for a directed verdict, which the court granted.

¶ 8 In October 2017, the State filed a second petition to revoke respondent's supervision, contending respondent failed to complete sex-offender treatment, in that he was unsuccessfully terminated from treatment on August 31, 2017. On December 4, 2017, the State filed a third petition to revoke respondent's supervision, contending respondent had contact, directly or indirectly, with B.L. on November 24, 2017, by attending an event at Stephen Decatur Middle School while B.L. was present.

¶ 9 In January 2018, the circuit court held a hearing on both the State's second and third petitions to revoke. The State presented the testimony of B.L. and Michael Warnick. Respondent presented memoranda dated January 4, 2018, and September 15, 2017, which were drafted by respondent's sex-offender treatment provider, Dave Metcalfe.

¶ 10 B.L. testified she attended Eisenhower High School and was a cheerleader. On November 27, 2017, she attended a basketball game during the Turkey Tournament at Stephen Decatur Middle School. A lot of people attended the basketball game. While she was cheerleading during the game, she noticed respondent walk in. She did not say anything and

continued cheering. B.L. stated she did not tell anyone because she was scared. B.L. later looked to her left and saw respondent standing around 15 feet away with a group of people. It made her feel really uncomfortable. Respondent did not talk to her and did not attempt to approach her. That night she told her mother and her cheer coach about respondent being at the game. The next day, she attended another basketball game at the tournament. Respondent attended that game as well. As soon as B.L. saw respondent, she told her cheer coach. Respondent was sitting at the top of the bleachers with a group of friends. When B.L. attempted to point respondent out to a police officer, respondent tried to hide from view. B.L. saw a police officer escort respondent out of the gym. Respondent did not attempt to talk to her. She had not seen respondent since the second basketball game.

¶ 11 Warnick testified he was the adult and juvenile sex-offender officer for Macon County probation. He was involved in the supervision of respondent. One of the conditions of respondent's supervision was to obtain sex-offender treatment. Warnick testified respondent had not completed treatment. According to Warnick, respondent was terminated on August 31, 2018, by Metcalfe based on respondent's (1) denial of his offense and refusal to take accountability for his actions as required in the treatment contract, (2) continuation of illegal behavior, (3) refusal to use trick concepts learned in treatment, and (4) attendance at only one of four treatment groups between July 27, 2017, and August 17, 2017. Additionally, it was anticipated respondent would be incarcerated for a lengthy period of time due to pending charges. However, those charges were resolved, and respondent was discharged from the juvenile detention center. At the time of the hearing on the petitions to revoke, respondent was back in treatment but had not yet completed it. When respondent missed the three classes during the initial treatment, he had charges pending against him. Before the three missed classes,

respondent had attended a majority of the sessions.

¶ 12 After hearing the parties' arguments, the circuit court found the State had proved both the second and third petitions to revoke by a preponderance of the evidence.

¶ 13 On March 29, 2018, the circuit court held a sentencing hearing. The State presented the testimony of (1) Jeremy Mclean, Macon County sheriff's deputy; (2) Doug Allen, detective with the Decatur police department's juvenile investigations unit; (3) Courtney Settles, assistant principal at Eisenhower High School; (4) Lil Mantay, Macon County probation officer; and (5) J.R., B.L.'s mother. Respondent made a statement in allocution and presented the testimony of Robert Crawford, athletic coordinator at the Boys and Girls Club, and respondent's mother. He also presented stipulated testimony from "Officer Lawary." After hearing all of the evidence and the parties' arguments, the court sentenced respondent to three years' probation.

¶ 14 That same day, respondent and his mother signed a certificate of conditions for his probation term. One of the conditions stated the following: "Permit the Probation Officer to visit your home, school, or elsewhere to the extent necessary as determined by the Probation Office and further, submit to searches of your person, residence, automobile, and/or effects at any time such requests are made by the Probation Officer and consent to the use of anything seized as evidence in a court proceeding."

¶ 15 On April 13, 2018, respondent filed a timely notice of appeal under Illinois Supreme Court Rule 606 (eff. July 1, 2017). See Ill. S. Ct. R. 660(a) (eff. Oct. 1, 2001) (providing the rules applicable to criminal cases govern appeals from final judgments in delinquent-minor proceedings, unless specifically provided otherwise). A sentencing order in a juvenile-delinquency proceeding is a final order. See *In re Justin L.V.*, 377 Ill. App. 3d 1073,

1079, 882 N.E.2d 621, 626 (2007)). Thus, we have jurisdiction over this appeal under Illinois Supreme Court Rule 660(a) (eff. Oct. 1, 2001).

