2017 IL App (1st) 161778-U

SECOND DIVISION
Rule 23 filed November 29, 2016
Modified upon denial of rehearing March 14, 2017

No. 1-16-1778

IN THE INTEREST OF SEBEYOUN W., a Minor,	)	Appeal from the
	)	Circuit Court of
(THE PEOPLE OF THE STATE OF ILLINOIS,	)	Cook County
	)	
	)	
Petitioner-Appellee,	)	
	)	
v.	)	No. 16 JD 648
	)	
SEBEYOUN W., a Minor	)	Honorable
	)	Stuart P. Katz,
Respondent-Appellant.)	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Hyman and Justice Neville concurred in the judgment.

ORDER MODIFIED ON DENIAL OF REHEARING

¶ 1 Respondent, Sebeyoun W., was adjudicated delinquent for defacing identifying marks from a firearm, aggravated unlawful use of a weapon under the age of 21, and unlawful possession of a firearm. Respondent was sentenced to a two-year term of probation. On appeal respondent argues that the State failed to prove him guilty beyond a reasonable doubt and that a condition of his 24-month probation, to clear his social media profiles of images of him posing with a guns and illegal drugs, violates his first amendment rights. For the following reasons, we

affirm the judgment of the juvenile court.

¶ 2 BACKGROUND

¶ 3 Prior to trial, the court heard testimony at a hearing on respondent's motion to quash his arrest and suppress evidence. Respondent testified at that hearing that on March 15, 2016, he was walking to a friend's house at 68th and Throop at about 2 p.m. Police approached him and told him to put his hands up. After searching him, officers recovered a gun from his right jacket pocket.

¶ 4 Officer Blackman of the Chicago police department testified that on March 15, 2016, he was on routine patrol in an unmarked vehicle with his partner near the location of 6833 South Throop Street in Chicago and observed a group of 15 to 20 individuals standing on the sidewalk. As he drove past the group with his window down, he smelled a strong odor of burning cannabis coming from the group. Officer Blackman and his partner exited their vehicle to conduct field interviews.

¶ 5 Officer Blackman testified that respondent looked in the officers' direction and then began to walk northbound at a fast pace away from the group. Respondent appeared to be holding his right side. Officer Blackman could see an outline of an object through respondent's jacket, which appeared to be a weapon, specifically the end of a handgun muzzle. Officer Blackman approached respondent and asked him to remove his hands from his jacket pocket. Respondent kept his right hand securing the object at his side and raised his left hand. Officer Blackman repeatedly instructed respondent to raise both hands but respondent only raised his left hand. Respondent appeared to have a handgun inside the right pocket of his jacket.

Consequently, Officer Blackman approached respondent, detained him and after he performed a protective search, discovered a handgun. Respondent was placed into custody.

¶ 6 After hearing the testimony, the juvenile court denied respondent's motion to quash arrest and suppress evidence.

¶ 7 At trial, the parties stipulated to the testimony given at the suppression hearing. Officer Blackman was recalled to testify. Officer Blackman testified that he recovered a loaded handgun from the right pocket of respondent's jacket on March 15, 2016. When he recovered the handgun, he noticed that the serial numbers on the firearm had been filed off. He could not detect any serial number anywhere on the handgun. After he was detained, respondent stated, "the gun is mine, it's not Romeo's." The firearm was inventoried pursuant to standard procedure.

¶ 8 The juvenile court granted respondent's motion for a directed verdict with respect to the charge of aggravated unlawful use of a weapon based on the lack of a Firearm Owner's Identification (FOID), but denied the motion as to all other charges. The court then found respondent guilty of possession of a firearm with defaced identification marks, aggravated unlawful use of a weapon by an individual under the age of 21, and unlawful possession of a firearm.

¶ 9 After a social investigation was completed and received by the court, the court sentenced respondent to two years of probation, 40 hours of community service, to be in school each day, counseling and was ordered to stay away from two geographic locations that had been identified as gang territories. Respondent was also ordered to remove photographs of himself engaging in criminal conduct from his social media accounts.

ANALYSIS

¶ 10 Respondent first argues that the State failed to prove him delinquent beyond a reasonable doubt where there was absolutely no evidence presented that respondent knew that the serial number on the gun in question had been obliterated.

