2017 IL App (1st) 150756-U
No. 1-15-0756
Order filed October 31, 2017

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 21929
	)	
JOHNATHON PUCKETT,	)	Honorable
	)	Michael B. McHale,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Neville and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's 14-year extended-term sentence for possession with intent to deliver less than one gram of a controlled substance is affirmed over his contention that the sentence was disproportionate to the nature of the offense and improperly punished him for his behavior while he was on probation, which led to the revocation of his probation.

¶ 2 Following a bench trial, defendant Johnathon Puckett was convicted of possession of a controlled substance (cocaine) with intent to deliver and sentenced to four years' probation. Following revocation of his probation, the trial court sentenced Puckett to an extended-term sentence of 14 years' imprisonment. Puckett appeals, arguing that the trial court failed to

properly admonish him in accordance with Illinois Supreme Court Rule 605(a) (eff. Oct. 1, 2001), which resulted in his failure to file a motion to reconsider sentence. He requests that this court remand the case for proper admonishment so that he may preserve his sentencing claims in a motion to reconsider sentence. Alternatively, should we find remand unnecessary, Puckett argues that his 14-year sentence is manifestly disproportionate to the nature of his offense, and improperly based on his behavior while he was on probation, rather than his conduct during the original offense.

¶ 3 We affirm the judgment of the trial court. We find that, although trial court's admonishments were improper, Puckett was not prejudiced by them and we will consider Puckett's excessive sentence claim. We also do not believe that the sentence was a penalty for his behavior while on probation or that his extended-term sentence is manifestly disproportionate to the nature of his offense.

¶ 4 Background

¶ 5 Puckett was charged by information with one count of possession of less than one gram of a controlled substance with intent to deliver within 1000 feet of a school. Puckett waived his right to a jury trial, and the case proceeded to a bench trial. Because Puckett does not challenge the sufficiency of the evidence to sustain his conviction, we recount the facts to the extent necessary to resolve the issue raised on appeal.

¶ 6 The evidence at trial showed that, on November 1, 2012, officers heard Puckett shouting "rock, rocks" near the area of 609 South Sacramento Boulevard, and saw him engage in a hand-to-hand transaction with a woman in a car that was parked on the side of the road. After the transaction, the officers parked their unmarked police car near the area, and Puckett fled from the

scene. The officers gave chase, during which Puckett dropped five ziplock bags. The officers apprehended Puckett and recovered the ziplock bags, which collectively contained .6 grams of cocaine.

¶ 7 After argument, the trial court found Puckett guilty of possession of a controlled substance with intent to deliver within 1000 feet of a school. The trial court denied Puckett's motion for a new trial, but reduced Puckett's conviction to the lesser-included offense of possession of a controlled substance with intent to deliver.

¶ 8 The case proceeded to sentencing. In aggravation, the State noted that Puckett was subjected to an extended-term sentence of 3 to 14 years' imprisonment.

¶ 9 In mitigation, Tamekia Puckett-Parnell, Puckett's sister, testified that Puckett "c[a]me up with a good upbringing" and that she and her three sisters had become successful. But, she did not know why Puckett had made the decisions and mistakes that he had made. She testified that her and her family were involved in his life and were looking into securing housing for him. She also stated that Puckett was a great father to his daughter. Puckett's mother, Rosetta Clifton, testified that Puckett had graduated from high school, got married, and joined the Air Force. After discharge from the Air Force, Puckett returned to Chicago and, at one point, had two jobs. She asked the court for leniency because she believed that Puckett "made a mistake" and would "do better" in the future.

¶ 10 In allocution, Puckett explained that he was "restless for things to happen in [his] life" and frustrated at the prospect of not being able to find a job. He asked the court to give him "an opportunity." When the court asked about his military discharge, Puckett informed the court that he was given an "other than honorable" discharge because he refused to go to field exercises. He

explained that he was trying to have the discharge "upgraded" to a medical discharge because he was seeing a psychiatrist once a week at the time that he left the military.

