



(720 ILCS 646/25(d)(1) (West 2008)). The count for unlawful possession was dismissed as part of an open plea to unlawful tampering, and the matter was set for sentencing.

¶ 5 On July 29, 2009, the trial court conducted a sentencing hearing. At the end of the hearing, the sentencing judge stated he had weighed mitigating and aggravating factors and then lectured defendant on the dangers of stealing anhydrous ammonia. The judge noted a presentence investigative report indicated defendant had an extensive criminal history and told defendant that a term of incarceration was warranted. Nonetheless, the judge told defendant "I am going to take a chance with you and place you" on probation. The judge commented that, although his record was extensive, defendant had not been in any serious trouble for over a decade and that incarceration would adversely affect defendant's dependents.

¶ 6 The court concluded:

"If I would had [*sic*] given you any time in the department of corrections, it would have been on the low end, and I have also considered that if I gave you two years, three years in the department of corrections with the credit for the time you have already served, that you wouldn't be there very long. You would be there a very minimal period of time without any restrictions other than parole after you got out or mandatory supervised release.

And based on that, it strikes me that this sentence is maybe worse than a penitentiary sentence in a lot of ways because you have to stay clean for 30 months. Also, if you screw up, I suggest you are not going to end up on the low end of the scale, you are going to end up on the higher end of the scale very likely. Do you understand?"

¶ 7 The court entered a written order sentencing defendant to 30 months of probation. The terms of probation were manifold and set forth in numbered paragraphs. One paragraph

required defendant to undergo an alcohol and drug evaluation within 30 days. In another paragraph, defendant was ordered to abstain from the use of alcohol or controlled substances. The order gave the Marion County Court Services Department the authority to require additional evaluations and counseling. Another paragraph required defendant to report to the Marion County Court Services Department. Defendant was also ordered to serve 180 days in jail with credit for time served and 100 hours of public service work.

¶ 8 On September 22, 2010, the State filed a petition to revoke probation. The petition outlined violations of various numbered paragraphs of the order of probation. According to the petition, defendant failed to undergo a drug and alcohol evaluation, failed to complete his public service work, failed to report to the probation department on several dates, and failed to appear for a previous court date.

¶ 9 A different judge than the one who issued the original sentence of probation handled the revocation and resentencing. At the hearing on the petition to revoke, defendant admitted that he missed appointments with the probation department, but attributed this to car problems and breakdowns in communication. Defendant stated that he had been depressed because of the death of his girlfriend and had mistaken the location for public service. Defendant also submitted a drug and alcohol evaluation report dated the day before the hearing. Probation officers testified about defendant's failure to comply with the terms of probation.

¶ 10 At the conclusion of the hearing, the court found that the State had proved each of the alleged violations by a preponderance of evidence. The court noted that, by defendant's own admission, he had failed to submit to an evaluation within 30 days of the order of probation, had failed to appear for a previous court date, and had not complied with the terms for public service work. In setting the matter for hearing on sentencing, the court ordered the update of a presentence investigative report.

¶ 11 One month later, the court conducted a resentencing hearing. The court first sought comments from counsel on the updated presentence investigative report and letters sent on behalf of defendant. The court then entertained argument. The State referred back to the original sentencing hearing and its argument that defendant should be incarcerated, and not granted probation, because of his extensive felonious history and failure to comply with probation in previous convictions. The State argued that its position had been vindicated and asked for four years of incarceration. Defense counsel argued that defendant had, on occasion, complied with probation and that he should be placed on probation again. Defendant made a statement in allocution.

¶ 12 At the conclusion of the hearing, the trial court sentenced defendant to 42 months' imprisonment with credit for time served. The court started by noting that it had considered the updated presentence investigative report and evaluated the arguments for sentencing alternatives. The court noted that in light of defendant's criminal record, the judge issuing probation was apparently giving defendant "a final bite of the apple." The court also noted that the order of probation contained nothing extraordinary and that the issuing judge had gone through the need for evaluation and treatment with defendant. The court concluded that, considering defendant's criminal record, the sentence was lenient.

¶ 13 Defendant appeals.

¶ 14 ANALYSIS

¶ 15 Probation plays a vital role in the administration of justice in Illinois. Though it is a critical tool, probation is not failsafe. Sometimes a defendant's conduct on probation displays a lack of rehabilitative potential. The issue on appeal is directed at the factors a court may consider when resentencing a defendant whose probation has been revoked. On appeal, defendant does not contest the terms of his probation, nor that he violated those terms. Instead, defendant contends that his sentence was not based on the original offense. The

record does not support defendant's assertion.

¶ 16 Defendant correctly asserts that a sentence issued after revocation of probation must be based on the original offense. *People v. Varghese*, 391 Ill. App. 3d 866, 876, 909 N.E.2d 939, 948 (2009). A defendant may not be punished for the conduct that is the basis for the violation of probation. *People v. Risley*, 395 Ill. App. 3d 918, 920, 834 N.E.2d 981, 983 (2005). A defendant whose alleged conduct while on probation constitutes a separate offense is entitled to a fair trial and the protections of criminal procedure. *Varghese*, 391 Ill. App. 3d at 876, 909 N.E.2d at 948. As such, the record must demonstrate that the trial court considered the original offense as the crime for which the sentence was imposed. *Varghese*, 391 Ill. App. 3d at 877, 909 N.E.2d at 948.

