2017 IL App (1st) 163084-U

SIXTH DIVISION
APRIL 21, 2017

No. 1-16-3084

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re DASHAWN K.,	)	Appeal from the
	)	Circuit Court of
a minor,	)	Cook County.
	)	
(The People of the State of Illinois	)	No. 16 JD 2191
Petitioner-Appellee,	)	
v.	)	Honorable
Dashawn K.,	)	Stuart F. Lubin,
a minor, Respondent-Appellant).	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: In committing respondent-appellant to the Department of Juvenile Justice (DOJJ), the trial court did not consider evidence of whether the DOJJ could provide services to meet respondent's individualized needs, as required by the Juvenile Court Act of 1987 (705 ILCS 405/5-750(1)(G) (West 2016)). Accordingly, the order of commitment is vacated and the case is remanded.

¶ 2 Following his adjudication as delinquent for possession of a stolen motor vehicle, the minor respondent appeals from the trial court's November 21, 2016 order committing him to the Department of Juvenile Justice (DOJJ). As the trial court did not review evidence regarding whether commitment to the DOJJ could provide services to meet respondent's individual needs, as required by the Juvenile Court Act of 1987 (Act), we vacate the order of commitment and remand for resentencing.

¶ 3 BACKGROUND

¶ 4 The respondent was born in January 1999 and was 17 years old at the time of the underlying proceedings. Prior to the September 2016 offense leading to this case, respondent had a number of prior arrests, had violated probation, and had an outstanding warrant.

¶ 5 On September 29, 2016 respondent was arrested after Chicago police officers saw him exit a van that was later identified as a stolen vehicle. On September 30, 2016 the State filed a petition for adjudication of wardship pursuant to the Act, alleging that the respondent was delinquent for possession of a stolen vehicle and criminal trespass to a motor vehicle.

¶ 6 The court conducted a bench trial on October 24, 2016. The owner of the van testified that he reported it stolen on September 28, 2016. One of respondent's arresting officers, Officer Cowie, testified that on September 29, 2016, he and his partner observed the respondent exit a van in a vacant parking lot that was known as a site of illegal drug sales. The respondent ran from the police but was apprehended and arrested.

¶ 7 The respondent testified in his own defense, denying that he was ever in the van. He testified that he was walking to his cousin's house when he saw a police vehicle approach, and that he ran because he knew he had an outstanding warrant. Respondent's girlfriend and respondent's cousin testified that they were with respondent shortly before the time of his arrest. In rebuttal, the State offered testimony of Officer Acevedo, who testified that she was on patrol with Officer Cowie when she observed respondent leave the van. Finding the police officers' testimony credible, the court found respondent guilty of possession of a stolen motor vehicle.

¶ 8 Prior to sentencing, respondent's probation officer, Karl Brown (Officer Brown) prepared a "Supplemental Social Investigation" report (SSI), dated November 9, 2016. The SSI reflected that a number of previous cases had been initiated against respondent. Among these, respondent

entered an admission of guilt with respect to a November 2012 petition for theft; for which he was placed on three years' probation. A separate proceeding was commenced in October 2013 in connection with a robbery, for which he was placed on 5 years' probation, including one year of intensive probation supervision (IPS). The SSI indicates that at the time of his arrest in this case, he had two pending cases, including an April 2016 case for retail theft. The SSI reported that respondent "has had warrants on (4) different occasions" since November 2012, and had an outstanding warrant issued in April 2016.

¶ 9 The SSI indicated that, although respondent had previously lived with his mother in Steger, Illinois, he resided with his grandmother in Chicago at the time of his arrest in this case. The SSI stated that he was attending a high school in Chicago, but was taking freshman classes in his third year of high school. He had previously attended Bloom Trail High School in Steger, but at that school he "was failing all of his classes based upon poor attendance and suspensions." The SSI notes: "It was discovered that he did have a Specific Learning Disability and there is some thought that perhaps his poor adjustment at Bloom Trail had to do with the fact that he wasn't in the proper setting."

¶ 10 According to the SSI, respondent reported that he had smoked marijuana "practically every day" until his arrest. Officer Brown had previously "attempted to have [respondent] engaging in outpatient drug treatment services, but he did not follow through" in pursuing those services. The respondent now said he was "open to" drug treatment.

¶ 11 The SSI also reported that respondent "has stated that he was dealing with what he thought may have been depression and [Officer Brown] made a referral to Grand Prairie Services to have him evaluated for possible medication." Respondent did not pursue those services. The

SSI notes that respondent told Officer Brown "that he did want the services to address his depression, but that did not happened [sic] based upon him leaving the area."

¶ 12 The SSI stated that respondent "has exhausted the services offered by this department" and "has made it clear by his actions that he is not going to comply with the Terms and Conditions of Probation." Thus, Officer Brown recommended that respondent be committed to the DOJJ.

¶ 13 The court held a sentencing hearing on November 21, 2016. After the court confirmed that the parties had received the SSI report, the court heard testimony from Officer Brown. Officer Brown reported that this was respondent's fourth finding of delinquency. The respondent had been in custody of the DOJJ for six months in conjunction with a robbery case, and was then placed on probation in October 2015. Since that time, he had "difficulties *** attending school and abiding by other terms and conditions of his probation." Officer Brown again recommended that respondent be committed to the DOJJ. No other evidence was presented at the sentencing hearing.

