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2015 IL App (3d) 140834-U

Order filed March 10, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

<i>In re</i> T.C.S.,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
a Minor)	Peoria County, Illinois,
)	
(The People of the State of Illinois,)	
)	
Plaintiff-Appellee,)	Appeal No. 3-14-0834
)	Circuit No. 12-JD-360
v.)	
)	
T.C.S.,)	Honorable
)	Albert L. Purham,
Defendant-Appellant).)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Carter and Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* The minor's sentence for probation revocation was not properly based on the underlying offense. Thus, the minor's sentence is reversed, and the cause is remanded for a new sentencing hearing.

¶ 2 The minor, T.C.S., entered an open admission to a charge of robbery (720 ILCS 5/18-5(a) (West 2012)). The trial court adjudged the minor delinquent and imposed a sentence of three years' probation. While the minor was serving the sentence, the State filed a petition to revoke

probation. The court granted the petition, committed the minor to the Department of Juvenile Justice until his twenty-first birthday, and awarded 93 days of presentence custody credit. On appeal, the minor argues that: (1) a new sentencing hearing is required because the trial court did not base the sentence on the underlying offense; and (2) the minor is entitled to additional credit for time spent in custody prior to the probation sentence. We reverse and remand for resentencing.

¶ 3

FACTS

¶ 4

On August 16, 2012, the State filed a juvenile delinquency petition alleging that the minor had committed the offense of aggravated robbery (720 ILCS 5/18-5(b)(1) (West 2012)). The State later amended the charge to robbery. The minor entered an open admission to the amended charge. The court adjudicated the minor delinquent and sentenced the minor to three years' probation.

¶ 5

On July 16, 2014, the State filed a petition to revoke the minor's probation. The petition alleged that the minor had committed the offense of unlawful possession of a firearm (720 ILCS 5/24-3.1(a)(1) (West 2012)). At the beginning of the hearing, the State said that, while on probation, the minor had committed "the case he's to be sentenced here today for." The evidence presented at the probation revocation hearing established that on the night of July 15, 2014, police officer Bryan Sylvester attempted to stop the minor and two other individuals. As Sylvester approached, the minor ran off, holding his right hand near his waist. Police officer Dave Logan found the minor lying in the weeds near his home. The minor did not have any contraband on his person, but Officer Anthony Rummans found a large revolver approximately 75 to 100 feet from the minor's location. During a search of the residence, an officer found a holster that fit the revolver recovered from the backyard. While the minor was in the patrol car,

he told his mother that the revolver "wasn't his" and that he had "just found it."

¶ 6 At the conclusion of the sentencing hearing, the court stated that it had read the social history investigation report, considered the parties' arguments, and looked at the two-year old psychological evaluation. The court noted that the minor was seeking a sixth term of probation and had exhausted all of the probation department's programs. The court stated that the minor's criminal history included two residential burglaries, a burglary, and a robbery—" [t]hat's 2 1s, 2 2s, and a 4, with today's offense." The court also discussed the prevalence of illegal firearms on the streets and that the minor could not possess a firearm with his record. The court concluded that, for the protection of the public, it was committing the minor to the Department of Juvenile Justice until his twenty-first birthday. The minor appeals.

¶ 7 ANALYSIS

¶ 8 I. Sentence

¶ 9 The minor argues that he is entitled to a new sentencing hearing because his sentence was imposed solely based on the conduct which led to his probation revocation. The minor acknowledges that he has waived review of this issue but contends that it is reviewable under the plain error doctrine. The State agrees that the issue was waived and argues that the sentence was not an abuse of discretion because (1) the court appropriately considered the minor's conduct while on probation to assess his rehabilitative potential and (2) the sentencing hearing was essentially a continuation of the original sentencing hearing for robbery.

¶ 10 The minor did not object to this issue during the sentencing hearing or raise it in a postsentence motion. As a result, the minor has forfeited review, and the issue may only be reviewed if the minor establishes plain error. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). To obtain relief, the minor must show that a clear or obvious error occurred and that the error was

reversible, *i.e.*, "(1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny [the minor] a fair sentencing hearing." *Id.* at 545. Because an unwarranted sentence threatens the integrity of the judicial process, it may be reviewed under the second prong of the plain error doctrine. *People v. Hardin*, 2012 IL App (1st) 100682, ¶ 23. The first step in plain error review is to determine whether error occurred. *Id.*

¶ 11 A sentence within the statutory range will not be overturned unless the court abused its discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). However, where the court mentions an improper factor, we must reverse and remand the cause unless we can conclude from the record that the weight placed on the improper factor was so insignificant that it resulted in no increase in the sentence. *People v. Ross*, 303 Ill. App. 3d 966, 984 (1999).

¶ 12 In a probation revocation proceeding, the record must clearly show that the trial court considered the original offense and imposed a sentence that would have been appropriate for that offense. *People v. Hess*, 241 Ill. App. 3d 276, 284 (1993). The trial court may consider a defendant's conduct while on probation, but it may not commingle matters relating to the original offense with the conduct that gave rise to the probation revocation. *People v. Gaurige*, 168 Ill. App. 3d 855, 870 (1988). The record should show that the court considered: (1) the evidence received during the original trial; (2) any presentence reports; (3) the financial impact of incarceration; (4) evidence and information offered by the parties in aggravation and mitigation; and (5) arguments regarding sentence alternatives. *Hess*, 241 Ill. App. 3d at 284. The court should also afford the defendant an opportunity to speak in his own behalf. *Id.*

¶ 13 Here, the record established that the trial court did not adequately consider the original offense in its sentencing the decision. The State erroneously advised the court that the minor was to be sentenced for the offense that he had committed while on probation. Thereafter, the

court's discussion of the underlying robbery conviction was limited to references to the minor's criminal history and consideration of the presentence reports. In contrast, the court made repeated references to the unlawful possession of a firearm charge that prompted the probation revocation. As a result, the trial court erred, to the extent that it commingled the two offenses and focused its ruling on the probation revocation offense. The court's focus on the revocation offense threatened the integrity of the judicial process and is reversible under the second prong of the plain error doctrine. Therefore, we reverse the minor's sentence and remand the cause for a *de novo* sentencing hearing.

¶ 14

II. Presentence Custody Credit

¶ 15

The minor argues that the court erroneously did not award day-for-day credit for the time he spent in custody prior to the imposition of the sentence on the original offense. The State concedes the issue. Our resolution of the first issue has mooted this issue; however, we would note that on remand, the trial court should apply the total presentence custody credit accrued during the original robbery proceeding and the revocation proceedings to offset any prison sentence imposed.

¶ 16

CONCLUSION

¶ 17

The judgment of the circuit court of Peoria County is reversed, and the cause is remanded for further proceedings.

¶ 18

Reversed and remanded.