2012 IL App (4th) 110174-U

Filed 8/24/12

NO. 4-11-0174

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TRINA Y. HALL, Defendant-Appellant.	)	Appeal from Circuit Court of McLean County No. 09CF563 Honorable Charles G. Reynard, Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Turner and Justice Cook concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in sentencing defendant to a term of sex-offender probation for misdemeanor battery convictions, which were neither enumerated sex offenses nor sexually motivated felonies; however, a condition of probation for sex-offender treatment was reasonable.

¶ 2 In July 2010, a jury convicted defendant, Trina Y. Hall, of two counts of misdemeanor battery (720 ILCS 5/12-3(a)(2) (West 2008)) involving the sex organs of two of her children. Prior to sentencing, the trial court ordered defendant to undergo a sex-offender evaluation. In November 2010, the trial court sentenced defendant to 24 months' sex-offender probation, including as conditions (1) a 180-day jail sentence held in remission with credit for 3 days served and (2) sex-offender registration. During a February 2011 hearing on defendant's amended motion to reconsider her sentence, the court found defendant's conviction did not qualify as a sex offense and removed the requirements she register as a sex offender and not

drive until she so registered. The court found, however, its previous order of sex-offender treatment reasonable.

¶ 3 Defendant appeals, arguing (1) the trial court lacked authority to sentence defendant to sex-offender probation, or (2) alternatively, defendant's cause must be remanded for resentencing because the court relied on its mistaken belief defendant's actions were sexually motivated to impose a term of sex-offender probation. We affirm in part, vacate in part, and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 On July 2, 2009, the State charged defendant with two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2008)), alleging defendant committed an act of sexual conduct upon two minors, her sons, who were under the age of 13, by placing her hand on their penises for her sexual gratification or arousal.

¶ 6 During the July 2010 jury trial, defendant's sons, then 13-year-old S.H. and 8-year-old J.N., testified about incidents where defendant had touched their private parts.

¶ 7 S.H. testified defendant had squeezed, touched, and rubbed him "[i]n the private parts where the balls and testicles are or penis and testicles are" on approximately five or six occasions. Two to three of these incidents occurred as defendant attempted to wake S.H. in the morning. When asked to describe how defendant grabbed S.H., he responded, "She grabbed my balls and penis, and she would wake me up and turn me over and grab at them." S.H. was clothed during these incidents. S.H. described another incident when he got out of the shower and defendant ripped the towel off him and started "grabbing and squeezing" his testicles. Each time defendant grabbed him, she giggled. During each incident, S.H. told defendant to stop.

S.H. stated he also witnessed defendant punch his half-brother, J.N., "in the balls" and laugh. S.H. testified defendant never punched him, but she did tickle his "balls and penis."

¶ 8 J.N. testified defendant used her finger to poke his "privates" on approximately five occasions but denied defendant ever punched him in the privates. J.N. stated defendant usually touched him when he was clothed, but she also poked his privates once as he was getting out of the shower. J.N. would tell defendant to stop when she touched him.

¶ 9 Prior to trial, S.H. and J.N. were interviewed by Officer Michael Burns. These interviews were recorded, admitted into evidence, and played for the jury.

¶ 10 During S.H.'s interview, he told Officer Burns defendant would punch and touch him in his private parts. Mostly, defendant touched S.H.'s privates to wake him up. S.H. also witnessed defendant punch J.N. in the privates.

¶ 11 During J.N.'s interview, he told Officer Burns defendant would "sneak" and touch his private parts. Defendant would laugh and smile when she touched J.N.'s private parts. J.N. explained the manner in which defendant touched his private parts as poking with her finger. J.N. also observed defendant touch S.H. in his private parts, once when S.H. had clothes on and once when he did not.

¶ 12 Timothy Hall, defendant's husband, testified on at least one occasion, he witnessed defendant tickling J.N., and noticed her hand touched J.N.'s penis. Timothy had never seen defendant tickle J.N. when he was naked and did not believe defendant's conduct was of a sexual nature. Timothy testified he had not seen defendant physically poke J.N.'s penis, but one time she did point at J.N.'s penis and said, "I see your pee-pee." Timothy stated he was not aware of any inappropriate touching between defendant and S.H.

