

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2012 IL App (4th) 100875-U

Filed 3/7/12

NO. 4-10-0875

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
ANGELA JONES,	)	No. 10CF4
Defendant-Appellant.	)	
	)	Honorable
	)	Jeffrey B. Ford,
	)	Judge Presiding.

JUSTICE COOK delivered the judgment of the court.  
Presiding Justice Turner and Justice Pope concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* (1) Defendant forfeited her argument on appeal where she failed to raise the argument in a posttrial motion to reconsider her sentence, but even if she had not, her argument fails on the merits because the record does not show the trial court's sentence was based primarily on defendant's conduct while on probation; and (2) the trial court's sentence was not excessive.
- ¶ 2 In December 2009, the State charged defendant, Angela Jones, with one count of unlawful possession of a controlled substance, a Class 4 felony. 720 ILCS 570/402(c) (West 2008). In January 2010, defendant pleaded guilty. In March 2010, the court sentenced defendant to 30 months' probation, drug court, and 180 days in jail, to be served at the drug court's discretion. In September 2010, the State filed a petition to revoke defendant's probation, and defendant stipulated to the allegations set forth in the State's petition. In October 2010, the court resentenced defendant to five years and six months' imprisonment. Defendant filed a motion to

reconsider sentence, which the court denied. Defendant appeals, arguing the court abused its discretion by (1) sentencing defendant based primarily upon her postplea conduct instead of the underlying offense and (2) imposing an excessive sentence. We affirm.

¶ 3

## I. BACKGROUND

¶ 4 In December 2009, police executed a search warrant at the residence that defendant shared with another individual, who was the target of the search warrant. While searching the residence, police found in defendant's purse a bag containing residue of heroin. The State charged defendant with unlawful possession of a controlled substance, a Class 4 felony. 720 ILCS 570/402(c) (West 2008).

¶ 5 After defendant pleaded guilty to the charge, the trial court sentenced her in March 2010 to 30 months' probation, drug court, and 180 days' incarceration to be served at the drug court's discretion. In September 2010, the State filed a petition to revoke defendant's probation, alleging that defendant's urine tested positive for cocaine and opiates in violation of the condition of her probation that she refrain from using controlled substances. Defendant stipulated to the allegations. Defendant was eligible for an extended-term sentence of one to six years in prison. 730 ILCS 5/5-5-3.2(b)(1) (West 2008), 730 ILCS 5/5-4.5-45(a) (West 2008) (as amended by Pub. Act 95-1052, § 5 (eff. July 1, 2009) (2008 Ill. Laws 4204, 4211)).

¶ 6 In October 2010, the trial court resentenced defendant to five years and six months' imprisonment. In announcing defendant's sentence, the trial court explained that it had considered the reports, the recommendations of counsel, statement of the defendant, factors in aggravation and mitigation, and the criminal code. The court noted that defendant had previously been afforded 11 community-based sentences, none of which she had successfully completed.

¶ 7 The trial court also stated, in relevant parts, as follows:

"[Defendant] does and can do treatment as easily as she does and she can do drugs. And that's [defendant]'s history. She will go, she will get whatever treatment, and then she will go back to her drugs. And that's what she continues to do at this time.

She has had setbacks as has been argued, yes, that is true. But to get treatment and stay clean, we have to have one piece that's missing here. We have to have the defendant really wanting to get clean. She has to try to stay clean. She hasn't done that. She has never done that.

\* \* \*

[Defendant] doesn't get drug court again. She just can't. She's not going to do it. It's an offense to the program to put her back on drug court because, until she decides she really wants to change, she's not going to change. And it is just using precious resources that we don't have."

¶ 8 Defendant filed a motion to reconsider her sentence, arguing that (1) her sentence was excessive, (2) the trial court erred in giving too much weight to factors in aggravation, and (3) the court erred in giving too little weight to factors in mitigation. The court denied the motion, and this appeal followed.

¶ 9

## II. ANALYSIS

¶ 10

### A. Defendant's Claim That The Trial Court Punished Her

## For Her Conduct On Probation

¶ 11 Defendant first argues that the trial court erred because it based its sentence on defendant's postplea conduct rather than her original underlying offense. The State responds that because defendant did not raise this argument in her motion to reconsider her sentence, defendant has forfeited this argument, and moreover, that defendant's argument fails on the merits. We agree with the State.

### ¶ 12 1. *The Forfeiture Rule*

¶ 13 To preserve an issue for appellate review, a defendant must raise the issue by filing a written postsentencing motion in the trial court. *People v. Reed*, 177 Ill. 2d 389, 394, 686 N.E.2d 584, 586 (1997) (referencing 730 ILCS 5/5-8-1(c) (West 1994), now 730 ILCS 5/5-4.5-50(d) (West 2008), incorporating amendments of Pub. Act 95-1052, § 5 (eff. July 1, 2009) (2008 Ill. Laws at 4212-13)).