¶ 17 This does not mean, however, that the court may not consider the conduct that constituted a violation of probation. A defendant's conduct while on probation may be relevant to his rehabilitative potential. Disregard for the terms of probation may be seen as evidence of a lack of potential for rehabilitation. *Risley*, 395 Ill. App. 3d at 920, 834 N.E.2d at 983. Generally, a defendant's lack of concern about complying with the terms of probation may lead to diminished faith in his ability to rehabilitate. *People v. Walsh*, 273 Ill. App. 3d 453, 460, 652 N.E.2d 1102, 1107 (1995). In particular, compliance with provisions addressing substance abuse is critical to whether a defendant who committed a drug-related offense may be rehabilitated. See *People v. Somers*, 2012 IL App (4th) 110180, ¶ 25, 970 N.E.2d 606.

¶ 18 *Varghese* exemplifies punishment for conduct while on probation. In *Varghese*, the defendant pled guilty to aggravated criminal sexual abuse stemming from his meeting a 13-year-old girl on the Internet and received two years of probation. The defendant's probation was eventually revoked for driving on a suspended license. The events leading to the traffic stop were the focus of the resentencing hearing. At the hearing, the mother of a

16-year-old girl testified that she had intercepted an e-mail to her daughter from an older man. The mother, concealing her identity, eventually set up a meeting with the man at a community park and called the police. The defendant was stopped in the area of the arranged rendezvous and arrested for driving with a suspended license. Police officers testified about the traffic stop and the defendant's alleged Internet communications that led to the stop. In resentencing the defendant to seven years of incarceration, the trial stated that there was no doubt that the defendant had attempted to meet with the 16-year-old for the purpose of engaging in sex.

¶ 19 *Varghese* rejected the State's contention that the contact with the 16-year-old was considered solely as a matter of rehabilitative potential. *Varghese* found that the record clearly reflected that the trial court punished the defendant for his attempt to seduce the girl, not for his original offense. *Varghese*, 391 Ill. App. 3d at 876, 909 N.E.2d at 948. The trial court stated on the record that it had considered both the mitigating and aggravating factors, but concluded with a detailed focus on the defendant's attempt to meet the 16-year-old girl. Immediately before issuing the sentence, the trial court chastised the defendant for his reprehensible conduct on probation. The trial court remarked how the defendant's attempt to meet the 16-year-old was "intolerable" and "dangerous." *Varghese*, 391 Ill. App. 3d at 877, 909 N.E.2d at 948. This focus commingled the uncharged conduct with the original crime. *Varghese*, 391 Ill. App. 3d at 877, 909 N.E.2d at 948.

¶ 20 In contrast to *Varghese*, the trial court's comments regarding defendant's noncompliance indicated that defendant lacked rehabilitative potential. The trial court discussed how defendant's conduct showed his unwillingness to follow the terms of probation—not how the conduct was reprehensible. The trial court found that defendant had disregarded the reporting requirements of probation, failed to appear for previous court dates, and did not follow the guidelines for substance abuse evaluation and treatment. The court

concluded that further probation would not be fruitful as defendant had decided that any compliance would be on his own timetable. Thus, rehabilitation through another term of alternative sentencing was not an option, and incarceration was warranted.

¶ 21 Moreover, the record clearly demonstrates that the trial court took the original offense into consideration at the resentencing hearing. Defendant equates the trial court's allocating so much discussion to the futility of resubmitting defendant to probation with a slight of the original offense. Defendant incorrectly asserts that the underlying offense was only mentioned tangentially at the sentencing hearing. In contrast to *Varghese*, the trial court's comments regarding the original offense were pointed and poignant. Immediately before issuing the sentence, the trial court commented that failure to incarcerate defendant "would deprecate the seriousness of the offense and would not be in keeping with the ends of justice."

¶ 22 Indeed, the trial court's discussion of defendant's conduct on probation was in the context of the viability of incarceration for the original offense. Before discussing defendant's conduct on probation, the trial court commented that the updated presentence investigation report was essentially the same as that presented at the time probation was granted. Noting the extensive criminal history in the report, the trial court harkened back to the judgment made to grant probation over incarceration. At the time probation was awarded, the judge told defendant he had contemplated sentencing him to two or three years' imprisonment and that if defendant ruined the chance given by probation, incarceration was likely. See *Varghese*, 391 Ill. App. 3d at 876, 909 N.E.2d at 948 (more severe sentence after revocation is permissible). In the words of the trial court at resentencing, defendant had been warned that probation was his "final bite of the apple." At the resentencing, the trial court explained that incarceration was now the remedy.

¶ 23 The court's reflection on the final bite of the apple underscores the fundamental

distinction with *Varghese*. In *Varghese* the defendant was punished for conduct while on probation. In the case at hand, defendant was incarcerated because probation had failed. At the resentencing hearing, the court found that further probation was futile. The sentence of 3½ years' incarceration is directly in line with the warning given when probation was ordered. At resentencing, the trial court reflected back on the original offense and did not abuse its discretion.

¶ 24 The trial court's concluding remark was that the sentence was lenient. The court commented that, in light of defendant's criminal record, he could have received the maximum sentence of 60 months. See, e.g., *People v. Morrison*, 298 Ill. App. 3d 241, 244, 698 N.E.2d 671, 674 (1998) (criminal history appropriately considered on resentencing). The record supports this pronouncement. Generally, if it is within the statutory range a sentence will not be reversed unless the reviewing court is strongly persuaded that the punishment was imposed as a penalty for the conduct on probation, and not the original offense. *Varghese*, 391 Ill. App. 3d at 876, 909 N.E.2d at 948; *People v. Young*, 138 Ill. App. 3d 130, 142, 485 N.E.2d 443, 450 (1985). The record indicates that the trial court acted within its discretion and sentenced defendant for the crime for which he pled guilty.

¶ 25 Accordingly, the order of the circuit court is hereby affirmed.

¶ 26 Affirmed.