2016 IL App (4th) 140318-U

NOS. 4-14-0318, 4-14-0319 cons.

FILED
April 1, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
ROSS JOHNSON,	)	No. 10CF1077
Defendant-Appellant.	)	No. 11CF553
	)	
	)	Honorable
	)	Robert L. Freitag,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: In this consolidated appeal, we grant appointed counsel's motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), where no meritorious issue could be raised on appeal as the (1) underlying guilty pleas were not void, (2) State proved the probation violation by a preponderance of the evidence, and (3) trial court did not improperly punish defendant for the alleged criminal conduct while defendant was on probation. We affirm the trial court's judgment.

¶ 2 This case comes to us on the motions of the office of the State Appellate Defender to withdraw as counsel in appeal Nos. 4-14-0318 and 4-14-0319 pursuant to *Anders v. California*, 386 U.S. 738 (1967), on the ground no meritorious issues can be raised on appeal. (On this court's motion, we have consolidated these cases on appeal.) For the following reasons, we grant counsel's motions and affirm the trial court's judgments.

¶ 3 I. BACKGROUND

¶ 4 A. Case No. 4-14-0319

¶ 5 In November 2010, defendant, Ross Johnson, was charged with theft from a person, a Class 3 felony (count I) (720 ILCS 5/16-1(a)(1), (4) (West 2010)), and criminal damage to property over $300, a Class 4 felony (count II) (720 ILCS 5/21-1(1)(a), (2) (West 2010)) (McLean County case No. 10-CF-1077).

¶ 6 In April 2011, defendant entered into a negotiated guilty plea. In exchange for his guilty plea, the State dismissed a misdemeanor count, and defendant was sentenced to 120 days in the county jail and a 30-month term of probation. As a condition of his probation, defendant was prohibited from "violat[ing] any criminal statute of any jurisdiction" or "possess[ing] a firearm or other dangerous weapon." At the plea hearing, the trial court thoroughly admonished defendant pursuant to the provisions of Illinois Supreme Court Rule 402(a) (eff. July 1, 1997). Specifically, the court advised defendant regarding (1) the charges to which he was pleading guilty, (2) the minimum and maximum possible sentences, (3) the terms of the plea agreement, and (4) defendant's right to a trial. Defendant advised the court he understood. Defendant confirmed he signed the jury waiver form and understood the rights he was giving up by signing the form. Defendant further assured the court he had not been forced, threatened, or promised anything not contained in the plea agreement. After hearing the factual basis for the plea, the court found the plea to be knowing and voluntary and advised defendant of his appellate rights.

¶ 7 Defendant did not file any postplea motions or initiate a direct appeal.

¶ 8 B. Case No. 4-14-0318

¶ 9 In July 2011, defendant was charged with unlawful possession of cannabis with intent to deliver (count I) (720 ILCS 550/5(c) (West 2010)), a Class 4 felony, and unlawful possession of cannabis (count II) (720 ILCS 550/4(c) (West 2010)), a Class A misdemeanor (McLean County case No. 11-CF-553).

¶ 10 In August 2011, defendant entered into a negotiated guilty plea to count I. In exchange for his plea to unlawful possession with intent to deliver, the State dismissed count II and the petition to revoke probation in case No. 10-CF-1077. Defendant was sentenced to 24 months' drug-court probation and 180 days in the county jail. As a condition of his probation, defendant was prohibited from "violat[ing] any criminal statute in any jurisdiction" or "possess[ing] a firearm or other dangerous weapon." At the plea hearing, the trial court thoroughly admonished defendant pursuant to Illinois Supreme Court Rule 402(a) (eff. July 1, 1997). Specifically, the court advised defendant regarding (1) the charges to which he was pleading guilty, (2) the minimum and maximum sentences, (3) the terms of the plea agreement, and (4) defendant's right to a trial. Defendant advised the court he understood. Defendant confirmed his signature on his jury waiver form and his understanding of the rights he was giving up by signing the form. Defendant further assured the court he had not been forced, threatened, or promised anything not contained in the plea agreement. After hearing the factual basis for the plea, the court found the plea to be knowing and voluntary and advised defendant of his appellate rights.

