

NOTICE
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2011 IL App (4th) 100468-U

Filed 10/26/11

NO. 4-10-0468

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Clark County
ANTHONY LEE PHILLIPS,)	No. 04CF99
Defendant-Appellant.)	
)	Honorable
)	Tracy W. Resch,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding that (1) the trial court did not err by sentencing the defendant to five years in prison and (2) the appellate court lacked jurisdiction to review the defendant's claim that the court erred by imposing a \$200 public-defender fee.

¶ 2 In October 2007, defendant, Anthony Lee Phillips, was convicted of unlawful possession of an all-terrain vehicle (ATV) with a removed vehicle identification number (VIN) (625 ILCS 5/4-103(a)(4) (West 2004)), a Class 2 felony, and was sentenced to probation for 24 months. In July 2009, the State filed a petition to revoke probation, alleging that defendant, violated his probation when police found him in possession of (1) methamphetamine, (2) chemical precursors required to manufacture a controlled substance, (3) cannabis, and (4) drug paraphernalia. In December 2009, defendant admitted violating the terms of his probation as alleged.

¶ 3 Following a January 2010 resentencing hearing, the trial court resentenced defendant to six years in prison. Shortly thereafter, defendant filed a motion to reconsider sentence, asserting that his sentence was "unusually harsh given the circumstances." In May 2010, the court reduced defendant's sentence to five years in prison.

¶ 4 Defendant appeals, arguing that the trial court erred by (1) resentencing him to five years in prison and (2) ordering him to pay a \$200 public-defender fee. Because we disagree that the court erred by resentencing defendant to five years in prison and conclude that we lack jurisdiction to review defendant's fee claim, we affirm.

¶ 5 I. BACKGROUND

¶ 6 In August 2004, the State charged defendant with unlawful possession of an ATV with a removed VIN (625 ILCS 5/4-103(a)(4) (West 2004)). In October 2007, defendant pleaded guilty to that charge, and the trial court sentenced him to probation for 24 months. At that sentencing hearing, the court ordered defendant to pay a \$200 public-defender fee.

¶ 7 In July 2009, the State filed a petition to revoke defendant's probation, alleging that defendant violated the terms of his probation when a search of defendant's vehicle conducted by Indiana police revealed defendant possessed (1) methamphetamine, (2) chemical precursors required to manufacture a controlled substance, (3) cannabis, and (4) drug paraphernalia. At a December 2009 hearing, defendant admitted violating the terms of his probation as alleged. This was an "open admission" because the State and defendant had no agreement regarding what sentence the trial court would impose.

¶ 8 At defendant's January 2010 resentencing hearing, the trial court considered defendant's presentence investigation report (PSI), which outlined defendant's criminal history,

as follows: (1) a 1991 conviction in Indiana for firearm and hunting violations, which resulted in a fine; (2) 1992 convictions in Indiana for (a) hunting from a roadway and (b) shooting from a vehicle at a wild animal, which resulted in fines; (3) a 2003 conviction in Indiana for possession of drug paraphernalia, which resulted in a fine and probation (that probation was later revoked and defendant was sentenced to 365 days in jail); and (4) 8 traffic offenses (2 in Illinois; 6 in Indiana) between 1994 and 2009, which resulted in several fines.

¶ 9 At that sentencing hearing, the State called Deputy Derrick Sanders, who testified that following a July 2004 traffic stop, he arrested defendant after a records check revealed that defendant had an outstanding warrant from Indiana. Sanders thereafter performed an inventory search of defendant's vehicle and found the following items: (1) a full-face helmet with camouflage tape; (2) a blow gun; (3) a three-bladed folding knife; (4) an ice-maker kit with 25-feet of plastic tubing; (5) binoculars; (6) night-vision goggles; (7) 17 lithium batteries; (8) a full-face breathing apparatus; (9) 2 boxes of allergy relief pills; (10) a gold bar; (11) a certificate of origin for a three-wheeled ATV (listed as stolen); (12) homemade pipe fitting with blue corrosion around the connections; (13) three portable propane tanks; (14) black gloves; (15) a camouflage poncho; (16) a camouflage face net; (17) a large black duffel bag; and (18) an ATV without a VIN located in the back of defendant's truck. Sanders explained that following his arrest, defendant admitted that he planned to steal anhydrous ammonia and later use that chemical to manufacture methamphetamine. (Defendant did not present any evidence but made a statement in allocution.)