¶ 11 In announcing its sentencing decision, the trial court stated that it believed Puckett had "emotional problems" and substance abuse issues. It also noted, "I know the State's position on sentencing. I don't have to ask. Given that you've got four prior felony convictions, you've been to the penitentiary * * * three out of four times." After stating that Puckett was eligible for an extended term sentence, the following colloquy took place:

> THE COURT: For whatever reason, I was moved by the testimony from your family, Mr. Puckett. And I just don't think that sending you to the penitentiary for a fifth time is going to really help you in any way.
>
> With that in mind, I think what would help you is some structured probation that addresses your drug problem and also your emotional problems. So what I'm going to do is sentence you to 36 months, over the State's strenuous objection, of drug probation, TASC probation. That's going to have to include psychological or psychiatric treatment as well. It will have to be put in the specs somewhere.
>
> Your family cares about you. This is an opportunity for you, Mr. Puckett. I hope you understand how lucky you are. I've never thought I would ever sentence somebody with four prior felony convictions to probation, but there are some exceptions to the rule.
>
> But I will caution you, you better take this probation seriously. If you mess it up, I'm going to give you double digits in the penitentiary, if I can.
>
> Is he extendable? I don't even know if I can; but if I can, I'm going to.
>
> [STATE'S ATTORNEY]: He would be extendable.

THE COURT: Yes. 7 to 14 years is the extended sentence, so you're looking at probably at least 10 years if you mess up my probation. Do you understand?

[DEFENDANT]: Yes, sir.

¶ 12 On January 23, 2014, the State moved for leave to file a violation of probation (VOP) because Puckett had pled guilty to selling a loose cigarette on a city bus. The trial court denied the State's leave to file a VOP, noting that Puckett had perfect attendance at drug treatment sessions and had a mental health evaluation scheduled

¶ 13 On May 9, 2014, the State moved for leave to file a VOP because Puckett failed to report to his probation officer and picked up three misdemeanor cases. The trial court granted the State leave to file the VOP. After Puckett turned himself in on the VOP warrant, he told the court that he missed his reporting date as he was in custody on one of his new cases, and had been evicted from his shelter and drug treatment facility for curfew violations. The court did not revoke his probation, but ordered that Puckett receive drug treatment from the county jail.

¶ 14 On June 20, 2014, the court was in receipt of a sheriff's report detailing the circumstances under which Puckett was removed from treatment at the county jail as a result of a fight with another inmate. Defense counsel spoke with a representative from the treatment program, who said that the program would accept Puckett again if so ordered. On July 11, 2014, Puckett addressed the court and explained that the treatment program was full of "gang members" and that he had been involved in a lot of fights because he was not going to let anyone "talk down" to him. He told the court that he would rather do time in prison than spend more time in the county jail treatment program. The court responded that it "would be happy to give you three years IDOC if that's what you want." After reviewing the transcript from Puckett's

sentencing, the court noted that it had previously told him that it would sentence him to at least 10 years' imprisonment if he violated probation. The court then gave Puckett the choice of taking a 10-year sentence or staying on probation. Puckett chose to stay on probation. The court signed another drug treatment order, and the case was continued.

¶ 15 On September 4, 2014, the State moved for leave to file a VOP because Puckett had been removed from the drug treatment program for fighting with another participant. The court granted the State leave to file the VOP. On the next court date, while the parties discussed continuing the matter for a hearing on the VOP, Puckett asked the court if it would just sentence him to IDOC. The court told Puckett that its sentence would be 14 years if he wanted to take time in prison. Over counsel's advice, Puckett pled "guilty" to the violation of probation. After noting Puckett's criminal background as contained in the PSI, consisting of a 2011 conviction for possession of a controlled substance, a 2010 conviction for possession of a controlled substance, a 2008 conviction for attempt aggravated robbery, and a 2006 conviction for aggravated battery, the trial court sentenced Puckett to 14 years' imprisonment. (AA-12).

¶ 16 The court then admonished Puckett about his right to appeal, as follows:

> THE COURT: Even though you just pled guilty, sir, you have the right to appeal. However, before you can appeal, you must file with the Clerk of Court within 30 days of today's date a written motion to withdraw this plea of guilty. In your motion, you would need to tell me all the reasons why you would want to withdraw this plea.
>
> If I granted your motion, we would set aside your plea and sentence, and we'd set your case down for a violation of probation hearing. If I denied your motion, you would have 30 days from that date to file a written notice of appeal. Any issue not raised in your

motion would be waived for appeal purposes. If you can't afford transcript or attorney, we'd give you those things for free.

