2012 IL App (2d) 110750-U
No. 2-11-0750
Order filed July 6, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10-CF-2191
	)	
CHANCE D. PRESLEY,	)	Honorable
	)	James K. Booras,
Defendant-Appellant.	)	Judge, Presiding.

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

ORDER

Held: The trial court did not abuse its discretion in resentencing defendant to an extended term where the court properly considered the nature of the original offense and did not commingle the original offense with the incidents giving rise to the revocation of probation. In addition, defendant is entitled to an additional 19 days of credit for the time spent in jail awaiting a hearing on the State's petition to revoke his probation.

¶ 1 Defendant, Chance D. Presley, was sentenced to probation after pleading guilty to violation of an order of protection (720 ILCS 5/12-30 (West 2010)). After revoking defendant's probation, the trial court resentenced defendant to six years' imprisonment. Defendant appeals, contending that the court abused its discretion by imposing an excessive sentence. Defendant further argues that he

is entitled to an additional 19 days of credit for time served. For the following reasons, we affirm in part but remand for correction of the mittimus.

¶ 2 BACKGROUND

¶ 3 On October 23, 2008, defendant's wife, Amber Presley (Amber), obtained an order of protection against defendant. In April 2010, defendant was convicted of violating the order of protection after he placed harassing and threatening phone calls to Amber.

¶ 4 On June 30, 2010, defendant was again arrested for violating the order of protection. At the time, defendant was living with his sister-in-law in an apartment building where Amber resided. The police were called to the apartment and found defendant sitting on his sister-in-law's couch. The police repeatedly directed defendant to leave the apartment. While there, the police learned that Amber had an active order of protection against defendant. Eventually, the police removed defendant from the apartment building, but defendant still refused to leave the area. At that time, Amber arrived, and defendant was within 100 feet of her. The police repeatedly told defendant to leave or he would be arrested, but defendant continued to disregard the officers' orders and remained in the road talking on his phone. The police arrested defendant shortly thereafter.

¶ 5 On September 8, 2010, defendant pleaded guilty to violating the order of protection. Upon accepting the plea and entering a judgment of conviction, the trial court sentenced defendant to 24 months' probation. The terms of probation required defendant to perform 100 hours of public service work, obtain employment or enroll in an educational program, submit to a drug and alcohol evaluation, obtain an Intervention Program for Domestic Abuse and Violence (IPDAV) evaluation, and abide by the order of protection.

¶ 6 On October 1, 2010, while on probation, defendant was again arrested and charged with violating the order of protection. The State filed a petition to revoke defendant's probation on November 10, 2010, alleging defendant's arrest on October 1 and contact with Amber.

¶ 7 On November 15, 2010, while on bond for the October arrest, defendant was arrested on charges of domestic battery and unlawful restraint. The State filed a supplemental petition for revocation of probation on January 13, 2011. In the supplemental petition, the State alleged that defendant violated the order of protection by having contact with Amber on October 1 and November 15. In addition, the State alleged that defendant never complied with the conditions of his probation. The State also claimed, *inter alia*, that defendant failed to obtain an IPDAV evaluation, complete his public service hours, obtain employment, or enroll in an educational program. On January 18, 2011, following an evidentiary hearing on the supplemental petition, the trial court revoked defendant's probation.

¶ 8 On March 1, 2011, the trial court resentenced defendant, finding that another period of probation was not appropriate.[1] The court explained:

> "I've considered what's contained in the [presentence investigation report], I've considered the arguments of counsel. Obviously, they are diametrical. There's been a lot of—I've considered the defendant's statement. Perhaps the defendant means what he says.
>
> It's a little late, though, Mr. Presley. I cannot find in good faith that you would complete another period of probation. Your track record indicates that you even though

[1]At the hearing, the court inquired whether the attorneys would be presenting any evidence in aggravation or mitigation. The assistant state's attorney indicated "None other than what's contained in the P.S.I., Judge," and defendant's attorney indicated, "No, Judge."

