2012 IL App (4th) 100392-U

Filed 2/15/12

NO. 4-10-0392

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

| | | |
|---|---|---|
| In re: Darius K., a Minor, | ) | Appeal from |
| THE PEOPLE OF THE STATE OF ILLINOIS | ) | Circuit Court of |
| Petitioner-Appellee, | ) | Champaign County |
| v. | ) | No. 09JD197 |
| DARIUS K., | ) | |
| Respondent-Appellant. | ) | Honorable |
| | ) | Harry E. Clem, |
| | ) | Judge Presiding. |

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Turner and Justice Appleton concurred in the judgment.

**ORDER**

¶ 1 *Held*: Respondent forfeited his argument regarding the trial court's reliance on "mere police contacts and arrests" during his sentencing because he did not bring this issue to the trial court's attention during the dispositional hearing. The trial court did not abuse its discretion in refusing to consider respondent's postsentencing behavior when ruling on his motion to reconsider sentence.

¶ 2 On February 1, 2010, respondent, Darius K., pleaded guilty to aggravated battery for his role in the August 2009 beating of a 51-year-old homeless man, a Class 3 felony (720 ILCS 5/12-4(a) (West 2008)). In exchange for his guilty plea, the State dismissed its petition to revoke respondent's probation in a prior burglary case, No. 09-JD-22.

¶ 3 On March 4, 2010, the trial court adjudicated respondent a delinquent minor and ordered him a ward of the court. The court further ordered him

"committed to the Illinois Department of Juvenile Justice [(DOJJ)]

> for an indeterminate term, which will automatically terminate in five years or upon the Minor attaining the age of 21 [ ] years, whichever comes first, unless the Minor is sooner discharged from parole or custodianship is otherwise terminated in accordance with the Juvenile Court Act, or as otherwise provided for by law."

The court awarded respondent 21 days' credit for time previously spent in custody. On March 30, 2010, defense counsel filed a motion to reconsider sentence and on April 29, 2010, an amended motion to reconsider sentence. On May 12, 2010, the trial court denied the motion to reconsider sentence.

¶ 4 On appeal, respondent argues the trial court erred by (1) relying on mere police contacts and arrests in the social investigation report (SIR) in sentencing respondent originally, and (2) concluding it had no discretion to consider respondent's postsentencing behavior when ruling on his motion to reconsider sentence. The State disagrees and argues (1) respondent has forfeited his police-contacts argument and the trial court relied on proper factors in sentencing him, and (2) the trial court properly declined to consider postsentencing behavior in denying the motion to reconsider sentence. We agree with the State and affirm.

¶ 5 I. BACKGROUND

¶ 6 On August 20, 2009, respondent was arrested and charged with aggravated battery causing great bodily harm for his role in the August 19, 2009, beating of a homeless man. Respondent admitted punching the man once and kicking him twice. Respondent was taken into custody and transported to the youth detention center. On September 9, 2009, respondent was released from custody pending further proceedings, subject to several restrictions.

¶ 7 Respondent committed this offense less than three months into his 30-month May 2009 probation sentence for a January 2009 burglary, case No. 09-JD-22. The State filed a petition to revoke his probation in case No. 09-JD-22 based on the instant offense. On March 4, 2010, after being admonished by the trial court, respondent pleaded guilty to aggravated battery in exchange for the dismissal of the petition to revoke probation in his burglary case.

¶ 8 The SIR prepared in anticipation of sentencing revealed respondent had eight prior police contacts. The three oldest, which were disputed by respondent at the dispositional hearing, were disregarded by the court. The five most recent were listed as follows:

| DATE | OFFENSE | DEPARTMENT | DISPOSITION |
|---|---|---|---|
| March 24, 2009 | Probation Violation | UPD | Juvenile Court |
| January 27, 2009 | Home Invasion and Robbery | UPD | Juvenile Court |
| January 8, 2009 | Armed Robbery Aggravated Robbery | UPD | Juvenile Court |
| October 25, 2008 | Theft Under $300 | UPD | Pending |
| January 18, 2008 | Burglary | UPD | Cleared by arrest |

Additionally, the SIR disclosed from January 27, 2009, through February 11, 2009, respondent was detained for "Home Invasion, Robbery, & Aggravated Robbery" and was released on pretrial conditions. Respondent was then detained for "Warrant of Apprehension for Contempt Original Offense: Home-Invasion" from March 25, 2009, through April 16, 2009. He was released pending sentencing