¶ 16 II. ANALYSIS

¶ 17 A. Revocation of Supervision

¶ 18 K.E. first argues the circuit court erred by revoking his supervision because the State failed to prove by a preponderance of the evidence he (1) had contact with B.L. and (2) did not complete sex-offender treatment.

¶ 19 In *In re Terry H.*, 2011 IL App (2d) 090909, ¶ 14, 952 N.E.2d 159, the reviewing court explained review of a circuit court's revocation of supervision as follows:

> "Minors in delinquency cases are entitled to the same due process protections as adults who face criminal charges. [Citations.] On a State's motion to terminate supervision, the State has the burden of showing a violation of supervision by a preponderance of the evidence. [Citation.] A proposition is proved by a preponderance of the evidence when the proposition is more probably true than not true. [Citation.] The State may meet its burden using circumstantial evidence. [Citations.] In evaluating whether the State met its burden, the trial judge is free to resolve inconsistencies in the testimony and to accept or reject as much of each witness's testimony as the judge pleases. [Citation.] A trial court's determination to revoke supervision will not be disturbed unless it is against the manifest weight of the evidence. [Citation.] A finding is against the manifest weight of the evidence only if the opposite result is clearly evident. [Citation.] Thus, even where the State's evidence is slight, we must affirm the revocation of supervision as long as the opposite conclusion is not clearly evident. [Citation.]"

(Internal quotation marks omitted.)

Since the State has to prove only *a violation* of supervision (*Terry H.*, 2011 IL App (2d) 090909, ¶ 14), this court does not need to consider any additional violations when a violation has been established by a preponderance of the evidence.

¶ 20 The third petition to revoke alleged respondent violated the supervision provision that required him to "[h]ave no contact directly or indirectly with B.L. *** and/or (2) not go upon or around a property located at B.L. [*sic*] residence or any school she attends." Respondent contends the State did not present any evidence he had contact with B.L. The State disagrees, asserting many forms of contact exist, including nonverbal.

¶ 21 In cases where "contact" is not defined by a statute, the reviewing courts have noted the dictionary definitions of "contact" include: "to make connection with [or] get in communication with" (*People v. Diestelhorst*, 344 Ill. App. 3d 1172, 1186, 801 N.E.2d 1146, 1157 (2003) (citing Webster's Third New International Dictionary 490 (1986)); and "association, relationship," "connection, communication," and "to get in communication with" (*People v. Jamesson*, 329 Ill. App. 3d 446, 455, 768 N.E.2d 817, 825 (2002) (citing Webster's Ninth New Collegiate Dictionary 282 (1990)). "Indirectly" has several definitions, including the following: (1) "deviating from a direct line or course: ROUNDABOUT," and (2) "not straightforward and open: DECEITFUL." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/indirect (last visited August 27, 2018).

¶ 22 As the circuit court found, the evidence showed B.L. was very visible during the two basketball games because she was cheerleading out in front of the crowd. Thus, a reasonable inference is respondent saw B.L. at the first basketball game. Despite respondent knowing B.L. was present at the first basketball game, he remained at the game and got within

15 feet of her with a group of people. Respondent then returned the next day for another basketball game at which B.L. cheered for her school. While respondent did not approach B.L. or attempt to talk to her at any time during the two games, it could reasonably be inferred respondent was communicating or connecting with B.L. in a roundabout or deceitful way by getting within 15 feet of her at the first basketball game and returning for a second game. Accordingly, we find the circuit court's finding respondent violated his supervision requirement that he have no direct or indirect contact with B.L. was not against the manifest weight of the evidence.

¶ 23 Since we have found the circuit court's finding of a violation based on respondent having indirect contact with B.L., we need not address whether respondent violated the supervision order based on his failure to complete sex-offender treatment.

¶ 24 B. Fourth Amendment

¶ 25 Respondent also asserts the circuit court's probation condition requiring him to submit to warrantless searches absent reasonable suspicion infringes on his fourth amendment right to be free from unreasonable searches and seizures. The State asserts respondent has forfeited this issue by not raising the issue at the trial level. See *In re Omar F.*, 2017 IL App (1st) 171073, ¶ 52, 89 N.E.3d 1023. In response, respondent seeks review under the plain-error doctrine.

¶ 26 The plain-error doctrine permits a reviewing court to consider unpreserved error under the following two scenarios:

> "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred

> and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1058 (2010).

In the sentencing context, a respondent must show either "(1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the [respondent] a fair sentencing hearing." *Omar F.*, 2017 IL App (1st) 171073, ¶ 53.

¶ 27 We begin our plain-error analysis by first determining whether any error occurred at all. *Sargent*, 239 Ill. 2d at 189, 940 N.E.2d at 1059. If error did occur, this court then considers whether either of the two prongs of the plain-error doctrine has been satisfied. *Sargent*, 239 Ill. 2d at 189-90, 940 N.E.2d at 1059. Under both prongs, the defendant bears the burden of persuasion. *Sargent*, 239 Ill. 2d at 190, 940 N.E.2d at 1059.