¶ 13 Defendant testified when she played with S.H. and J.N. she used her fists and jabbed in between her sons' legs, but she did this mostly when they were "wrestling, fighting, playing army, doing Karate, messing around, [or] doing the tickle fight." She admitted Timothy told her other people might think her actions looked "weird." Defendant admitted she had tickle fights with S.H. and J.N. but denied ever resting her hands on their penises or doing anything for sexual gratification. Defendant denied ever waking S.H. up by playing with his genitals but admitted she had spanked his "butt" as a means to wake him up. Defendant further admitted S.H. and J.N. had touched the tops of her breasts while she was breast feeding her youngest son.

¶ 14 Officer Burns also interviewed defendant and the interview was introduced into evidence and played for the jury. Defendant's testimony, outlined above, was basically consistent with the answers she gave during the interview with Officer Burns.

¶ 15 After hearing all the evidence, the jury convicted defendant of two counts of misdemeanor battery, finding her not guilty of aggravated criminal sexual abuse. The trial court ordered defendant to undergo a sex-offender evaluation prior to sentencing.

¶ 16 During defendant's November 12, 2010, sentencing hearing, the trial court acknowledged its review of the presentence investigation report and the sex-offender evaluation. The State noted defendant was convicted of battering the sex organs of two of her sons and recommended defendant be sentenced to 24 months' sex-offender probation, including sex-offender treatment, registration as a sex offender, and 60 days in the McLean County jail. In recommending court supervision, defense counsel maintained a conviction for battery would be inappropriate as defendant had virtually no criminal history. Counsel argued the touching was not done for sexual gratification, expressed concern with the sex-offender evaluation, and argued

defendant was not required to register as a sex offender because the jury found no sexual gratification.

¶ 17 After considering the statutory factors in aggravation and mitigation, evidence presented, and nonstatutory factors, the trial court found defendant's actions were sexually motivated and sentenced her to 24 months' sex-offender probation, including as conditions she (1) serve sex-offender probation under additional conditions required by court services, (2) register as a sex offender, and (3) serve a 180-day jail sentence, stayed, with credit for 3 days served. The court gave defendant the option to seek a second sex-offender evaluation and agreed to reconsider her sentence if the second evaluation recommended different treatment.

¶ 18 On November 15, 2010, defendant filed a motion to reconsider her sentence, alleging the trial court exceeded its authority by requiring her to register as a sex offender when she had not been convicted of a sex offense (see 730 ILCS 150/3 (West 2008)) and by finding the offenses were sexually motivated. The motion stated defendant had attempted to register at the Peoria police department as directed on her conditions of probation, but the police department refused to allow her to register, and she requested the trial court vacate the sex-offender registration requirement.

¶ 19 On December 7, 2010, defendant filed an amended motion to reconsider her sentence, which further alleged placement of defendant on sex-offender probation required her to register as directed by the Illinois Sex Offender Registration Act (730 ILCS 150/1 to 12 (West 2008)), but the act only pertains to persons convicted of sex offenses. Additionally, the motion asserted numerous sex-offender restrictions unrelated to the offense for which defendant was convicted had been imposed, including the following: place and type of employment, place of

residence, prohibition from using a motor vehicle until proof of sex-offender registration has been provided to the Secretary of State, prohibition against use of a computer without prior written approval from the probation officer, and prohibition against access or use of a social networking site. The motion requested the trial court vacate the sex-offender registration requirement and order defendant placed on regular probation.

¶ 20 At the December 30, 2010, hearing on defendant's amended motion, defense counsel agreed the court had discretion to order a sex-offender evaluation. The trial court granted temporary relief with respect to the registration requirement and the motor vehicle restriction and took the matter under advisement, continuing the hearing until February 2011. Also, while not relieving defendant of the social network restriction, the court added if the sex-offender treatment provider later found this condition unnecessary, then the prohibition would be removed.

¶ 21 On February 3, 2011, the trial court conducted a further hearing on defendant's motion to reconsider her sentence. The court found defendant's convictions for misdemeanor battery did not qualify as sex offenses, and, thus, permanently removed the requirement she register as a sex offender and refrain from operating a motor vehicle until such time as she registered. However, based on its interpretations of sections 10 and 17 of the Sex Offender Management Board Act (20 ILCS 4026/10, 17 (West 2008)), the court held it was within its discretion to order reasonable conditions of probation, including a sex-offender evaluation and sex-offender treatment, based on its finding defendant's conduct was sexually motivated. The court denied defendant's motion in all other respects.