¶ 9 Respondent lived with his mother, older sister, and one-year-old nephew. His mother was unemployed and his father's whereabouts were unknown. Respondent and his mother previously participated in a program entitled "Parenting with Love and Limits," but they

were asked to leave due to "inappropriate behavior." Respondent's mother explained they were asked to leave over a misunderstanding. Further, respondent had been attending a Mission 180 night basketball program for nearly three weeks prior to sentencing. He reported to his probation officer as ordered. Respondent was getting good grades in school and earned 23 hours toward his public service work; however, he was involved in 36 disruptive or disrespectful incidents at school from September 2009 through February 2010. For the 2009 through 2010 school year, respondent had 32.5 excused absences and 12 unexcused absences. He also tested positive for cannabis while on probation in January and February 2010.

¶ 10 At the March 4, 2010, dispositional hearing, the State recommended commitment to DOJJ, arguing respondent posed a danger to others in the community. The State pointed out respondent was on probation for burglary when he participated in the "savage beating of a homeless man[,]" was still involved in gang activities, abusing substances, and received numerous discipline referrals at school, two of which involved hitting or threatening other students. Defense counsel argued for a community-based sentence to give respondent the opportunity to turn his life around, or in the alternative, if the court determined a sentence to DOJJ was necessary, the sentence only be for a 60-day assessment which would "give [respondent] a taste of what it's like there, and hopefully get him back on the right track."

¶ 11 After considering all relevant information, the trial court stated in part:

> "The Court has specifically considered the best interests of the minor and the public. The Court finds that the Minor Respondent's parent is unable, for reasons other than financial circumstances alone, to care for, protect, train and discipline the minor.

> And that the best interests of the public will not be served by placement under Section 705 of the Illinois Compiled Statutes, 405/5-740. It will be the order of the Court, therefore, that the Minor Respondent be committed to [DOJJ] for an indeterminate term."

Further, the court stated:

> "This could have been a murder case. *** Were you an adult, you could spend as long as five years in the penitentiary. And since you were—if you were an adult already on probation for another felony offense, that would have been served after the sentence for that offense. It's called consecutive sentences, something you might want to think about when you're away.
>
> Now, as far as the rest of this is concerned, I'm going to not consider the prior information in here about prior police contacts that you dispute, which leaves me with the ones you don't dispute. One for burglary. One for theft under $300.00. One for armed robbery and aggravated robbery. One for home invasion robbery. And a probation violation, in addition to the one that you're here for today. Conduct that's at least gone on for the last couple of years."

¶ 12 The trial court also mentioned respondent had already been given the opportunity of a community-based sentence, which he violated within three months of sentencing. The court

recognized respondent was an intelligent young man based on his grades, but pointed out he continuously acted out in school by being disrespectful to staff, bullying other students, and giving gang handshakes. The court also acknowledged respondent had a substance-abuse problem. The court informed respondent his behavior while incarcerated would affect how long he would be in custody.

¶ 13 On March 30, 2010, defense counsel filed a motion to reconsider sentence, (1) arguing respondent's substance-abuse issues would be better addressed in the community and (2) noting the several mitigating factors presented at the dispositional hearing, including the following: respondent's (a) good behavior at home, (b) good grades in school, (c) regular attendance at probation appointments, (d) enrollment in a mentoring program, and (e) taking responsibility for his actions by pleading guilty. On April 28, 2010, defense counsel filed an amended motion, which noted respondent was enrolled in a substance-abuse treatment program in DOJJ and intended to continue with treatment if he were resentenced to probation. Additionally, counsel asked the court to consider a letter from DOJJ, which stated respondent had "experienced a completely positive adjustment" to DOJJ.

¶ 14 On June 9, 2010, the trial court denied the motion to reconsider sentence, reiterating the factors upon which it had relied in support of the original commitment order. The court also determined it was "inappropriate *** to consider information as to [respondent's] progress at [DOJJ] in regard to a Motion to Reconsider the order that sent him there in the initial instance."