¶ 11 Defendant did not file any postplea motions or initiate a direct appeal.

¶ 12 C. The Probation-Revocation Proceedings

¶ 13 While on probation, defendant was charged with four counts of attempt (murder), one count of home invasion, and four counts of aggravated battery with a firearm in McLean County case No. 12-CF-1085. On June 17, 2013, as a result of the charges in case No. 12-CF-1085, the State filed a petition to revoke defendant's probation in case Nos. 10-CF-1077 and 11-CF-553. Over defendant's objection, the trial court heard the petition to revoke simultaneously with defendant's jury trial on the charges underlying the petition to revoke (case

No. 12-CF-1085).

¶ 14 In October 2013, the jury convicted defendant on all charges in case No. 12-CF-1085. In November 2013, the trial court found, by a preponderance of the evidence, the State established defendant had violated his probation in case Nos. 10-CF-1077 and 11-CF-553 by having committed four counts of attempt (murder), four counts of aggravated battery with a firearm, and one count of home invasion.

¶ 15 In January 2014, the trial court held a joint sentencing hearing for case Nos. 10-CF-1077, 11-CF-553, and 12-CF-1085, as well as a fourth case that is not a part of these appeals. Before sentencing defendant to a total of 120 years in the Illinois Department of Corrections in case No. 12-CF-1085, the court discussed the factors it considered in reaching its sentence. In regard to case Nos. 10-CF-1077 and 11-CF-553, without additional comment, the court sentenced defendant to three separate three-year terms of imprisonment for each count, all to be served concurrently to the sentences imposed in case No. 12-CF-1085. In February 2014, defense counsel filed a motion to reconsider the sentence in case No. 12-CF-1085, arguing the 120-year sentence was excessive. In April 2014, the court denied the motion to reconsider.

¶ 16 These appeals followed.

¶ 17 In January 2016, appointed counsel moved to withdraw, attaching briefs in conformity with the requirements of *Anders*. The records show service of the motions on defendant. On its own motion, this court granted defendant leave to file additional points and authorities by February 11, 2016, but defendant has not done so. After examining the records and executing our duties in accordance with *Anders*, we grant counsel's motions and affirm the trial court's judgments.

¶ 18 II. ANALYSIS

¶ 19 Appointed counsel contends the record shows no meritorious issues can be raised on either appeal. For each appeal, counsel noted the following identical potential issues for which he could find no merit:

¶ 20 A. The Underlying Guilty Pleas

¶ 21 OSAD asserts no colorable argument can be made that defendant's guilty pleas are void in either case No. 10-CF-1077 or case No. 11-CF-553. We agree.

¶ 22 "When no direct appeal is taken from an order of probation and the time for appeal has expired, a reviewing court is precluded from reviewing the propriety of that order in an appeal from a subsequent revocation of that probation, unless the underlying judgment of conviction is void." *People v. Johnson*, 327 Ill. App. 3d 252, 256, 762 N.E.2d 1180, 1183 (2002).

¶ 23 Here, defendant did not file a direct appeal from either guilty plea and the time to file such an appeal has expired. See Ill. S. Ct. R. 604(d) (eff. July 1, 2006). As a result, defendant can only challenge his guilty pleas if they are void. The record does not support such an argument. Defendant was thoroughly admonished pursuant to Rule 402(a). The trial court found defendant understood his rights and knowingly and voluntarily waived those rights and persisted in his offers to plead guilty. The State presented factual bases supporting the findings of guilt beyond a reasonable doubt. Defendant confirmed the State could present sufficient evidence to sustain the charges. Having found the guilty pleas to be knowing and voluntary with sufficient factual bases, the court accepted defendant's pleas and dismissed the agreed-upon charges. The court concurred in the sentencing recommendations incorporated in the plea agreements. Defendant was advised of his appellate rights pursuant to Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001). *People v. Dominguez*, 2012 IL 111336, ¶¶ 11, 17-19, 54, 976

N.E.2d 983 (the trial court must substantially advise the defendant in such a way he is properly informed, or put on notice, of what he must do in order to preserve his right to appeal his guilty plea or sentence). Thus, no colorable argument can be made defendant's guilty pleas are void.

