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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

| | | |
|-------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE |) | Appeal from the Circuit Court |
| OF ILLINOIS, |) | of Lake County. |
| |) | |
| Plaintiff-Appellee, |) | |
| |) | |
| v. |) | No. 07—CF—1052 |
| |) | |
| JAMES K. DIGGS, |) | Honorable |
| |) | John T. Phillips, |
| Defendant-Appellant. |) | Judge, Presiding. |

JUSTICE McLAREN delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

Held: Upon the revocation of defendant's probation, the trial court properly sentenced defendant to eight years' imprisonment per the parties' agreement, rather than imposing the suspended seven-year sentence that was part of the parties' original plea agreement; the original agreement did not mandate the seven-year sentence in the event of a revocation, and, even if it did, defendant's agreement to an eight-year sentence, in exchange for the State's dismissal of the charge that was the basis for the revocation, superseded the original agreement.

Defendant, James K. Diggs, appeals from a judgment that revoked his probation and imposed a sentence of eight years' imprisonment. That judgment was the result of an agreement with the State in which the State agreed, among other things, to nol-pros a felony charge. Defendant asserts

that the eight-year sentence was inconsistent with his *original* plea agreement, in which he pled guilty in exchange for a sentence that included 30 months' probation and a suspended sentence of 7 years' imprisonment. He asserts that the original agreement bound the State to seek instatement of the suspended sentence as the penalty for any probation violation, and he asks us to modify the new sentence to conform to his reading of the old agreement. We hold that the record does not support his reading of the original agreement, and that, whatever the content of the original agreement, the new agreement he entered into properly superseded it. We therefore affirm defendant's eight-year sentence.

I. BACKGROUND

Defendant was charged by indictment with one count of burglary of a motor vehicle (720 ILCS 5/19—1(a) (West 2006)), one count of attempted burglary of a motor vehicle (720 ILCS 5/8—4(a), 19—1(a) (West 2006)), one count of possession of burglary tools (720 ILCS 5/19—2(a) (West 2006)), and one count of unlawful possession of a controlled substance (720 ILCS 5/70/402(c) (West 2006)). Because of prior convictions, he was subject to Class X sentencing. See 730 ILCS 5/5—5—3(c)(8) (West 2006)).

On June 6, 2007, he entered into a fully negotiated plea agreement in which he pled guilty to attempted burglary. In conformity with the agreement, the court sentenced him to 30 months' therapeutic and intensive monitoring drug court probation and 7 years' imprisonment, with the imprisonment stayed pending successful completion of his probation. In accepting defendant's plea, the court told him that, if he failed to follow the terms of his probation, "then a couple of things could happen":

“I could lift the stay on the term of imprisonment ***; another thing that could happen is, the State [c]ould always *** file a petition to revoke your probation ***; and if they prove by a preponderance of evidence that you violated the probation *** you could be re-sentenced again and sentenced up to the maximum on an extendable Class 3[.]”

On January 28, 2009, the State filed a petition for revocation of probation, alleging that defendant had committed the offense of unlawful possession of a controlled substance. The State explained to the court that defendant, in response to a phone call from a police informant, had arrived at an agreed location. He had brought with him a small amount of cocaine, which he later admitted he had expected to sell to the caller. The State told the court that it would prefer going forward on the revocation rather than filing new charges. On January 30, 2009, the court advised defendant that he could have his “probation revoked,” he could be “resentence[d] on that Class 3 felony,” or he could be “punished for contempt of court.”

On February 6, 2009, defendant and the State presented an agreement to the court. Defendant agreed to admit the probation violation, and the State “would move to nolle pros 09 CF 534.” Further, defendant would receive a sentence of 10 years’ imprisonment. However, he would also receive a two-week furlough and, if he returned on time and tested negative for drugs, the court would reduce the sentence to eight years’ imprisonment. Case No. “09 CF 534” may have been the case associated with the offense that led to the petition to revoke, but no one explicitly explained that it was.

The court accepted the agreement. Defendant duly reported at the end of his furlough, and the court reduced his sentence in accord with the new agreement.

On February 27, 2009, defendant filed a motion to vacate the admission. As amended, the motion asserted that, because counsel never investigated the strength of the evidence relating to case No. 09—CF—534 and the petition to revoke, his assistance was ineffective. The court denied the motion, and defendant timely appealed.

On appeal, defendant asserts that the original plea agreement precluded a sentence on revocation longer than seven years. He further argues that the imposition of the longer sentence is reversible as plain error, and asks us to reduce the eight-year sentence to seven years. The State argues, among other things, that, because defendant’s claim of error amounts to an attack on his original guilty plea, we lack jurisdiction to “consider [his] argument.” It asserts that, once the original agreement became final, defendant could not properly “raise any issue concerning the guilty plea.”