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 Respondent contends the trial court erred by (1) relying on mere police contacts and arrests in his SIR in sentencing respondent, and (2) concluding it had no discretion to consider respondent's postsentencing behavior when ruling on his motion to reconsider sentence

¶ 18 A. The Trial Court Properly Considered Police Contacts During Disposition

¶ 19 Respondent argues the trial court erroneously relied on mere police contacts and arrests in adjudicating him delinquent and sentencing him to an indeterminate term in DOJJ. Specifically, respondent contends the following: (1) the trial court improperly relied on his mere arrests and police contacts listed in the SIR because juveniles are entitled to the same procedural safeguards as adults; and (2) because it is impossible to tell whether the trial court's reliance on the minor's prior police contacts was insignificant, his case must be remanded for resentencing.

¶ 20 1. *Forfeiture*

¶ 21 The State contends respondent's arguments are forfeited because he failed to raise this claim at the dispositional hearing or in his motion to reconsider. Respondent asserts review of his claim is warranted because it is a "clear and obvious" error under Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967). We agree with the State.

¶ 22 Respondent argues this court should review this claim, "despite the omission of the foregoing error from the minor's motion to reconsider sentence" because the error is "clear and obvious." Generally, to preserve an error for review, a respondent in proceedings under the Juvenile Court Act of 1987 (Juvenile Act) must object at those proceedings. *In re M.W.*, 232 Ill. 2d 408, 430, 905 N.E. 2d 757, 772 (2009). A party who fails to raise an alleged deficiency in the SIR at the *dispositional hearing* forfeits the issue on appeal. *In re P.E.K.*, 200 Ill. App. 3d 249, 252, 558 N.E.2d 763, 765 (1990) (applying *People v. Powell*, 199 Ill. App. 3d 291, 294-95, 556

N.E.2d 896, 898 (1990) (holding the party who believes the presentence report contains an inaccuracy has the burden to call the inaccuracy to the court's attention at the sentencing hearing; failure to bring any inaccuracies to the court's attention results in waiver of that claim on appeal)); see also *People v. Williams*, 149 Ill. 2d 467, 493, 599 N.E.2d 913, 925 (1992) (holding "[a]ny claimed deficiency or inaccuracy within a presentence report must first be brought to the attention of the sentencing court, and a failure to do so results in waiver of the issue on review."). Including the issue in a motion to reconsider does not suffice. Respondent objected to three police contacts and arrests noted in the SIR at the dispositional hearing, and the court disregarded those contacts. He failed to object to the five police contacts and arrests at issue now, at least some of which he claims should never have been considered by the court. By the objections he made, he essentially acquiesced in the court considering the remaining items stated in the SIR. Respondent has forfeited this issue on appeal unless he can demonstrate plain error. *M.W.*, 232 Ill. 2d at 431, 905 N.E.2d at 773.

¶ 23 Supreme Court Rule 615(a) provides "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967). The "plain error" rule also applies in proceedings under the Juvenile Act. *M.W.* 232 Ill. 2d at 431, 905 N.E.2d at 773. "An unpreserved error will not be 'noticed' under Rule 615(a) unless it is 'clear and obvious.' " *Id.* (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 n.2, 870 N.E.2d 403, 410 n.2 (2007), citing *United States v. Olano*, 507 U.S. 725, 734 (1993)). If plain error is found, a reviewing court will grant relief if one of the following two conditions are satisfied: (1) " 'the evidence is so closely

balanced that the error threatened to tip the scales of justice against the defendant,' " or (2) the error is " 'so serious that it affected the *** integrity of the judicial process.' " *.M.W.*, 232 Ill. 2d at 431, 905 N.E.2d at 773 (quoting *Piatkowski*, 225 Ill. 2d at 565, 870 N.E.2d at 403). "The [respondent] has the burden of persuasion on both the threshold question of plain error and the question whether [he] is entitled to relief as a result of the unpreserved error." *Id.*

¶ 24 Respondent asserts the trial court committed "plain error" when it relied on his list of prior police contacts, tipping the scales of justice against him; however, respondent cannot meet his burden of persuasion. The Juvenile Act provides when sentencing a delinquent minor, "[a]ll evidence helpful in determining [the best interest of the minor and the public], including oral and written reports, may be admitted and may be relied upon to the extent of its probative value, even though not competent for the purposes of [ ] trial." 705 ILCS 405/5-705(1) (West 2010). This court has previously held "the trial court may consider a number of factors [in a delinquency proceeding], including prior arrests, station adjustments or curfew violations, and the social-investigation report when determining whether commitment is necessary." *In re Nathan A.C.*, 385 Ill. App. 3d 1063, 1077, 904 N.E.2d 112, 123 (2008). The law clearly allows trial courts to consider police contacts in SIRs. The trial court did not commit "plain error."