¶ 24 B. Sufficiency of the Evidence Defendant Violated Probation

¶ 25 OSAD next argues no colorable claim can be made the State failed to meet its burden of proving defendant violated his probation by a preponderance of the evidence. *People v. Crowell*, 53 Ill. 2d 447, 451, 292 N.E.2d 721, 723 (1973); 730 ILCS 5/5-6-4.1(c) (West 2010). We agree.

¶ 26 A probation-revocation proceeding is civil, not criminal, in nature. *People v. Woznick*, 278 Ill. App. 3d 826, 828, 663 N.E.2d 1037, 1038 (1996). Accordingly, proof of a probation violation need only be shown by a preponderance of the evidence, and the trial court's finding will not be overturned unless it is against the manifest weight of the evidence. *Woznick*, 278 Ill. App. 3d at 828, 663 N.E.2d at 1038-39; see also 730 ILCS 5/5-6-4(c) (West 2010).

¶ 27 Here, in its petitions to revoke defendant's probation, the State alleged defendant violated his probation by committing four counts of attempt (murder), one count of home invasion, and four counts of aggravated battery with a firearm in case No. 12-CF-1085. At the jury trial in case No. 12-CF-1085, the State presented evidence defendant shot at the door of an apartment in October 2012, hitting four people who were inside. The jury found him guilty on all counts. The trial court considered the evidence from the jury trial in the revocation proceedings and concluded defendant violated probation in case Nos. 10-CF-1077 and 11-CF-553. The jury found defendant guilty beyond a reasonable doubt. No argument can be made the State failed to prove he violated the terms of probation by a preponderance of the evidence.

¶ 28 C. The Resentencing Hearing

¶ 29 OSAD asserts no colorable argument can be made the trial court deprived defendant of a fair sentencing hearing following revocation of his probation in case Nos. 10-CF-1077 and 11-CF-553 by punishing him for the criminal conduct alleged to have occurred while he was on probation. We agree.

¶ 30 "A trial court is given great deference when making sentencing decisions, and if a sentence falls within the statutory limits, it will not be disturbed on review unless the trial court abused its discretion and the sentence was manifestly disproportionate to the nature of the case." *People v. Thrasher*, 383 Ill. App. 3d 363, 371, 890 N.E.2d 715, 722 (2008). "When a sentence of probation has been revoked, the trial court 'may impose any other sentence that was available *** at the time of the initial sentencing.' " *People v. Somers*, 2012 IL App (4th) 110180, ¶ 21, 970 N.E.2d 606 (quoting 730 ILCS 5/5-6-4(e) (West 2008)).

¶ 31 In this case, after revoking defendant's probation, the trial court resentenced him as follows: in case No. 10-CF-1077, concurrent terms of three years in prison for theft from a person, a Class 4 felony with a sentencing range of one to three years (720 ILCS 5/16-1(a)(1), (4) (West 2010); 730 ILCS 5/5-4.5-45(a) (West 2010)), and criminal damage to property over $300, a Class 3 felony with a sentencing range of two to five years (720 ILCS 5/21-1(1)(a), (2) (West 2010); 730 ILCS 5/5-4.5-40(a) (West 2010)); and in case No. 11-CF-553, a nonextended term of three years in prison for unlawful possession of cannabis with intent to deliver, a Class 4 felony with an extended-term sentencing range of three to six years (720 ILCS 550/5(c) (West 2010); 730 ILCS 5/5-4.5-45(a), 5-8-2 (West 2010)). Nothing in the record indicates the court considered defendant's criminal conduct while he was on probation when sentencing defendant. The sentences were within the statutory limits and nothing in the record supports a claim the

sentences were disproportionate to the offenses.

¶ 32 III. CONCLUSION

¶ 33 After reviewing the record pursuant to *Anders*, we agree with appointed counsel no meritorious issues can be raised on appeal, and we grant counsel's motions to withdraw as counsel for defendant and affirm the trial court's judgments.

¶ 34 No. 4-14-0318, Affirmed.

¶ 35 No. 4-14-0319, Affirmed.