¶ 17 On September 18, 2014, Puckett filed a *pro se* "motion [to] withdraw guilty plea and vacate sentence," claiming that he was diagnosed with schizophrenia in 2011 and that he was not taking his medication on the day that he pled guilty to the VOP. The court appointed a public defender, and ordered a *nunc pro tunc* behavioral clinical exam (BCX) to evaluate Puckett's fitness to plead guilty. The psychiatrist, who examined Puckett, determined that he would have been fit to plead guilty on September 4. After a hearing, the trial court denied Puckett's motion, noting that it was "abundantly clear" that Puckett "knew exactly what was going on" when he pled guilty on September 4. Puckett filed this appeal.

¶ 18 Analysis

¶ 19 Puckett appeals, arguing that the trial court improperly admonished him regarding his right to appeal, which resulted in his failure to file a motion to reconsider sentence. He requests that this court remand the case for proper admonishments so that he may preserve his sentencing claims by filing a timely motion to reconsider sentence. In the alternative, should this court find that remand is not necessary, he argues that his 14-year, extended-term sentence is disproportionate to the nature of his offense of possession with intent to deliver less than one gram of a controlled substance. He also claims that the trial court improperly based his sentence on his behavior while he was on probation, instead of his original offense.

¶ 20 We review *de novo* issues concerning the application of a supreme court rule. *People v. Alexander*, 408 Ill. App. 3d 994, 1005 (2011).

¶ 21 Illinois Supreme Court Rule 605 (eff. Oct. 1, 2001), entitled "Advice to Defendant," describes the admonishments that trial courts are required to give to a defendant following sentencing. The Rule details different sets of admonishments for a defendant who was found guilty, a defendant who pled guilty, and a defendant who pled guilty to a negotiated plea deal with the State. Ill. Sup. Ct. R. 605 (a), (b), (c) (eff. Oct. 1, 2001). Sub-parts (b) and (c) describe the admonishments to be given to a defendant who plead guilty or entered into a negotiated plea deal with the State, which inform the defendant that he must file a motion to vacate judgment or a motion to withdraw the plea of guilty before he is able to appeal. Ill. Sup. Ct. R 605(b)(2), (c)(2) (eff. Oct, 1, 2001). But, as relevant to this case, sub-part (a) applies to cases in which the defendant is found guilty and "in which a sentence of probation or conditional discharge has been revoked." Ill. Sup. Ct. R. 605 (a)(1) (eff. Oct. 1, 2001). In contrast to sub-parts (b) and (c), sub-part (a) informs the defendant that he must file a motion to reconsider sentence in the trial court before appealing any issues regarding "the correctness of the sentence, or any aspect of the sentencing hearing" and that any claim of error regarding the sentence imposed "not raised in the written motion shall be deemed waived." Ill. Sup. Ct. R. 605(a)(3)(B), (C) (eff. Oct. 1, 2001).

¶ 22 The trial court advised Puckett that he was required to file a motion to withdraw his plea of guilty before he could appeal. Thus, it appears that the trial court read Puckett the admonishments required for a defendant who had plead guilty or entered into a negotiated plea deal. This was an error, as Puckett did not enter into a plea of guilty, but, rather, admitted to a violation of probation. See *People v. Tufte*, 165 Ill. 2d 66, 76 (1995) (noting difference between pleading guilty to criminal charge and admitting to violation of conditional discharge, and holding that the admissions trigger admonishment under 605(a)). As Puckett was found guilty

after a bench trial and had his probation revoked, the trial court was required to read Puckett the admonishments listed under 605(a), which includes the requirement of filing a motion to reconsider sentence before appealing.

¶ 23 Not every case of improper admonishment requires remand. Indeed, remand for proper admonishment "is required only where there has been prejudice or a denial of real justice as a result of the inadequate admonishment." *People v. Henderson*, 217 Ill. 2d 449, 466 (2005). In cases where a defendant raises sentencing issues on appeal despite improper admonishment, an "appellate court would at least [be] alerted to the existence of these issues" and "could [take] whatever actions it deem[s] appropriate, including hearing the challenges itself or remanding them to the trial court." *Id* at 468. Thus, appellate courts may consider sentencing issues that have not been properly preserved as a result of inadequate 605(a) admonishments. *People v. Medina*, 221 Ill. 2d 394, 412 (2006) (citing *Henderson*, 217 Ill. 2d 449 (2005)).