¶ 25 2. *Standard of Review*

¶ 26 The trial judge has broad discretion in determining an appropriate disposition in delinquency proceedings, and we will not reverse such a disposition absent an abuse of discretion. *In re A.J.D.*, 162 Ill. App. 3d 661, 666, 515 N.E.2d 1277, 1280 (1987). As we have noted, the trial court was allowed to consider the police contacts, and respondent forfeited any discussion of the issue. Further, the aggravating factors were more than sufficient to support the

indeterminate sentence imposed. Less than three months before this offense, respondent was sentenced to 30 months' probation for burglary in case No. 09-JD-22. The trial court relied heavily on this factor and stated as follows:

> "[Y]ou were already sentenced and given an opportunity to work with people who tried to help you and get you redirected into doing things that you know need to get done and stop doing things that you know are not to be done. And in that regard, of course, the very first thing that was on the order of conditions that you signed in regard to the first sentence that you were given by the Court, the community [-] based sentence, was not to violate any laws in this or any other jurisdiction; something that, within a very short time, you violated."

The court recognized respondent's potential to do well in school but pointed out instead of living up to his potential, respondent "goes to school regularly, but *** apparently just *** to cause trouble, to be disrespectful to the staff, to be a bully to the other students who are there, [and] to show off by giving *** gang handshakes." Respondent "caused trouble" at school on 36 separate occasions and had multiple excused and unexcused absences over a six-month period. Additionally, the court considered the seriousness of the offense, calling it "a totally senseless violation of the law, which could have resulted in even more serious injuries than the *** victim ultimately sustained," and emphasized respondent could have been facing a murder charge.

¶ 27 The foregoing factors were more than sufficient to support an indeterminate sentence in DOJJ for a period not to exceed five years or respondent's twenty-first birthday,

whichever comes first.

¶ 28 B. The Trial Court Did Not Abuse Its Discretion by Refusing To Consider Respondent's Postsentence Behavior in Ruling on His Motion To Reconsider Sentence

¶ 29 Respondent next contends the trial court "erred in concluding it had no discretion to consider" a letter written by DOJJ regarding his postsentencing behavior when it denied his motion to reconsider sentence. We disagree.

¶ 30 1. *Standard of Review*

¶ 31 Respondent argues whether a trial court has the discretion to consider a delinquent minor's postsentencing behavior when ruling on a motion to reconsider sentence is a question of law, which is reviewed *de novo*. See *People v. Dameron*, 196 Ill. 2d 156, 171, 751 N.E.2d 1111, 1120 (2001). The ultimate issue here, however, is whether the trial court abused its discretion in refusing to consider a letter from DOJJ regarding respondent's postsentencing behavior when it considered respondent's motion to reconsider sentence. The standard of review as to that refusal is abuse of discretion. *In re Jermaine J.*, 336 Ill. App. 3d 900, 902, 784 N.E.2d 428, 429 (2003).

¶ 32 2. *Postsentencing Behavior*

¶ 33 Respondent argues the trial court erred in concluding it was inappropriate to consider his postsentencing behavior when ruling on his motion to reconsider sentence. He acknowledges criminal defendants may not rely on good postsentencing behavior as a grounds for a sentence reduction because the purpose of a motion to reconsider sentence in criminal court is to bring the trial court's attention to later changes in the law or the court's misapplication of existing law, rather than to relitigate a defendant's sentence. *People v. Johnson*, 286 Ill. App. 3d 597, 601, 676 N.E.2d 1040, 1042-43 (1997), *abrogated on other grounds by People ve. Latona*,

184 Ill. 2d 260, 269, 271-72, 703 N.E.2d 901, 906-07 (1998); see also *People v. Medina*, 221 Ill. 2d 394, 413, 851 N.E.2d 1220, 1230-31 (2006). In contrast, citing *In re Justin L.V.*, 377 Ill. App. 3d 1073, 1079-82, 882 N.E.2d 621, 628-29 (2007), respondent argues the Juvenile Act "expressly provides a mechanism by which delinquent minors may petition the trial court for release from [DOJJ] at any time, based on post-sentencing behavior."