> you're a young man, you have a lengthy criminal record, and that counts. I must consider your past criminal record."

The court then noted that defendant had served a total of eight years during four different trips to the Illinois Department of Corrections. The court indicated he had done nothing on probation and agreed with the assistant state's attorney that whenever faced with a difficulty, defendant reacted violently against it and failed to abide by the rules. Then, the court identified the importance of protecting society, stating:

> "I've done what I could do. I must protect society.
>
> ***
>
> I must follow—I must find that your conduct has caused criminal harm. I have to find you have a history of criminal con—a history of prior delinquency and criminal activity. I must find that your conduct was a result of circumstances that will likely recur."

The court also noted, "And there's two more pending cases that I see here." The court then found defendant "eligible for an extended term *** based upon [his] previous convictions for [unlawful use of a weapon], unlawful possession of [a] controlled substance, obstructing justice, unlawful possession of a controlled substance, aggravated fleeing and eluding, a violation of an order of protection, the current one." The court sentenced defendant to six years in the Illinois Department of Corrections with credit for time served.

¶ 9 Defendant filed a motion to reconsider the sentence on March 9, 2011, which the trial court denied on March 22, 2011. This court granted defendant's motion to file a late notice of appeal.

¶ 10 ANALYSIS

¶ 11 Defendant contends that the trial court abused its discretion in sentencing him to the maximum extended term of six years. Defendant also argues that he is entitled to an additional 19 days' credit for the time he spent in jail awaiting a hearing on the State's petition to revoke. We consider each contention in turn.

¶ 12 Article I, section 11, of the Illinois Constitution provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, §11; *People v. Perruquet*, 68 Ill. 2d 149, 154-55 (1977). The role of the trial judge is to fashion a sentence that both protects the interests of society and allows for the possibility of the offender's rehabilitation. *Perruquet*, 68 Ill. 2d at 155. A trial judge's determination should depend upon a number of factors including "defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *Perruquet*, 68 Ill. 2d at 154.

¶ 13 In order to sustain the trial court's sentence, the record must clearly show the trial court considered the original offense and that the sentence imposed was appropriate for the original offense. *People v. Hess*, 241 Ill. App. 3d 276, 284 (1993). Conduct that results in the revocation of a defendant's probation can be considered as evidence of the extent to which a defendant's rehabilitative potential has diminished. See *People v. Vilces*, 186 Ill. App. 3d 983, 987 (1989). Courts should not commingle matters concerning the original offense with the conduct that brought about the revocation of probation. *People v. Gaurige*, 168 Ill. App. 3d 855, 870 (1988). "[A] sentence within the statutory range for the original offense will not be set aside on review *unless* the reviewing court is strongly persuaded that the sentence imposed after revocation of probation was

in fact imposed as a penalty for the conduct which was the basis of revocation, and *not* for the original offense." (Emphases in original.) *People v. Young*, 138 Ill. App. 3d 130, 142 (1985).

¶ 14 Our standard of review is abuse of discretion. *People v. Varghese*, 391 Ill. App. 3d 866, 876 (2009). Given the trial court's capacity to observe the defendant's demeanor and other factors, its sentencing decision is entitled to great deference and weight. *Perruquet*, 68 Ill. 2d at 154. We may find that the trial court abused its discretion if the sentence imposed " 'is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *People v. Flores*, 404 Ill. App. 3d 155, 157 (2010) (quoting *People v. Stacey*, 193 Ill. 2d 203, 210 (2000)).

¶ 15 On appeal, defendant contends that the trial court abused its discretion in sentencing him to an extended term of six years because the court improperly commingled the original offense with the incidents resulting in defendant's probation being revoked and failed to consider the minimal nature of the original offense. We disagree.