¶ 28 Regardless of whether a probation condition is expressly enumerated by statute or not, circuit courts possess broad discretion in imposing probation conditions to achieve the goals of fostering rehabilitation and protecting the public. *Omar F.*, 2017 IL App (1st) 171073, ¶ 55. However, the court's discretion is constrained by constitutional safeguards and the requirement the condition must be reasonable. *Omar F.*, 2017 IL App (1st) 171073, ¶ 55. To be reasonable, the probation condition cannot be "overly broad when viewed in the light of the desired goal or the means to that end." *Omar F.*, 2017 IL App (1st) 171073, ¶ 57. Stated differently, "[w]here a condition of probation requires a waiver of precious constitutional rights, the condition must be narrowly drawn; to the extent it is overbroad it is not reasonably related to the compelling state interest in reformation and rehabilitation and is an unconstitutional restriction on the exercise of fundamental constitutional rights." (Internal quotation marks and emphasis omitted.) *Omar F.*,

2017 IL App (1st) 171073, ¶ 57 (quoting *In re J.W.*, 204 Ill. 2d 50, 78, 787 N.E.2d 747, 764 (2003)).

¶ 29 Respondent contends the probation search condition (1) violates his fourth amendment rights and (2) is unreasonable under Illinois law because the condition omits a reasonable suspicion of criminal activity requirement. With both arguments, respondent is challenging the level of individualized suspicion required for a search pursuant to the probation condition. The probation condition as written provides for suspicionless searches if directed by a probation officer. Generally, Illinois courts address nonconstitutional arguments and then consider constitutional ones only to the extent required by the issues presented. See *People v. Chairez*, 2018 IL 121417, ¶ 13. Here, respondent's nonconstitutional argument is based solely on his argument the probation condition violates his fourth amendment rights, and thus the two arguments are one and the same. Thus, we will address respondent's claim his fourth amendment rights were violated.

¶ 30 In support of his argument his probation search condition violates his fourth amendment rights, respondent cites *People v. Lampitok*, 207 Ill. 2d 231, 249, 798 N.E.2d 91, 103 (2003), where our supreme court addressed whether a search pursuant to the defendant's fiancée's probation condition violated the fourth amendment. The State suggests *Lampitok* is inapplicable to this case because the court addressed the constitutionality of the search and not the probation condition itself. However, the *Lampitok* court analyzed the constitutionality of the search because, even if the probation search order did not contain a reasonable suspicion requirement, the search could still be valid under the fourth amendment if the officers actually had reasonable suspicion of a probation violation supporting the search. *Lampitok*, 207 Ill. 2d at 253, 798 N.E.2d at 105 (citing *United States v. Vincent*, 167 F.3d 428, 431 (8th Cir. 1999)

("probation search is permissible, even if probation condition is overbroad, if the search authority is 'narrowly and properly exercised' ")). Additionally, we note Illinois courts have addressed challenges to the validity of a juvenile's probation condition on appeal from the sentencing order. See *J.W.*, 204 Ill. 2d at 55, 787 N.E.2d at 750-51; *Omar F.*, 2017 IL App (1st) 171073, ¶ 1. Thus, we will address *Lampitok*.

¶ 31 When evaluating the propriety of a search pursuant to a probation search condition, courts balance the level of intrusion on personal privacy against the degree of need for the search to promote legitimate government interests. *Lampitok*, 207 Ill. 2d at 249, 798 N.E.2d at 103. In analyzing the probationer's privacy, the *Lampitok* court cited the language from the United States Supreme Court's decision in *United States v. Knights*, 534 U.S. 112, 120 n.6 (2001)), where it "recognized a correlation between the terms of the probation search condition and the degree of the probationer's expectation of privacy, which in turn influences the level of individualized suspicion required to justify a search." *Lampitok*, 207 Ill. 2d at 251, 798 N.E.2d at 104. In *Knights*, the court found the defendant had a "significantly diminished" expectation of privacy because he accepted the probation order's broad search condition. *Knights*, 534 U.S. at 119-20. The probation search condition required the defendant to " '[s]ubmit his *** person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer.' " *Knights*, 534 U.S. at 114. While after conducting the balancing test the *Knights* Court found the officers needed no more than reasonable suspicion to conduct the search of the defendant's house, the Court noted it did not address whether the probation condition in that case so diminished or eliminated the probationer's expectation of privacy as to allow a search by law enforcement without any individualized suspicion because the defendant had

conceded the search at issue was supported by reasonable suspicion. *Knights*, 534 U.S. at 120 n.6, 121-22.