¶ 11 On appeal, when the defendant challenges the sufficiency of the evidence, the reviewing court must determine, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). "A reviewing court affords great deference to the trier of facts and does not retry the defendant on appeal." *People v. Smith,* 318 Ill. App. 3d 64, 73 (2000). "A reviewing court must allow all reasonable inferences from the record in favor of the State." *People v. Cunningham,* 212 Ill. 2d 274, 280 (2004). A criminal conviction will not be reversed "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt." *People v. Graham,* 392 Ill. App. 3d 1001, 1009 (2009).

¶ 12 "It is within the function of the trier of fact to assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence." *Id.* It is not the duty of the trier of fact to accept any possible explanation that favors the defendant's innocence and "elevate it to the status of reasonable doubt." *People v. Siguenza-Brito, 235 Ill. 2d 213, 229 (2009).* "A reviewing court will not substitute its judgment for that of the trier of fact." *People v. Sutherland,* 223 Ill. 2d 187, 242 (2006).

¶ 13 To sustain a finding of delinquency on the offense of possession of a firearm with defaced identification marks, the State was required to prove beyond a reasonable doubt that

respondent "possess[ed] any firearm upon which any such importer's or manufacturer's serial number has been changed, altered, removed or obliterated." 720 ILCS 5/24-5(b) (West 2006). As respondent points out, section 24-5(b) does include an explicit mental state, and therefore when no mental state is provided, a person cannot be proven guilty without the additional proof of either a negligent, reckless, knowing, or intentional state of mind. See 720 ILCS 5/24-5(b) (West 2016). Respondent claims that under a faithful reading of these statutes, this court should find that the State was required to show that respondent knew that the gun he possessed was defaced. We disagree and find *People v. Stanley*, 397 Ill. App. 3d 598, 609 (2009) to be dispositive of respondent's claim.

¶ 14 In *Stanley*, as in this case, the defendant contended that he had not been proven guilty of possessing a defaced firearm where the State presented no evidence to suggest that he knew the identifying marks had been scratched off the gun he possessed. *Id*. at 603. The defendant alternatively argued that if such knowledge was not required, the statute was unconstitutional as tending to criminalize innocent conduct without a showing of a culpable mental state. *Id*. Before beginning its analysis, the *Stanley* court stated that as it was being "mindful of the supreme court's mandate, we will endeavor to resolve this challenge on nonconstitutional grounds and only address the constitutional challenge if necessary." *Id.* (citing *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 196 (2009) ("cases should be resolved on nonconstitutional grounds whenever possible and constitutional issues should be reached only as a last resort")).

¶ 15 The *Stanley* court began by examining section 24–5(b), which provides: "A person who possesses any firearm upon which any such importer's or manufacturer's serial number has been changed, altered, removed or obliterated commits a Class 3 felony." *Id*. See also 720 ILCS

5/24–5(b) (West 2008). Noting that the statute, as written, did not provide a mental state, the court determined that the applicable *mens rea* for the offense is knowledge and that "the knowledge required applies only to the possessory component of the offense." *Id*. at 608. Therefore, to prove the defendant guilty of possession of a defaced firearm, the State was required to show knowing possession of the defaced firearm by the defendant, but was not required to establish knowledge of the character of the firearm, as defacement is not an element of the offense. *Id*. at 609. See also *People v. Falco*, 2014 IL App (1st) 111797 (in order to prove the offense of possession of a defaced firearm, the State was only required to prove that the possession was knowing and did not have to prove that the defendant knew the firearm was defaced).

¶ 16 We find no reason to depart from our holding in *Stanley* or *Falco* and conclude that the State was only required to establish that respondent knowingly possessed the firearm in this case, which it did beyond a reasonable doubt, and which respondent did not dispute.

¶ 17 Respondent next argues that the juvenile court's order that as a condition of his probation he clear his social media profiles of images of him posing with a gun violates his first amendment right to speech. Respondent acknowledges that he failed to object to this condition of his probation, but argues that under the second prong of plain error analysis, the error is so serious that it challenges the integrity of the sentencing hearing.

¶ 18 Normally issues not objected to at sentencing are forfeited. To obtain relief under the plain error rule, a defendant must first show that a clear or obvious error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). In the context of sentencing, defendant must then show either that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so

egregious as to deny the defendant a fair sentencing hearing. *People v. Hall*, 195 Ill. 2d 1, 18 (2000). Under both prongs of the plain-error doctrine, the defendant has the burden of persuasion. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008); *People v. Herron*, 215 Ill. 2d 167, 187 (2005). If the defendant fails to meet his burden, the procedural default will be honored. *Naylor*, 229 Ill. 2d at 593.