¶ 22 This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 A. Sex-Offender Probation

¶ 25 Defendant first asserts her sentence is void and must be vacated because the trial court was not authorized to sentence her to sex-offender probation since she was not convicted of either a sexually motivated felony or a sex offense under the Sex Offender Management Board Act (20 ILCS 4026/10 (West 2008)). The State concedes defendant was not convicted of a sex offense or a sexually motivated felony; and, thus, the court's label of "sex-offender probation" was incorrect. However, the State contends the court's sentence is not void and the cause must be remanded only so the court can amend the written sentencing judgment "to reflect the title *** as regular probation" rather than sex-offender probation.

¶ 26 Whether a trial court imposed an unauthorized sentence is a legal question subject to *de novo* review. *People v. Thompson*, 209 Ill. 2d 19, 22, 805 N.E.2d 1200, 1202 (2004).

¶ 27 An unauthorized or void judgment is one entered by a court (1) without jurisdiction or (2) which exceeds its jurisdiction by entering an order beyond its inherent power. *People v. Johnson*, 327 Ill. App. 3d 252, 256, 762 N.E.2d 1180, 1183 (2002). When a trial court imposes a sentence greater than is statutorily permitted, the excess portion of the sentence is void. *People v. Harvey*, 196 Ill. 2d 444, 448, 753 N.E.2d 293, 295 (2001). An improperly imposed probation condition does not render the entire probation order void but merely renders the condition voidable. See *People v. Harris*, 238 Ill. App. 3d 575, 582, 606 N.E.2d 392, 397 (1992).

¶ 28 In this case, defendant was convicted of two misdemeanor counts of battery. The trial court sentenced defendant to 24 months' sex-offender probation. However, pursuant to

section 10 of the Sex Offender Management Board Act, misdemeanor battery is neither an enumerated sex offense nor a sexually motivated felony. See 20 ILCS 4026/10(c)(1)-(20) (West 2008). Therefore, the imposition of "sex-offender probation" was error.

¶ 29 B. Sex-Offender Treatment

¶ 30 Defendant next argues the trial court abused its discretion in ordering sex-offender treatment based on its conclusion, unsupported by the record, defendant's actions were sexually motivated. The State responds section 5-6-3(b) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-6-3(b) (West 2008)) allows the court to impose conditions similar to those found in sex-offender probation, *e.g.*, sex-offender treatment, as part of a sentence of regular probation where the condition is reasonable and supported by the evidence, as was the case here.

¶ 31 Contrary to defendant's assertion an abuse-of-discretion standard of review should apply, a trial court's factual findings in support of its determination defendant's crime was sexually motivated is reviewed under the manifest-weight-of-the-evidence standard. *People v. Black*, 2012 IL App (1st) 101817, ¶ 18, 2012 WL 1956788, at *4 (citing *People v. Cardona*, 2012 IL App (2d) 100542, ¶ 36, 966 N.E.2d 1013, 1020).

¶ 32 Subsection (b) of section 5-6-3 of the Unified Code reads, in part, as follows: "The [c]ourt may *in addition to other reasonable conditions* relating to the nature of the offense or the rehabilitation of the defendant as determined for each defendant in the proper discretion of the [c]ourt require that the person: ***." (Emphasis added.) 730 ILCS 5/5-6-3(b) (West 2008). Subsection (b) goes on to list 18 conditions of probation a trial court may impose *in addition to other reasonable conditions*. *Id.* Citing section 5-6-3(a)(8.5) of the Unified Code (730 ILCS

5/5-6-3(b)(8.5) (West 2008)), defendant contends, "[a] person can only be ordered to participate in sex-offender treatment if convicted of a *felony* [sex] offense as defined by the Sex Offender Management Board Act." (Emphasis added.) See 730 ILCS 5/5-6-3(a)(8.5) (West 2008); 20 ILCS 4026/17 (West 2008). In her reply brief, defendant further asserts "the language of subsection (a)(8.5) unambiguously demonstrates that a person shall be ordered to participate in sex-offender treatment *only* if convicted of a felony [sex] offense as defined in the Sex Offender Management Board Act." We disagree.