¶ 10 After considering the evidence and counsel's respective arguments, the trial court resentenced defendant to six years in prison, stating, in part, as follows:

"The Court has considered the history of this case, the circumstances of the original charge and of the probation violation. The Court has considered the evidence presented at the sentencing hearing today. The Court has considered the statement in allocution made by [defendant]. The Court has considered the arguments of counsel as to sentencing alternatives. The Court has considered each and every one of the factors set forth in the statute in aggravations and mitigation. The Court has considered the arguments of counsel.

[Defendant] is [40] years of age. On October 1 of 2007, he was placed on 24 months probation for a Class 2 felony offense ***. [Defendant] violated his probation by committing drug offenses in late June ***. He has additional drug charges dating from September 2009. There is no question that he's continued to use drugs through his probation.

* * *

Defendant's criminal history as well as his self-report, reflects that he has a substantial history of unlawful drug use. Defendant has no work history since 2001. He's been on disability as a result of shooting himself in the leg in December 2002 when he accidentally discharged a pistol. According to the PSI, he evidently had a pistol on his person, apparently was loaded, on his

person. Apparently he dropped it on a concrete floor and it discharged, shooting himself. [The Court] won't even inquire whether [defendant] was sober at the time this occurred, because [the Court does not] think he would tell me the truth. As a result of that, he has been on Disability. His claimed disability has not prevented him from engaging in significant illegal drug use. It hasn't prevented him from violating the criminal laws of the State of Indiana, State of Illinois; hasn't prevented him from failing to live up to even minimal obligations of probation, from operating motor vehicles and violating traffic laws while doing so[. T]hat, too, he's been able to accomplish on disability.

During [defendant's] lengthy period of leisure, he has successfully avoided the opportunity to participate in educational opportunities or participate in drug programs. He has managed to do nothing constructive except collect \$1,000.00 monthly Disability payments. He reports in the PSI to spending his free time working on vehicles, riding bicycles, watching television, and throwing darts. All of this, [defendant], is more than relevant to your character and your attitude. *** [H]ere you shot yourself, disabling yourself, and the public has been paying you a thousand dollars a month. The public doesn't have the moral obligation to pay you a thousand dollars a month, but your fellow citizens have

paid you a thousand dollars a month in Disability so you don't have to work. What have you done in turn? What have you given them? You continue to use drugs, you continue to violate criminal laws of the jurisdictions in which you live. In this record the Court can't find anything that you seem to feel that you responsibly owe the public or your community. A thousand dollars is just what you accept as your due and, in turn, you have no due to anyone else.

*** Defendant claims he needs to and wants to pursue a regimen of physical and drug rehabilitation so he can go back to work. Nothing prevented him from doing that these past seven years. He's had a lot of free time, clearly more free time than he can handle within the framework of a law-abiding life. ***

Defendant did not come close to succeeding on probation. He may have come close to successfully completing probation without getting caught, but that's a different matter. He continued to use illegal drugs throughout probation."

¶ 11 Shortly thereafter, defendant filed a motion to reconsider sentence, asserting that his sentence was "unusually harsh given the circumstances". In May 2010, the court reduced defendant's sentence to five years in prison, conceding that it failed to properly consider evidence in mitigation regarding his status as a disabled person.

¶ 12 This appeal followed.

¶ 13

II. ANALYSIS

¶ 14 Defendant argues that the trial court erred by (1) resentencing him to five years in prison and (2) ordering him to pay a \$200 public-defender fee. We address defendant's contentions in turn.

¶ 15 A. Defendant's Claim That the Trial Court Erred by Resentencing Him to Five Years in Prison

Defendant first contends that the trial court erred by resentencing him to five years in prison. Specifically, defendant asserts that the court abused its discretion by basing defendant's sentence "primarily" upon his postplea conduct rather than the underlying offense, as follows: "[T]he court made various statements at re-sentencing which indicated that it recognized [defendant's] post-plea conduct as the most significant sentencing factor, rather than the underlying offense ***." We disagree.