¶ 19 At sentencing, the State argued that a report issued to determine whether respondent was eligible for a violence intervention program showed that respondent had many "selfies" posted to his various social media accounts showing him posing with handguns. The State argued that respondent was a threat to himself and the community and asked that respondent be committed to the Department of Juvenile Justice. Respondent's counsel argued in mitigation that respondent was in need of treatment and had to take responsibility for the crime. After hearing arguments, the juvenile court stated:

> "First and foremost, I'm going to tell you that this stuff had better be gone by the end of the day today.
>
> ***
>
> All social media. I mean, I can't believe –this is ridiculous. I can't imagine the thoughts that are going through your head when you do this stupid kind of stuff posting photos like this.
>
> And, for the record, I'm leafing through the Violence Intervention Program report with multiple, multiple photos of Sebeyoun holding guns posted on social media.
>
> Every site – I don't care if it's Facebook, Twitter, Instagram, Snapchat -- whatever it is, it gets cleared up by the end of today.

> And if [the probation officer] or anybody else find this by the end of the week—and obviously we can find it – you're going to be doing it in the detention center upstairs; is that clear?"

The court then sentenced respondent to two years of probation with the following conditions: counseling, 40 hours of community service, school every day, no gang activity, no guns, and no drugs. Respondent was also ordered to refrain from entering a specific geographical territory. With respect to the condition of no gang activity, the court stated, "When I say no gang activity and when I tell you to clear off those photos, I don't just mean photos with guns—photos of you with weed, photos of you flashing gang signs, any references to gang activity or violence." Respondent stated that he understood these conditions of his probation.

¶ 20 Section 5-715 of the Juvenile Court Act of 1987 (Act) sets out conditions that the juvenile court may impose as conditions of juvenile probation and states in relevant part:

> "(2) The court may as a condition of probation or of conditional discharge require that the minor:
>
> (a) not violate any criminal statute of any jurisdiction;
>
> (g) refrain from possessing a firearm or other dangerous weapon, or an automobile;
>
> (j) attend school;
>
> (r) refrain from entering into a designated geographic area except upon terms as the court finds appropriate. The terms may include consideration of the purpose of the entry, the time of day, other persons accompanying the minor, and advance approval by a probation officer, if the minor has been placed on

probation, or advance approval by the court, if the minor has been placed on conditional discharge;

(s) refrain from having any contact, directly or indirectly, with certain specified persons or particular types of persons, including but not limited to members of street gangs and drug users or dealers." 705 ILCS 405/5-101 (2016).

¶ 21 Courts have the direction to impose conditions of probation that are not specifically enumerated by statute to achieve the goals of fostering rehabilitation and protecting the public. See *People v. Meyer*, 176 Ill. 2d 372, 378, (1997); *People v. Harris*, 238 Ill. App. 3d 575, 581 (1992). The court's discretion is limited by constitutional safeguards and must be reasonable. *Harris*, 238 Ill. App. 3d at 581. "The constitutional safeguards, which circumscribe a trial court's exercise of its discretion to impose conditions, are the basic constitutional rights of the probationer." *Id.*

¶ 22 The first amendment to the United States Constitution, made applicable to the states through the due process clause of the fourteenth amendment, prohibits governmental action that "abridg[es] the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const., amends. I, XIV. Although the first amendment speaks of the freedom of speech, it also extends to expressive conduct. *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Generally, the first amendment prevents the government from proscribing speech or expressive conduct because of disapproval of the ideas expressed. *City of Chicago v. Pooh Bah Enterprises, Inc.*, 224 Ill. 2d 390, 406-07 (2006). First Amendment protection is not limited to written or spoken words, but includes other mediums of expression, including music, pictures, films, photographs, paintings, drawings,

engravings, prints, and sculptures. See *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995)("[T]he Constitution looks beyond written or spoken words as mediums of expression; *Kaplan v. California*, 413 U.S. 115, 119-120 (1973)("[P]ictures, films, paintings, drawings, and engravings ... have First Amendment protection.")

¶ 23 Although the condition of probation imposed on respondent in this case, to remove photographs of himself on social media in which he is holding a firearm or drugs, or photographs where he is flashing gang signs or promoting violence, seemingly implicates his first amendment rights, "a condition of probation which impinges on fundamental constitutional rights is not automatically deemed invalid. Even fundamental constitutional rights are not absolute and may be reasonably restricted in the public interest." *In re J.W.*, 204 Ill. 2d 50, 78 (2003); see also *City of Chicago v. Morales*, 177 Ill. 2d 440, 460 (1997); *Harris*, 238 Ill. App. 3d at 582.