¶ 33 Subsection (a)(8.5) provides, "if convicted of a felony sex offense as defined in the Sex Offender Management Board Act, the person shall undergo and successfully complete sex[-]offender treatment by a treatment provider approved by the Board ***." 730 ILCS 5/5-6-3(a)(8.5) (West 2008). Our reading of subsection (a)(8.5) fails to provide any support for defendant's contention *only felony sex offenders* can be sentenced to sex-offender treatment. While this subsection may require a person convicted of a felony sex offense to undergo sex-offender treatment, it does not preclude a sentence of sex-offender treatment for an offense not classified as a sex offense where such treatment is reasonable.

¶ 34 In her reply brief, defendant further asserts the qualifying language in subsections (b)(17) and (b)(18) would be rendered meaningless if the trial court is authorized to sentence someone like defendant to sex-offender treatment based on the "in addition to other reasonable conditions" language in subsection (b). See 730 ILCS 5/5-6-3(b)(17), (b)(18) (West 2008). We are not persuaded. Subsections (b)(17) and (b)(18) provide for certain Internet and computer restrictions to be placed on defendants who are convicted of an offense that would qualify (1) defendant as a child sex offender as defined in the Criminal Code of 1961 (730 ILCS 5/5-6-

3(b)(17) (West 2008)) or (2) as a sex offense as defined in the Sex Offender Registration Act (730 ILCS 5/5-6-3(b)(18) (West 2008)). We see no reason the "child sex offender" or "sex offense" language in subsections (b)(17) and (b)(18) would be rendered meaningless by a finding sex-offender treatment may be ordered even without a defendant's conviction qualifying her as a child sex offender or the crime as a sex offense.

¶ 35 The purpose of probation is to restore a defendant to useful citizenship, rather than allowing a defendant to become a burden on society as a habitual offender. *People v. Lowe*, 153 Ill. 2d 195, 205, 606 N.E.2d 1167, 1173 (1992). One goal of probation is to protect the public by requiring treatment so the defendant does not repeat the same conduct for which she was convicted. *People v. Meyer*, 176 Ill. 2d 372, 379, 680 N.E.2d 315, 318 (1997). A trial court "may impose a probation condition not expressly authorized by statute as long as such a condition (1) is reasonable, and (2) *some* connection exists between the condition and either (a) the underlying crime or (b) the behavior or attitudes of the defendant that the trial court thinks need adjusting." (Emphasis in original.) *People v. Ferrell*, 277 Ill. App. 3d 74, 79, 659 N.E.2d 992, 996 (1995). To be reasonable, the condition of probation must not be overly broad when viewed in light of the desired goal or the means to that end. *In re J.G.*, 295 Ill. App. 3d 840, 843, 692 N.E.2d 1226, 1228 (1998); see also *State v. Marshall*, 170 P.3d 923, 927 (Mont. 2007) (Montana Supreme Court found a sex-offender treatment sentence reasonable where the defendant pleaded guilty to burglary because the underlying facts showed after defendant went through the homeowner's underwear drawer, he masturbated on her bed).

¶ 36 Contrary to defendant's contention, the record evidence supports the trial judge's conclusion defendant's actions were sexually motivated, but even if it did not, sex-offender

treatment is a reasonable probation condition in this case. "Sexually motivated" is defined as follows: "one or more of the facts of the underlying offense indicates conduct that is of a sexual nature or that shows an intent to engage in behavior of a sexual nature." 20 ILCS 4026/10(e) (West 2008).

¶ 37 Defendant was convicted of two counts of battery for touching the sex organs of her children. At trial, J.N. testified defendant would poke at his privates and on one occasion defendant snuck up on him when he was getting out of the shower and touched his privates. S.H. told his father defendant had been touching him and it made him feel "pretty bad." S.H. described defendant's conduct as "squeezing, touching and rubbing" his penis and testicles. On one occasion, S.H. testified defendant ripped off the towel he was wearing and started grabbing and squeezing his testicles. During her interview with Officer Burns, defendant admitted she touched S.H. and J.N.'s sex organs with her fist at times when they were clothed, but stated this was "a joke around the house" and denied her actions were sexual in nature. Defendant also informed Burns S.H. and J.N. "play with [her] boobs" when she breast-feeds her youngest son. Based on this evidence, the trial court could reasonably find defendant's actions were sexually motivated because one or more of the facts of the battery had a sexual nature. Although the jury found defendant not guilty of aggravated criminal sexual abuse, this may have been an act of jury lenity and does not preclude the court from concluding defendant's actions were nevertheless sexually motivated for sentencing purposes. Further, the sex-offender evaluation, which trial counsel conceded was properly ordered, recommended sex-offender treatment after finding defendant at a moderate risk to reoffend. See *People v. Nussbaum*, 251 Ill. App. 3d 779, 784-85, 623 N.E.2d 755, 759 (1993) (holding, "The trial court has the duty to craft an appropriate

sentence for each defendant [citation], and in doing so, the court may exercise wide discretion in the source and type of evidence it uses to determine that sentence.").