¶ 14 Here, defendant filed a motion to reconsider her sentence but failed in her motion to raise her argument that the trial court improperly sentenced her based on her postplea conduct. Accordingly, defendant has forfeited this argument. *People v. Rathbone*, 345 Ill. App. 3d 305, 310, 802 N.E.2d 333, 337 (2003).

### ¶ 15 2. *The Merits*

¶ 16 The State further argues that, even if defendant had not forfeited her argument, her argument fails on the merits. We agree.

¶ 17 When resentencing a defendant after a revocation of probation, the trial court "may impose any other sentence that was available \*\*\* at the time of initial sentencing." 730 ILCS 5/5-6-4(e) (West 2008). Although a new sentence may not be imposed as a "penalty" for

the conduct that violated a probation condition, the court should consider the probationer's conduct while on probation in choosing a sentence. *People v. Goleash*, 311 Ill. App. 3d 949, 956, 726 N.E.2d 194, 199 (2000). "Conduct which leads to revocation of probation has been regarded as a 'breach' of the court's trust, or as otherwise causing the court to lose confidence in the defendant's rehabilitative potential." *People v. Young*, 128 Ill. App. 3d 130, 140, 485 N.E.2d 443, 449 (1985). A statutorily authorized sentence will not be set aside on review unless this 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 for revocation, and *not* for the original offense." *Young*, 138 Ill. App. 3d at 142, 485 N.E.2d at 450.

¶ 18 Here, defendant was charged with unlawful possession of a controlled substance, a Class 4 felony. 720 ILCS 570/402(c) (West 2008). Defendant was eligible for extended term sentencing under section 5-5-3.2(b)(1) of the Unified Code of Corrections (730 ILCS 5/5-5-3.2(b)(1) (West 2008); thus, the court was authorized to sentence defendant to up to six years' imprisonment. 730 ILCS 5/5-5-3.2(b)(1) (West 2008); 730 ILCS 5/5-4.5-45(a) (West 2008) (as amended by Pub. Act 95-1052, § 5 (eff. July 1, 2009) (2008 Ill. Laws at 4211)).

¶ 19 In resentencing defendant to five years and six months of imprisonment, the trial court specifically noted that it had considered the reports, recommendation of counsel, defendant's statement, criminal code, and factors in mitigation and aggravation. While the court discussed defendant's prior probation violations and past attempts at drug rehabilitation, nothing in the record indicates that the court's sentence was imposed as a penalty for these violations. Rather, taken in the context of the proceedings, it appears the court properly considered these violations to assess defendant's rehabilitative potential. Specifically, the court stated, "To get

treatment and stay clean, we have to have one piece that's missing here. We have to have the defendant really wanting to get clean. She has to try to stay clean. She hasn't done that. She has never done that."

¶ 20 We are therefore not persuaded that the trial court imposed its statutorily authorized sentence as a penalty for defendant's postplea conduct.

¶ 21 B. Defendant's Claim That Her Sentence Was Excessive

¶ 22 Defendant next argues that the trial court's sentence was excessive in light of the mitigating factors, including defendant's drug addiction, her acceptance of responsibility, the length of time since her last felony conviction, and the minor nature of the offense. We disagree.

¶ 23 A trial court has broad discretion in imposing a sentence. *People v. Patterson*, 217 Ill. 2d 407, 448, 841 N.E.2d 889, 912 (2005). A sentence within statutory guidelines will only be disturbed on review if the trial court abused its discretion. *People v. Mitchell*, 395 Ill. App. 3d 161, 168, 916 N.E.2d 624, 630 (2009). Where a defendant presents evidence in mitigation, it is presumed that the trial court considered said evidence. *People v. Newbill*, 374 Ill. App. 3d 847, 854, 873 N.E.2d 408, 414 (2007). A plea of guilty is a relevant mitigating factor. *People v. Bailey*, 364 Ill. App. 3d 404, 409, 846 N.E.2d 147, 151 (2006). However, a trial court is free to find a defendant's remorse to be incredible. *Newbill*, 374 Ill. App. 3d at 854, 873 N.E.2d at 414. Moreover, drug addiction is not necessarily a mitigating factor. *Id.*

¶ 24 As previously mentioned, in this case the trial court considered the reports, the recommendations of counsel, statement of defendant, factors in aggravation and mitigation, and the criminal code. Defendant's criminal history spanned a period of 26 years. While defendant acknowledged her long-standing drug addiction and accepted responsibility for her actions (in

January 2010 she pleaded guilty to unlawful possession of a controlled substance, heroin; in September 2010 she admitted willfully violating her probation in that her urine tested positive for cocaine and opiates), the court noted that defendant had been given numerous chances at community-based sentences in the past. In light of this, we find that the court did not abuse its discretion in sentencing defendant to five years and six months' imprisonment.

¶ 25

### III. CONCLUSION

¶ 26 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.

¶ 27 Affirmed.