¶ 16 Defendant's probation was revoked for violating an order of protection under section 12-30 of the Criminal Code of 1961 (720 ILCS 5/12-30 (West 2010)). Since defendant had previously been convicted of violating an order of protection in April 2010, the instant violation constituted a Class 4 felony as opposed to a Class A misdemeanor. See 720 ILCS 5/12-30(d) (West 2010). The presentence investigation report also revealed that defendant previously had been convicted of aggravated unlawful use of a weapon on May 7, 2002 (02-CF-2359), unlawful possession of a controlled substance on June 20, 2002 (02-CF-2358), obstructing justice on February 17, 2005 (05-CF-589), unlawful possession of a controlled substance with an intent to deliver on December 15, 2006 (06-CF-5057), and aggravated fleeing and eluding on March 4, 2008 (08-CF-895). He was sentenced to the Illinois Department of Corrections for terms ranging from two to five years for these

convictions. These previous convictions of Class 4 or greater felonies[2] within the prior 10 years qualified defendant for an extended term. See 730 ILCS 5/5-5-3.2(b)(1) (West 2010). A Class 4 felony conviction carries a sentencing range of one to three years, or an extended term of three to six years. 730 ILCS 5/5-4.5-45(a) (West 2010).

¶ 17 Initially, we note our examination of the record indicates that the trial court properly considered the original offense. To determine whether the court considered the original offense, the reviewing court may consider the remarks of the trial court during sentencing. *People v. Varghese*, 391 Ill. App. 3d 866, 876 (2009). The trial court's remarks "must be taken in context, and read in their entirety, including arguments of counsel." *Young*, 138 Ill. App. 3d at 142. During the assistant state's attorney's argument at the resentencing hearing, he stated:

> "I think you'll need to look no further than the Page 3 of the P.S.I., the instant offense. The defendant's violating the order of protection that Amber Presley had, but the defendant didn't have to be arrested on that date. In fact, the defendant was offered an opportunity by the police to simply leave the scene without being arrested. But the defendant after being repeatedly told to leave or he would be arrested continued to stand in the roadway, talk on his phone and clearly not cooperate with the officers.
>
> He could have left and wouldn't have been arrested. But he didn't leave, and he wouldn't listen to the officers. He got a break but he wouldn't take advantage of it because

[2]We utilized information provided on the Department of Corrections' website to establish that defendant's convictions within the prior 10 years were Class 4 felonies or greater. We are permitted to take judicial notice of this information. *People v. Young*, 355 Ill. App. 3d 317, 321 n.1 (2005).

> he wasn't going to listen to the police, he doesn't listen to anybody, he's going to do what he wants when he wants."

Following argument, the court heard defendant's statement in allocution and identified that it considered, *inter alia*, the presentence investigation report, which prominently referenced and discussed the "instant offense" in detail on page 3. The probation department's sentencing recommendation on pages 20-22 of the report also specifically referenced the June 30 original offense. The court stated that it "must protect society," that defendant's "conduct [had] caused criminal harm," and that his "conduct was a result of circumstances that will likely recur." Read in context, these statements do refer to defendant's conduct in the original offense.

¶ 18 Nonetheless, defendant argues that we should reverse because, similar to *Gaurige*, the record does not clearly show that the trial court considered the original offense. We find defendant's argument unconvincing. In *Gaurige*, the defendant committed the offense of voluntary manslaughter while on probation for residential burglary. The trial court revoked the defendant's probation. *Gaurige*, 168 Ill. App. 3d at 859. When resentencing the defendant for the residential burglary conviction, the trial court focused on the fact that a "life was taken." *Gaurige*, 168 Ill. App. 3d at 871. The appellate court concluded that the record did not show what factors beyond the voluntary manslaughter conviction, which was the basis for the petition to revoke, that the trial court had considered in imposing the defendant's sentence. *Gaurige*, 168 Ill. App. 3d at 871. Accordingly, the appellate court vacated the sentence and remanded the case for a new sentencing hearing. *Gaurige*, 168 Ill. App. 3d at 871. The present case is distinguishable from *Gaurige* in that the record does reflect that the trial court considered the underlying offense of violation of an order of protection. Unlike *Gaurige*, where the trial court only discussed specific facts regarding the conduct

that was the basis for the revocation of probation, here, the trial court only briefly noted the petition's allegations of the October 1 contact with Amber and the arrest for the November 15 domestic battery and unlawful restraint offenses. The court's remark "And there's two more pending cases that I see here" was made only in response to defendant imploring the court in essence for another opportunity on probation.