II. ANALYSIS

We start by considering the State’s claim of lack of jurisdiction. Defendant seeks to have his newly-imposed sentence reduced to the seven years that he asserts the original plea agreement requires. Although we might have no power to modify the original plea agreement, we fail to see how that circumstance would deprive us of the power to modify the new sentence. If the State is simply arguing that, to give defendant what he wants, this court would have to modify the original agreement, that argument is a disagreement with defendant’s interpretation of the agreement, not an argument that this court lacks jurisdiction. To state the obvious, we need not have the jurisdiction necessary to modify an order to have the jurisdiction necessary to decide what that order means. Simply put, the merit of the State’s claim that we lack jurisdiction is what is lacking.

Turning to the merits of the matter, we disagree that the eight-year sentence violated defendant's rights under the original agreement with the State. There are two flaws in defendant's argument. One, the original agreement did not clearly require a seven-year sentence if defendant failed to fulfill the terms of his probation. Two, even if it did, nothing prevented defendant and the State from negotiating a new agreement—a substituted contract—if both deemed such an agreement to be mutually acceptable. We discuss those two flaws in order.

First, the record does not support defendant's view of the agreement. When the court imposed sentence, it explicitly advised defendant that, in case of a violation, the possibilities were (1) that the court could instate the seven-year sentence *or* (2) the State could pursue a petition to revoke, which, if successful, would result in *resentencing*. Defendant has not explained how, in the face of the court's explanation of these two alternatives, there could have existed a commitment to use only the first. Indeed, defendant, in his statement of facts, failed entirely to mention the court's explanation of the sentence.

Defendant asks what the purpose of the seven-year suspended sentence was if not to guarantee him that specific sentence if he did not comply with the terms of his probation. Assuming that the court accurately described the alternatives, the purpose of the suspended sentence was to serve as a punishment if there were no future agreements that would supersede it. Additionally, the original agreement was silent as to additional punishment based upon the commission of other crimes that would be grounds for vacating the suspension and imposing the seven year sentence.

Nevertheless, assuming that defendant and the State *did* originally have an agreement of the sort he claims they did, he has pointed to nothing that would bar renegotiation of that agreement. We are unaware of any disability that would preclude the defendant or the State from entering into

more than one contract/plea agreement. Basic principles of contract law allow defendant and the State to enter into a contract providing that the three elements of a contract are present. The three elements of a contract are an offer, an acceptance, and consideration. *Melena v. Anheuser-Busch, Inc.*, 219 Ill.2d 135, 151 (2006). Probation violations are not necessarily criminal violations, but any criminal violation, from the pettiest to the most serious, is a probation violation. Because it would be absurd for the State to agree to handle *any* criminal probation violation *solely* through a request to instate a suspended sentence for the prior offense, a plausible agreement would necessarily have to leave the State free to prosecute a new offense separately. Thus, the State was free to prosecute the possession offense (or whatever offense was charged in case no. 09—CF—534) without any limitation stemming from the old agreement.

When the State nol-prossed the new charge, it gave up a legal right. Defendant seems to suggest that the old agreement meant that he needed to give up nothing in exchange. Although defendant invokes the principle of “the benefit of the bargain” and other contract principles in support of his claim, contract principles allowed defendant to give up his right to a seven-year sentence in exchange for the State’s giving up its right to prosecute the new offense. Indeed, defendant did get the benefit of the bargain—that bargain under which the eight-year sentence was imposed.

An agreement between defendant and the State to abrogate the original agreement in exchange for a new one is in accord with ordinary contract principles. Such an agreement would be an example of a *substituted contract*. “A substituted contract is a contract that is itself accepted by the obligee in satisfaction of the obligor’s existing duty.” Restatement (Second) of Contracts §279(1), at 375 (1981). A substituted contract must be supported by consideration or a substitute

for consideration. Restatement (Second) of Contracts §279, Comment *b*, at 376 (1981). Continuing with the assumption that the agreement that defendant describes existed, the State's nol-prossing the new charge was consideration for defendant's accepting the abrogation of the old agreement and the entry of the new 10-year sentence that was reduced to eight years by the defendant's passing a drug test. See *Kalis v. Colgate-Palmolive Co.*, 337 Ill.App.3d 898, 901 (2003) (stating that a promise to forego the pursuit of a legal claim is adequate consideration). Such a substituted contract was entirely in accord with principles of fairness and with due process. Defendant received the benefit of two bargains but refuses to acknowledge that he accepted an offer coupled with consideration that abrogated his first agreement, the seven-year sentence, and imposed an eight-year sentence with no further prosecution of a pending felony charge.

III. CONCLUSION

For the reasons stated, we affirm defendant's eight-year sentence.

Affirmed.