¶ 38 At the February 2011 hearing on defendant's motion to reconsider her sentence, the trial court opined as follows:

> "I have found that the underlying offense in this case indicates conduct that is of a sexual nature, or that shows an intent to engage in behavior of a sexual nature. This is not—this case is a unique case. This particular [d]efendant is clearly not one specifically contemplated by the various laws enacted concerning sex offenders. She's certainly not a stereotypical sex predator. All of those arguments are well taken[;] however, the Court found no interpretation other than that her conduct was sexually motivated in a very unusual, but very compelling, way based upon the testimony of her sons ***. The testimony of one of the boys as to what happened in the bathroom when he was naked, and in terms of what she did during those particular times ***. *** [T]here just isn't any other meaningful interpretation that the Court believes can be assigned to that conduct other than it contains a sexually motivated element. It may have been play; it may have been a game, but it was not a nonsexual game. It was sexually motivated, and the Court's finding in that regard is supported by this evidence. It's disputed evidence, and I simply found that the [d]efendant's

version was not believable.

> I believe it is within the inherent authority of the Court to order reasonable conditions of probation, and I think that there is a reasonable basis to have ordered a sex-offender evaluation; and as pointed out by [the State], that evaluation comes back with a strong basis upon which sex-offender treatment is entirely reasonable to order."

We do not find the trial court's finding of sexual motivation was against the manifest weight of the evidence.

¶ 39 Further, we note even if defendant's conduct was not sexually motivated, the trial court's order of sex-offender treatment as a condition of probation was appropriate. Whether a condition of probation is appropriate is reviewed for an abuse of discretion. See *People v. Perruquet*, 68 Ill. 2d 149, 154, 368 N.E.2d 882, 883 (1977) (absent an abuse of discretion by the trial court, a sentence may not be altered upon review); *People v. Burke*, 136 Ill. App. 3d 593, 608, 483 N.E.2d 674, 685 (1985) (the conditions attached to a defendant's term of probation are matters within the trial court's discretion and will not be reversed so long as the record does not show a clear abuse of discretion).

¶ 40 In *Ferrell*, this court held "a probation condition (whether explicitly statutory or not) is reasonable if (1) the trial court believes the condition would be a good idea, and (2) the record contains no indication that the court's imposition of the condition is clearly unreasonable." *Ferrell*, 277 Ill. App. 3d at 79, 659 N.E.2d at 996. Here, the condition of sex-offender treatment is reasonable—not overly broad—and there is a connection between the underlying crime, *i.e.*,

battery to the sex organs of defendant's children, and defendant's behavior or attitude that needs adjusting. By participating in sex-offender treatment, defendant may come to realize touching the sex organs of her children in this manner is not a game but is inappropriate conduct, knowledge of which will protect the public from further inappropriate touching by defendant. After hearing all the evidence and reviewing defendant's sex-offender evaluation, the trial court believed sex-offender treatment was reasonable and the record does not belie this finding. We also note the trial court agreed to reconsider the sex-offender treatment conditions if defendant obtained a second sex-offender evaluation and the conclusions differed from the first evaluation. The record before us does not show defendant obtained a second sex-offender evaluation. Thus, we hold the trial court did not abuse its discretion in requiring defendant to participate in sex-offender treatment as a condition of her probation.

¶ 41 III. CONCLUSION

¶ 42 For the reasons stated, we affirm defendant's conviction, vacate in part, and remand with directions to issue an amended sentencing judgment reflecting general probation and removing all reference to "sex offender" and "sex-offender probation." As part of our judgment, because the State successfully defended a portion of the appeal, we award the State its $50 statutory assessment against defendant as costs of this appeal. See *People v. Smith*, 133 Ill. App. 3d 613, 620, 479 N.E.2d 328, 333 (1985) (citing *People v. Nicholls*, 71 Ill. 2d 166, 178, 374 N.E.2d 194, 199 (1978)).

¶ 43 Affirmed in part and vacated in part; cause remanded with directions.