¶ 24 In order to determine whether a statutory or non-statutory condition of probation imposed in a particular case is proper, we must look at the reasonableness of the condition. *In re M.P.*, 297 Ill. App. 3d 972, 976 (1998); *People v. Ferrell*, 277 Ill. App. 3d 74, 79 (1995). A condition of probation is reasonable when it is not overly broad when viewed in the light of the desired goal or the means to that end. *In re J.G.*, 295 Ill. App. 3d 840, 843 (1998). In other words, " '[w]here a condition of probation requires a waiver of precious constitutional rights, the condition must be narrowly drawn; to the extent it is overbroad it is not reasonably related to the compelling state interest in reformation and rehabilitation and is an unconstitutional restriction on the exercise of fundamental constitutional rights.' " (Emphasis omitted.) *In re J.W.*, 204 Ill. 2d at 78 (quoting *People v. Mason*, 5 Cal.3d 759, 768 (1971)). Other considerations are: (1)

whether the condition of probation reasonably relates to the rehabilitative purpose of the legislation, (2) whether the value to the public in imposing this condition of probation manifestly outweighs the impairment to the probationer's constitutional rights, and (3) whether there are any alternative means that are less subversive to the probationer's constitutional rights, but still comport with the purposes of conferring the benefit of probation. *Harris*, 238 Ill. App. 3d at 582.

¶ 25 The State has chosen not to address respondent's first amendment issue, instead arguing that it was within the trial court's discretion to craft a sentence that was unique and appropriate for respondent, and that this condition of probation was geared toward rehabilitation and prevention of further delinquent behavior in accordance with the Act. The fact that the State has omitted any discussion of a probationer's first amendment rights makes determining whether error occurred particularly difficult because the State has failed to explain how the condition of probation is reasonably related to the compelling state interest of reformation and rehabilitation in this context.

¶ 26 We note that generally, probationers are required to relinquish some of their constitutional rights by mere consequence of conviction. See *People v. Hugo G.*, 322 Ill. App. 3d 727 (2001) (imposition of restriction on juvenile probationer's liberty was upheld where value to the public outweighed any impairment of juvenile's constitutional rights). Nevertheless, even if we were to assume that error occurred here, we are not persuaded by respondent's argument that the error was so egregious as to deny him a fair sentencing hearing. Respondent's underdeveloped argument amounts to a general attack on the sentencing order. He argues that invalid sentencing orders, similar to the one here, have been addressed on the merits under the second prong of plain error.

¶ 27 Our supreme court has held that the second prong plain error analysis is satisfied in cases involving structural error, *i.e.*, cases involving complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self- representation at trial, denial of a public trial, and a defective reasonable doubt instruction. *People v. Thompson*, 238 Ill. 2d 598, 609 (2010); *In re Samantha V.*, 234 Ill. 2d 359 (2009). "Structural errors are systemic, serving to erode the integrity of the judicial process and undermine the fairness of the defendant's trial." (Internal quotation marks omitted.) *Id*. at 608-09 (quoting *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009)). In *People v. Clark*, 2016 IL 118845, our supreme court stated that although it equated second prong plain error with structural error, it never "restricted plain error to the six types of structural error" but recognized anything that affected the integrity of the judicial process, such as an improper conviction, as satisfying the second prong of plain error. *Id*. ¶46.

¶ 28 The string of cases cited by respondent in support of his argument that invalid sentencing orders can be addressed on the merits despite forfeiture under the second prong of plain error, (*People v. Easley*, 2012 IL App (1st) 110023), ¶16 (addressing contention that defendant was subject to an improper double enhancement as plain error), *People v. Black*, 394 Ill. App. 3d 935 (2009) (addressing contention that defendant was placed on sex-offender registry without specifying required findings as plain error), *People v. McCleary*, 278 Ill. App. 3d 498 (1996) (addressing claim that judge sentenced defendant without specifying sentencing scheme as plain error)), do not address how the alleged error here affected the integrity of the judicial process in this case. Respondent was sentenced to 24-months probation and as a condition of that probation, respondent was ordered to remove all photographs from his social media accounts showing him holding weapons or illegal drugs. He has failed to establish how the imposition of

this condition of probation affected the integrity of the judicial process in the context of this case. Consequently, we decline to conduct plain error analysis and the procedural default is honored. See *Naylor*, 229 Ill. 2d at 593.

¶ 29 CONCLUSION

¶ 30 For the foregoing reasons, we affirm the judgment of the juvenile court.

¶ 31 Affirmed.