¶ 32 In *Lampitok*, the fiancée's probation condition stated the following: " 'That the Defendant shall submit to a search of her person, residence, or automobile at any time as directed by her Probation Officer to verify compliance with the conditions of this Probation Order.' " *Lampitok*, 207 Ill. 2d at 236, 798 N.E.2d at 96. The *Lampitok* court found the fiancée's probation terms were more limited than those in *Knights*, as they restricted the search to those directed by her probation officer and only to verify her compliance with the conditions of her probation. *Lampitok*, 207 Ill. 2d at 251-52, 798 N.E.2d at 105. Since the fiancée's probation search condition was more limited, her expectation of privacy was not as diminished, and more individualized suspicion was required by the fourth amendment than would have been required for the defendant in *Knights*. *Lampitok*, 207 Ill. 2d at 251, 798 N.E.2d at 105. The *Lampitok* court further noted the aforementioned comparison supported the assertion a probation search of the fiancée with no individualized suspicion would be constitutionally unreasonable. *Lampitok*, 207 Ill. 2d at 252, 798 N.E.2d at 105. After balancing the privacy and government interest considerations, our supreme court concluded law enforcement could only search the fiancée's hotel room if they had reasonable suspicion of a probation violation by the fiancée. *Lampitok*, 207 Ill. 2d at 252-53, 798 N.E.2d at 105. In support of its holding, the *Lampitok* court noted the existence of a clear trend in the federal courts of appeals to require reasonable suspicion to support a probation search and the United States Supreme Court rarely allowed warrantless, suspicionless searches. *Lampitok*, 207 Ill. 2d at 254, 798 N.E.2d at 106.

¶ 33 Respondent contends the terms of his probation search condition are similar to those in *Lampitok*. We disagree. Respondent's probation search condition provides the

following: "Permit the Probation Officer to visit your home, school, or elsewhere to the extent necessary as determined by the Probation Office and further, submit to searches of your person, residence, automobile, and/or effects at any time such requests are made by the Probation Officer and consent to the use of anything seized as evidence in a court proceeding." The aforementioned language is much broader than that in *Lampitok*. Respondent agreed to searches that are not limited to verifying compliance with probation conditions. In *People v. Moss*, 217 Ill. 2d 511, 532, 842 N.E.2d 699, 712 (2005), our supreme court found a defendant on mandatory supervised release (MSR) had a "much more limited" expectation of privacy than the probationer in *Lampitok* where the MSR condition required the defendant to "consent to a search of his person, residence, or property under his control, with no limitation on what government agent may perform that search or what purpose they may have." Moreover, under respondent's probation search condition, he consented to the use as evidence in court of any items seized as a result of the search. Respondent's rights were significantly diminished by the probation search condition. Thus, we find the terms of the probation search condition in *Lampitok* and respondent's are significantly different.

¶ 34 Additionally, *Lampitok* was published in 2003, and respondent does not cite any new cases indicating the trends referenced by our supreme court still exist. See *Lampitok*, 207 Ill. 2d at 254, 798 N.E.2d at 106. We note that, in *Moss*, 217 Ill. 2d at 532-33, 842 N.E.2d at 712-13, the Illinois supreme court found a warrantless, suspicionless pat-down search of a defendant on MSR was reasonable. Later, in *People v. Wilson*, 228 Ill. 2d 35, 39, 52, 885 N.E.2d 1033, 1036, 1043 (2008), the Illinois Supreme Court concluded a warrantless, suspicionless search of the bedroom of a defendant, who was on MSR, was reasonable based on his agreement to consent to a search of his residence in his MSR agreement. In reaching its holding, the *Wilson*

court noted the United State Supreme Court's analysis in *Samson v. California*, 547 U.S. 843, 857 (2006), controlled and that decision declared, " '[T]he Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee.' " *Wilson*, 228 Ill. 2d at 52, 885 N.E.2d at 1043. Moreover, in *People v. Absher*, 242 Ill. 2d 77, 91, 950 N.E.2d 659, 668 (2011), our supreme court found a defendant, who had pleaded guilty pursuant to a negotiated plea agreement, waived his fourth amendment rights by agreeing to the suspicionless search condition set forth in his probation order. While none of the aforementioned cases are directly on point, they call into question the limitations of the language in *Lampitok* indicating reasonable suspicion is generally required to support a probation search. See *Lampitok*, 207 Ill. 2d at 254, 798 N.E.2d at 106.

¶ 35 Accordingly, we find respondent has failed to meet his burden of proof to establish an error in his probation search condition based on *Lampitok*.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we affirm the Macon County circuit court's judgment.

¶ 38 Affirmed.