¶ 19 Defendant's reliance on *Varghese* is also unavailing. In *Varghese*, the defendant pleaded guilty to aggravated criminal sexual abuse and received two years of sex offender probation. The trial court later granted the State's petition to revoke the defendant's probation. *Varghese*, 391 Ill. App. 3d at 868. At the resentencing hearing, the State sought to establish that at the time the defendant was arrested for driving without a license (the incident resulting in the probation revocation), the defendant was attempting to meet a 16-year-old girl to have sex. *Varghese*, 391 Ill. App. 3d at 868-72. This court vacated the defendant's sentence and remanded the case for resentencing because the trial court improperly commingled uncharged conduct with the original offense. *Varghese*, 391 Ill. App. 3d at 877. Although the trial court in *Varghese* mentioned that the defendant had been placed on sex offender probation pursuant to a plea agreement (*Varghese*, 391 Ill. App. 3d at 872), it failed to discuss the defendant's original offense. Rather, the court provided an extensive and lengthy discussion of the defendant's subsequent conduct in attempting to meet the 16-year-old girl. *Varghese*, 391 Ill. App. 3d at 872.

¶ 20 Unlike *Varghese*, and as discussed above, the trial court here did consider the original offense when finding that defendant's "conduct has caused criminal harm" and "was a result of circumstances that will likely recur." There is nothing in the record showing that the trial court improperly commingled any subsequent conduct with the original offense. In fact, the trial court

briefly referenced the two subsequent offenses separately only after discussing the original offense. Furthermore, although in *Varghese* the court gave an extensive discussion of the factual basis surrounding the defendant's probation revocation, here, the trial court did not discuss the factual circumstances surrounding the pending charges at all. While the court did discuss defendant's conduct on probation, as we point out later, the thrust of his remarks indicated that the court viewed defendant's noncompliance as evidence of his low rehabilitation potential.

¶ 21 Defendant next contends that the trial court abused its discretion by not properly considering the minimal nature of the offense. Defendant argues that the original offense constituted a technical violation of the 2008 order of protection, as evidenced by a letter Amber wrote to the Lake County assistant public defender. In this letter, dated July 29, 2010, Amber stated that she phoned the police after learning that defendant was residing with his sister-in-law. Amber also claimed that she unexpectedly showed up at the apartment, and that "once [she] informed the police who [she] was and stated [defendant wouldn't] leave the residence[,] he was in violation." Defendant insists that Amber's letter indicated that Amber came within 500 feet of defendant, as opposed to his coming within 500 feet of her. Defendant argues that this technical violation of the order of protection supports the minimal nature of his original offense.

¶ 22 Accepting for purposes of argument that defendant committed only the minimum conduct necessary to violate an order of protection, it does not follow that the trial court had to impose a sentence on the lower end of the range. See *Flores*, 404 Ill. App. 3d at 158 ("Given the trial court's ability to observe defendant's demeanor and other intangible factors, a sentence above the minimum would not necessarily be contrary to the purpose and spirit of the law even had defendant committed the minimum conduct to violate the statute.").

¶ 23 A conviction of violation of an order of protection is an offense committed against a person. Section 112A-14(a) of the Criminal Code of 1961 (725 ILCS 5/112A-14(a) (West 2010)) provides that an order or protection can be issued "[i]f the court finds that petitioner has been abused by a family or household member." 725 ILCS 5/112A-14(a) (West 2010). As defined by the legislature, abuse refers to "physical abuse, harassment, intimidation of a dependent, interference with personal liberty or willful deprivation." 725 ILCS 5/112A-3(1) (West 2010). Regardless how technical, a violation of an order of protection is inherently not *de minimus*. The legislature's decision to increase the classification from a Class A misdemeanor to a Class 4 felony, when a defendant was previously convicted of violating an order of protection, further supports the more serious nature of the offense, regardless of the circumstances.

