

NOTICE

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FILED

April 29, 2014
Carla Bender
4th District Appellate
Court, IL

2014 IL App (4th) 121068-U

NO. 4-12-1068

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
VERNELL L. ANTHONY,)	No. 10CF754
Defendant-Appellant.)	
)	Honorable
)	John R. Kennedy,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Pope and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err by conducting the motion to reconsider hearing in defendant's absence and any error was harmless because defendant was not statutorily eligible for impact incarceration.

¶ 2 In October 2012, the trial court resentenced defendant, Vernell L. Anthony, to 66 months' imprisonment for harassment of a witness (720 ILCS 5/32-4a(a)(2) (West 2010)). The same month, defendant filed a motion to reconsider his sentence. In November 2012, the trial court held a hearing on defendant's motion to reconsider. Defendant was not present at the hearing. The court denied defendant's motion.

¶ 3 On appeal, defendant argues the trial court erred by holding the motion to reconsider hearing in his absence. Defendant asserts he was entitled to be present at the motion

hearing because the issue of whether he should be sentenced to impact incarceration required an evidentiary hearing. We disagree and affirm.

¶ 4

I. BACKGROUND

¶ 5 In May 2010, a Champaign County grand jury indicted defendant with harassment of a witness (720 ILCS 5/32-4a(a)(2) (West 2010)). Defendant was also indicted on two other counts not relevant to this appeal. The same month, defendant pleaded guilty to harassment of a witness and the trial court sentenced him to 24 months' probation.

¶ 6 In February 2012, the State filed a petition to revoke defendant's probation. In September 2012, defendant admitted the allegations contained in the petition to revoke.

¶ 7 In October 2012, the trial court held a resentencing hearing. The State introduced a presentence investigation report (PSI). The PSI stated defendant had been sentenced to the Illinois Department of Corrections, Juvenile Division, and had completed an impact incarceration program in July 2004. It also stated defendant had five previous misdemeanor convictions and a felony conviction in Kankakee County case No. 05-CF-276. Evidence in mitigation included a statement from Katrina Jarrett, the mother of defendant's son, a letter from a member of the community, and emergency-room discharge instructions for defendant's son. Defendant made a statement in allocution.

¶ 8 The State requested a "lengthy" prison term, considering defendant's criminal record and inability to comply with the probation obligations. The State added, "[i]t would be unconscionable to keep him on a community based sentence considering how badly he has flouted the court already before." Defendant requested an additional term of probation. The trial court revoked defendant's probation and resentenced him as previously stated.

¶ 9 In October 2012, defendant, through counsel, filed a motion to reconsider sentence. It did not mention impact incarceration. In November 2012, the trial court held a hearing on the motion. At the start of the hearing, the trial court noted defendant was not present and stated to defense counsel, "I understand *** [defendant] did not request to be writted for the hearing, correct?" Defense counsel replied, "That's correct, Your Honor." Defense counsel acknowledged she had not requested the court to permit impact incarceration at the resentencing hearing. In support of defendant's argument he should be allowed to participate in an impact incarceration program, counsel presented an exhibit to the trial court. We note the record on appeal does not contain this exhibit but it appears to have consisted of a series of letters from members of defendant's family and the community. In announcing its ruling, the court addressed impact incarceration and stated "defendant's record does not show that he would comply with that or successfully complete it or benefit from it in the way that that should be imposed." The court denied the motion to reconsider.

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 Generally, a defendant has a right to be present at every stage of his trial. *People v. Bean*, 137 Ill. 2d 65, 80, 560 N.E.2d 258, 265 (1990). The supreme court has explained, "a defendant is not denied a constitutional right every time he is not present during his trial, but only when his absence results in a denial of an underlying substantial right, in other words, a constitutional right; and it is only in such a case that plain error is committed." *Id.* at 81, 560 N.E.2d at 265. "To phrase the rule another way, 'a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would

contribute to the fairness of the procedure.' " *Id.* at 83, 560 N.E.2d at 266 (quoting *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987)). "The nearly unanimous rule in this country is that the defendant's constitutional right to be present at the trial does not embrace a right also to be present at the argument of motions prior to trial or subsequent to verdict." *People v. Lofton*, 194 Ill. 2d 40, 66, 740 N.E.2d 782, 797 (2000).

¶ 13 Defendant relies on *People v. Brasseaux*, 254 Ill. App. 3d 283, 660 N.E.2d 1321 (1996), in support of his argument his presence was required at the motion to reconsider hearing. In *Brasseaux*, the defendant filed a *pro se* motion to reconsider which did not contain any allegations of error or a prayer for relief. *Id.* at 286, 660 N.E.2d at 1323. The defendant did not appear at the motion hearing and was not represented by the same assistant public defender who had been his attorney up until the hearing. *Id.* A different assistant public defender appeared and presented no argument on defendant's behalf. *Id.* The Second District concluded the defendant had been denied the effective assistance of counsel. *Id.* at 290, 660 N.E.2d at 1326.

The court added, in *dicta*, the following:

"We conclude that if a motion to reconsider sentence alleges facts outside of the record or raises issues which may not be resolved without an evidentiary hearing, the defendant's presence should be required. [Citation.] If, however, a motion to reconsider sentence does not allege facts outside of the record and does not raise issues which may not be resolved without an evidentiary hearing, his presence should not be required." *Id.* at 291-92, 660 N.E.2d at 1327.

¶ 14 Defendant argues his presence was required because he did not otherwise have an opportunity "to directly address the trial court and explain why he should be given the chance at [impact incarceration]." Defendant fails to articulate what factual issues were raised in his motion to reconsider or how those factual issues required an evidentiary hearing. The trial court did consider an exhibit presented by defense counsel, but defendant does not argue his presence was required because this evidence was presented. Rather, he contends his presence was required in order for the court to observe his "character and demeanor" and to allow him to "directly" address the court about an impact incarceration placement. In other words, to make a second statement in allocution. The court had already observed defendant at the resentencing hearing and received defendant's statement about why he believed a lesser sentence was warranted. Defendant's presence at the motion to reconsider hearing was not required.

¶ 15 The State argues defendant's absence from the motion to reconsider hearing was harmless. We agree. Section 5-8-1.1 of the Unified Code of Corrections states the trial court has discretion to approve an impact incarceration program and in order for a person to be eligible for the program, the person must not have "previously participated in the impact incarceration program." 730 ILCS 5/5-8-1.1(b)(2) (West 2012). Defendant does not argue previous participation is limited to adult impact incarceration programs. The PSI stated defendant had completed the impact incarceration program in July 2004. Defendant was statutorily ineligible for impact incarceration and any error from his absence at the motion hearing was harmless.

¶ 16 III. CONCLUSION

¶ 17 We affirm the judgment of the trial court.

¶ 18 Affirmed.