¶ 34 When a minor is adjudicated delinquent and committed to DOJJ, the Director must be appointed the minor's legal custodian. 705 ILCS 405/5-750(4) (West 2010). Minors committed to DOJJ serve an indeterminate term of imprisonment, "unless *** custodianship is otherwise terminated in accordance with this [Juvenile] Act." 705 ILCS 405/5-750(3) (West 2010). Section 5-745(3) of the Juvenile Act further provides: "[t]he minor or any person interested in the minor may apply to the court for a change in custody of the minor and the appointment of a new custodian or guardian of the person or for the restoration of the minor to the custody of his or her parents or former guardian or custodian." 705 ILCS 405/5-745(3) (West 2010). This provision clearly applies to minors who have been committed to DOJJ. *Justin L.V.* at 1081, 882 N.E.2d at 628. Further, periodic reports concerning "the child's present condition of physical, mental and emotional health as well as facts relative to his or her present custodial *** care" are topics which must be periodically reported on by the minor's custodian or guardian. 705 ILCS 405/5-745(2) (West 2010). Respondent's assertion section 5-745 of the Juvenile Act should be construed so broadly as to force courts to consider postsentencing behavior when ruling on a motion for reconsideration of sentence is misplaced.

¶ 35 Contrary to respondent's contention, *Justin L.V.* does not encourage trial courts to consider postsentencing behavior in ruling on a motion for reconsideration pursuant to section

5-745 of the Juvenile Act, but it does permit courts to do so. In *Justin L.V.*, this court held a minor or any interested person could petition the court to return guardianship to the minor's parents and vacate DOJJ's guardianship without adhering to the niceties of formal pleadings. *Justin L.V.*, 377 Ill. App. 3d at 1081-82, 882 N.E.2d at 628-29. Nonetheless, this court also encouraged counsel to "file a written motion expressly invoking section 5-745(3), when the change of custody is sought, either at the time of sentencing or after the sentencing to [DOJJ]" to avoid any doubt as to the procedural accuracy of the request. *Id.* at 1082, 882 N.E.2d at 629. In respondent's motion to reconsider sentence, no express invocation of section 5-745(3) appears. Moreover, in *In re Justin L.V.*, the trial court *sua sponte* scheduled a status hearing for 60 days after sentencing specifically to evaluate the minor's postsentencing behavior and to determine whether vacating the minor's commitment in exchange for a sentence of probation was appropriate. *Id*. at 1076, 882 N.E.2d at 624. In respondent's case, the trial court did not schedule a status hearing to evaluate his behavior. When the court adjudicated the minor delinquent, it specifically sentenced him to "[DOJJ] for an indeterminate term, which will automatically terminate in five years or upon the Minor attaining the age of 21 [ ] years, whichever comes first" unless he was discharged sooner in accordance with the Juvenile Act.

¶ 36 The purpose of a motion to reconsider sentence in juvenile proceedings is analogous to the purpose in criminal proceedings. In both, the purpose "is not to conduct a new sentencing hearing, but rather to review the appropriateness of the sentence imposed and correct any errors." *In re Jermaine J.*, 336 Ill. App. 3d 900, 902-903, 784 N.E.2d 428, 430 (2003). Respondent cannot use his motion to reconsider sentence as a new commitment hearing. Respondent's postsentencing behavior in the two months following his commitment to DOJJ,

regardless of how good it may be, could be considered, but it does not show the sentence was erroneous when imposed. It is for the trial court to decide whether to consider the behavior and the weight to be afforded that behavior. The trial court did not abuse its discretion in refusing to consider the letter from DOJJ regarding respondent's behavior during the two months after he was adjudicated delinquent.

¶ 37 III. CONCLUSION

¶ 38 Respondent forfeited the issue of whether the trial court improperly relied on mere police contacts and arrests during the dispositional hearing because he failed to object or otherwise bring the issue to the court's attention at the hearing. The trial court did not abuse its discretion in declining to consider respondent's postsentencing behavior in denying his motion to reconsider sentence.

¶ 39 We affirm the trial court's judgment.

¶ 40 Affirmed.