¶ 16 We afford the trial court's sentencing decision substantial deference and weight and will not disturb its decision absent an abuse of discretion. *People v. Campbell*, 325 Ill. App. 3d 569, 571, 758 N.E.2d 504, 505 (2001). It is the function of the trial court to balance the relevant factors and make a reasoned decision as to the appropriate sentence, and we will not substitute our own judgment for that of the trial court. *People v. Richmond*, 341 Ill. App. 3d 39, 53, 791 N.E.2d 1132, 1143 (2003).

¶ 17 In *People v. Rathbone*, 345 Ill. App. 3d 305, 312, 802 N.E.2d 333, 339 (2003), this court rejected the defendant's claim that the trial court erred by considering his conduct while on probation when sentencing him after his probation had been revoked. Indeed, we explicitly held that "when resentencing after a revocation of probation, trial courts are entitled to consider the defendant's conduct on probation." *Rathbone*, 345 Ill. App. 3d at 312, 802 N.E.2d at 339, citing *People v. Young*, 138 Ill. App. 3d 130, 142, 485 N.E.2d 443, 450 (1985) ("[t]he manner in which

a defendant conducts himself or herself while on probation is an appropriate consideration in any sentencing hearing”). Thus, as we explained in *Rathbone*, although defendant in this case appears to assert that he was resentenced based on an improper factor, a more accurate characterization of his claim is that the trial court gave a proper factor undue weight. The record, however, belies that claim.

¶ 18 At defendant's resentencing hearing, the trial court stated that it had considered all of the statutory factors in aggravation and mitigation, counsels' arguments, and defendant's allocution. The record shows that the court also considered defendant's age, his drug abuse, his conduct on probation, and the underlying offense of which he was convicted. The available sentencing range for defendant's Class 2 felony was between 3 and 7 years. 730 ILCS 5/5-8-1(a)(5) (West 2004). Reviewing the evidence in accordance with the applicable standard of review, we conclude that the court did not abuse its discretion by resentencing defendant to five years in prison.

¶ 19 B. Defendant's Claim That the Trial Court Erred by Ordering
Him To Pay a \$200 Public-Defender Fee

¶ 20 Defendant next contends that the trial court erred by ordering him to pay a \$200 public-defender fee. Specifically, defendant contends that the court erred by ordering him to pay that fee without conducting a hearing to determine his ability to pay the fee. The State responds that this court lacks jurisdiction to consider defendant's contention, given that the court imposed the public-defender fee when defendant was originally sentenced to probation in October 2007, 32 months before defendant filed his notice of appeal in this case. We agree with the State.

¶ 21 A trial court loses subject-matter jurisdiction 30 days after a sentence is imposed, and a defendant should not be permitted to pursue a direct appeal after that point. *People v.*

Flowers, 208 Ill. 2d 291, 301, 802 N.E.2d 1174, 1181 (2003). This general rule notwithstanding, defendant asserts that we should review his contention because the erroneously imposed public-defender fee renders his sentence void. Contrary to defendant's assertion, however, failure to conduct a hearing to determine a defendant's ability to pay a public-defender fee renders a sentence voidable, rather than void. See *People v. Morrison*, 298 Ill. App. 3d 241, 244, 698 N.E.2d 671, 673-74 (1998) (holding that the court lacked jurisdiction to review the propriety of the public defender reimbursement order, given that the order was merely voidable); see also *People v. Davis*, 344 Ill. App. 3d 400, 405-06, 800 N.E.2d 539, 544-45 (2003) (where this court explained the difference between void orders and voidable orders).

¶ 22 Accordingly, we have no jurisdiction to review the propriety of the trial court's public-defender fee reimbursement order.

¶ 23 Further, we note that the record shows that no hearing was required in this case, given that defendant agreed to pay the \$200 public defender fee as part of his October 2007 negotiated plea, he had paid that fee in full by the time he was resentenced, and the trial court imposed no additional fees at the January 2010 resentencing hearing.

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 26 Affirmed.