¶ 24 We find that Puckett was not prejudiced by the trial court's improper admonishments. Puckett has raised sentencing issues on appeal and we have been alerted of these issues. Further, he does not assert that there are additional issues that he seeks to raise before this court but is prevented from doing so by the improper admonishment. See *People v. Reed*, 376 Ill. App. 3d 121, 127 (2007) (finding no prejudice to defendant where he raised all sentencing issues despite improper admonishment). In its brief, the State, noting that it is not advancing a forfeiture argument on appeal, implicitly acknowledges that we may reach the merits of his claim. See *People v. Whitfield*, 228 Ill. 2d 502, 509 (2007) (State may forfeit claim that issue raised by defendant is forfeited if State does not argue forfeiture on appeal). So we will consider Puckett's excessive sentence claim. See *People v. Stewart*, 365 Ill. App. 3d 744, 752 (2006) (electing to

consider defendant's sentencing claims instead of remanding for proper 605(a) admonishments); *People v. Burdine*, 362 Ill. App. 3d 19, 29 (2005) (considering defendant's sentencing claims noting that "[i]t would be an exercise in futility" to remand so that defendant could file motion to reconsider in the trial court).

¶ 25 Puckett next contends that his 14-year, extended-term sentence is manifestly disproportionate to his conviction for possession of less than one gram of a controlled substance with intent to deliver. In setting forth this argument, Puckett does not ask us to reweigh the sentencing factors considered by the trial court. Rather, he argues that, even when considering his criminal background, his 14-year sentence is disproportionate to the non-violent offense of possession of less than one gram of a controlled substance with intent to deliver.

¶ 26 A trial court has broad discretion in fashioning an appropriate sentence for a particular defendant, and its sentencing decision will not be disturbed absent and abuse of discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). This is because the trial judge "'observed the defendant and the proceedings,' and is better positioned to weigh factors such as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 10 (quoting *People v. Alexander*, 239 Ill.2d 205, 212 (2010)). A court abuses its discretion when its ruling is " 'arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it.' " *People v. Lerma*, 2016 IL 118496, ¶ 23 (quoting *People v. Rivera*, 2013 IL 112467, ¶ 37). A sentence within the statutory guidelines is presumed proper, and " 'will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense.' " *People v. Brown*, 2015 IL App (1st) 130048, ¶ 42 (quoting *People v. Fern*, 189 Ill.

2d 48, 54 (1999)). Our state constitution requires that "penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. In fashioning an appropriate sentence, the most important factor to consider is the seriousness of the crime. *People v. Busse*, 2016 IL App (1st) 142941, ¶ 28.

¶ 27 We do not believe that Puckett's extended-term sentence of 14 years' imprisonment is manifestly disproportionate to the nature of his offense. Puckett was convicted of possession of less than one gram of a controlled substance with intent to deliver, a Class 2 felony with a sentencing range of 3-7 years' imprisonment. 720 ILCS 570/401(d) (West 2012); 730 ILCS 5/5-4.5-35(a) (West 2012). Then, based on his criminal background, he was subject to an extended-term sentence of 3-14 years' imprisonment. See 730 ILCS 5/5-5-3.2(b)(1) (West 2012). Puckett's sentence falls within the statutory range.

¶ 28 The legislature designed the extended-term sentencing provision "to increase the length of imprisonment, where the defendant has a criminal record of prior felonies, in order to punish and deter recidivist behavior." *People v. Hicks*, 164 Ill. 2d 218, 224 (1995) (upholding maximum extended-term sentence of six-years for retail theft of less than $150 worth of merchandise). Puckett's criminal background contains two convictions for possession of a controlled substance, as well as convictions for attempt aggravated robbery and aggravated battery of a police officer. See *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009) ("criminal history alone" may "warrant sentences substantially above the minimum."). Moreover, Puckett had served time in IDOC for possession of narcotics, but was "not deterred by previous, more

lenient sentences." *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 13. Under these circumstances, a 14-year sentence is not manifestly disproportionate to Puckett's offense.

¶ 29 Puckett finally argues that the trial court improperly based his 14-year sentence on the behavior that led to the revocation of his probation rather than his original offense. When resentencing a defendant after revocation of probation, a trial court may consider the defendant's conduct while on probation as evidence of his potential for rehabilitation. *People v. Varghese*, 391 Ill. App. 3d 886, 876 (2009). A trial court's sentence may never punish a defendant for the conduct which gave rise to the violation of probation. *Id*. "If the conduct while on probation constitutes a separate offense, the defendant should be tried and found guilty, and the sentence should conform to " 'orderly criminal processes.' " *Id.* (quoting *People v. Koppen*, 29 Ill. App. 3d 29, 32 (1975). Generally, a sentence within that statutory range for the original offense will not be set aside unless the reviewing court is " 'strongly persuaded that the sentence following a revocation of probation was *in fact* imposed as a penalty for the conduct which was the basis of the revocation, and *not f*or the original offense.' " (Emphasis in original.) *Id*.