¶ 24 Notwithstanding defendant's argument to the contrary, the trial court could have viewed the original offense as more than minimal due to its prolonged nature. Defendant's decision to disobey the officers' orders, coupled with his choice to remain in violation of the order of protection after being given an opportunity to avoid arrest, supports the trial court's imposition of the sentence to the Department of Corrections.

¶ 25 Defendant further contends that, because he was on probation for only a little over two months, the trial court's suggestion that he made no effort to satisfy any condition of his probation was inappropriate. We do not agree with defendant's argument. Defendant had been on probation before. The trial court determined that two months was enough time for defendant to exhibit his willingness to comply with the conditions of his probation. During those two months, the court indicated defendant could have demonstrated his readiness to fulfill his probation requirements by at least beginning one of the programs. Defendant did not attempt to enroll in an educational

program, obtain employment, or start his public service hours. It is not improper "for the trial court to consider the defendant's conduct while on probation to assess his 'rehabilitative potential.' " *Vilces*, 186 Ill. App. 3d at 986 (quoting *Young*, 138 Ill. App. 3d at 135). The trial court's consideration of defendant's conduct on probation, regardless of the length, was properly used to assess defendant's lack of rehabilitative potential.

¶ 26 Because the record establishes that the trial court properly considered the nature of defendant's original offense, did not commingle it with the subsequent conduct, and considered other appropriate factors such as defendant's prior record, we are not strongly persuaded that the court imposed a six-year sentence in fact to punish defendant for his conduct resulting in the revocation of probation, rather than for the original offense. Accordingly, the trial court did not abuse its discretion. See *Young*, 138 Ill. App. 3d at 142 (stating that sentencing determinations which "follow upon the revocation of probation ought not be more easily overturned than sentencing determinations generally.").

¶ 27 Defendant next argues that he is entitled to an additional 19 days' credit for the time he spent in jail awaiting a hearing on the State's petition to revoke his probation. The State concedes that defendant was incorrectly credited with only 110 days' presentence credit rather than 129 days. We agree.

¶ 28 Our standard of review is *de novo*. *People v. Gomez*, 409 Ill. App. 3d 335, 341 (2011). A defendant is entitled to "credit *** for time spent in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5-4.5-100(b) (West 2010); see *People v. Williams*, 239 Ill. 2d 503, 505 n.1 (2011) (explaining that prior to the enactment of section 5-4.5-100 in 2009, section 5-8-7 of the Unified Code of Corrections (see 730 ILCS 5/5-8-7(b) (West 2008)) contained the same

provision, but has since been repealed). "[O]nce a defendant is arrested for an offense he or she is clearly 'in custody' for that offense even before he or she is formally charged." *People v. Roberson*, 212 Ill. 2d 430, 439 (2004). A defendant is entitled to credit against his or her sentence from the date he or she is arrested. See *People v. White*, 357 Ill. App. 3d 1070, 1075 (2005). The date a defendant is transferred to the Department of Corrections is counted toward his prison sentence, not toward his presentence credit. *Williams*, 239 Ill. 2d at 510.

¶ 29 The record establishes that defendant was arrested on November 15, 2010, and transferred to the Illinois Department of Corrections on March 24, 2011. The total number of days between November 15, 2010, and March 24, 2011, not counting March 24 (the date of transfer) but including November 15 (the date of the arrest), is 129 days. Thus, defendant was entitled to 129 days of presentence credit. Accordingly, we remand with directions to the trial court to issue a corrected mittimus to reflect a presentencing credit of 129 days.

¶ 30 For the foregoing reasons, we affirm the judgment as to the sentence of the circuit court of Lake County but remand with directions to issue a corrected mittimus to reflect the addition of 19 days of credit for time served.

¶ 31 Affirmed and remanded with directions.