¶ 30 In determining whether the sentence was a penalty for Puckett's behavior while on probation, " 'the record must clearly show that the court considered the original offense.' " *Varghese*, 391 Ill. App. 3d at 876 (quoting *People v. Hess*, 241 Ill. App 3d 276, 284 (1993). Further, the record should reflect that the court " '(1) considered the evidence, if any, received during the original trial, (2) considered any pre-sentence reports, (3) considered evidence and information in aggravation and mitigation, (4) heard arguments regarding sentence alternatives, and (5) afforded the defendant an opportunity to speak in his own behalf.' " *People v. Gaurige*, 168 Ill. App. 3d 855, 869 (1988) (quoting *People v. Clark*, 97 Ill. App. 3d 953, 957 (1981)).

¶ 31 After considering these factors, we find that Puckett's sentence was not a penalty for his behavior while on probation. At the initial sentencing hearing, the court stated "I know the State's position on sentencing. I don't have to ask. Given that you've got four prior felony convictions, you've been to the penitentiary * * * three out of four times." The court noted that it was moved by Puckett's family and sentenced him to probation. After Puckett was removed from treatment at the county jail, the court heard from Puckett, who explained that the treatment program was full of "gang members" and he would rather do prison time than attend the treatment program. The court reviewed the transcript from Puckett's initial sentencing hearing and noted that it had indicated a sentence of "at least" 10 years' imprisonment if he violated probation. The court then gave Puckett the choice of taking a 10-year sentence or staying on probation. Puckett chose to stay on probation and the court signed another drug treatment order.

¶ 32 After Puckett was again removed from treatment, he asked the court to sentence him to prison. The court admonished Puckett that its sentence would be 14 years if he wanted to be sentenced without a hearing on the VOP. Puckett then pled "guilty" to the violation of probation. In sentencing Puckett to 14 years' imprisonment, the court explicitly considered Puckett's presentence investigation report, which contained information regarding Puckett's original conviction. In aggravation, it noted Puckett's criminal background, which contained two convictions for possession of a controlled substance, as well as a conviction for attempt aggravated robbery and aggravated battery of a police officer. In mitigation, the court considered the testimony of Puckett's family from his original sentencing hearing. The court also gave Puckett an opportunity to speak in allocution, but he declined to do so. The trial court then sentenced Puckett to an extended-term of 14 years' imprisonment. Given this record, we are not

"strongly persuaded" that the sentence was in fact imposed as a penalty for Puckett's violation of probation, and not for his original offense.

¶ 33 Puckett argues that the disparity between the court's offer of 10 years' imprisonment following Puckett's first ejection from drug treatment and its final sentence of 14 years demonstrates that "the sentence was based on the behavior that lead to [his] probation being revoked." We disagree. The trial court's initial warning to Puckett said that it would sentence him to "at least" 10 years on revocation of probation. Moreover, the four year discrepancy may reflect that the court no longer believed in Puckett's rehabilitative potential after he violated the conditions of his probation three times. See *Varghese,* 391 Ill. App. 3d at 876.

¶ 34 In reaching this conclusion we are not persuaded by the cases cited by Puckett in support of his argument that the trial court improperly sentenced him for his conduct while on probation. See *Gaurige*, 168 Ill. App. 3d 855; *People v. Bedenknop*, 252 Ill. App. 3d 419 (1993); and *Varghese,* 391 Ill. App. 3d 866. Unlike in *Gaurige,* the judge who presided over Puckett's trial and sentenced him to probation also sentenced him to 14 years' imprisonment. Also, unlike in *Gaurige*, *Bedenknop,* and *Varghese*, the judge did not make comments on the record which called into question whether it was sentencing Puckett based on his original offense or for his behavior on probation. As discussed, the trial court warned Puckett it would sentence him to "at least" 10 years on revocation of probation. Hence, the record reflects that Puckett's 14-year sentence was a product of his criminal background, and not a punishment for his behavior while on probation.

¶ 35 We affirm the judgment of the circuit court of Cook County.

¶ 36 Affirmed.