¶ 14 Arguing that respondent should be committed to DOJJ, the State noted that four violations of probation had been filed since respondent was recommitted to probation in October 2015. The State also informed the court it recently received a report from the Juvenile Temporary Detention Center indicating respondent had participated in an assault. The State argued that respondent had been "extended services through regular, intensive probation and DOJJ and still cannot comply with the law or the terms of his probation."

¶ 15 Arguing against commitment, respondent's counsel stated:

> "There are some special education issues, and I don't think that DOJJ can adequately address those. It seems that there's maybe

> some history of depression and other issues like that, and I would just argue that an institution-like setting such as DOJJ might not be appropriate. And I would just ask for another chance on behalf of my client[.]"

¶ 16 The court then addressed the respondent: "Well, at this point, in your life, the Department of Juvenile Justice is the least restrictive alternative for you." After noting that the respondent would be turning 18 in January 2017, the court explained:

> "[Y]ou won't be coming to Juvenile Court anymore, and they don't give people as many chances as we do here. So you're going to have to take advantage of what they have to offer you in the [DOJJ], which will include the following: When you get there, they will do an intake screening and assessment. So they'll figure out what your criminogenic risks are, your needs. ***
>
> They'll do a behavioral health screening and assessment. They will do an educational assessment. They'll assign you an aftercare specialist. They'll determine how long you stay there ***.
>
> *** They'll do an assessment and case planning for you and start planning for your reentry into the community ***.
>
> *** They'll give you substance abuse treatment if you need that, mental health treatment if you need that. If you suffered some trauma in your life, they'll have structured psychotherapy for youth responding to crises. There will be academic vocational training.

> There will be a work detail, life skills training. *** If they determine that you're aggressive or disruptive, they'll have some highly structured programming for you also. ***
>
> They will prepare you for reentry 30 days before you are going to be released. And after you are released, there will still be supervision and support for you. So hopefully, you will take advantage of what they have to offer you there."

¶ 17 On the same date, November 21, 2016, the court entered a written "Order of Commitment to the Department of Juvenile Justice." That order consists of a pre-printed form with a number of check boxes by which the court may indicate certain typewritten findings supporting the order of commitment. The findings listed on the form mirror language from section 5-750 of the Act, which describes the findings that a court must make before committing a minor to the DOJJ. 705 ILCS 405/5-750 (West 2016).

¶ 18 In respondent's commitment order, boxes were checked to indicate the finding that respondent's parents "are unfit or unable *** to care for, protect, train or discipline the minor or are unwilling to do so" and that it is "necessary to ensure the protection of the public" from the respondent's criminal activity.

¶ 19 The order similarly indicated that "Secure confinement is necessary after a review of the following individualized factors"; the court checked the boxes corresponding to the factors that must be considered under section 5-750 of the Act: "Age"; "Criminal background"; "Review and results of any assessments; "Educational background"; "Physical, mental and emotional health"; "Viability of community based services"; and that "Service within DOJJ will meet the needs of the minor." Similar boxes were checked to indicate findings that reasonable efforts have been

made to prevent the need for respondent's removal, that removal was in respondent's best interest, and that "reasonable efforts were made to locate less restrictive alternatives to secure confinement and were unsuccessful."

¶ 20 The order committed respondent to DOJJ for an indeterminate term, to terminate upon his reaching the age of 21 "unless the minor is sooner discharged from parole or custodianship or is otherwise terminated or vacated as provided for by law." In a separate order, also entered November 21, 2016, respondent was adjudged a ward of the court. The following day, respondent filed a notice of appeal.

¶ 21 ANALYSIS

¶ 22 We note that we have jurisdiction as the defendant perfected a timely notice of appeal. See Ill. S. Ct. R. 606(a),(b) (eff. Feb. 6, 2013).

¶ 23 On appeal, respondent does not challenge his conviction. Rather, his arguments are limited to his sentencing. He requests a new sentencing hearing because the trial court failed to comply with section 5-750 of the Act, regarding "Commitment to the Department of Juvenile Justice." 705 ILCS 405/5-750(1) (West 2016). That provision of the Act states:

> "[W]hen any delinquent has been adjudged a ward of the court under this Act, the court may commit him or her to the Department of Juvenile Justice, if it finds that (a) his or her parents, guardian or legal custodian are unfit or are unable *** to care for, protect, train or discipline the minor, or are unwilling to do so ***, or it is necessary to ensure the protection of the public from the consequences of criminal activity of the delinquent; and (b) commitment to the Department of Juvenile Justice is the least

restrictive alternative based on evidence that efforts were made to locate less restrictive alternatives to secure confinement and the reasons why efforts were unsuccessful in locating a less restrictive alternative to secure confinement. Before the court commits a minor to the Department of Juvenile Justice, it shall make a finding that secure confinement is necessary, following a review of the following individualized factors:

(A) Age of the minor.

(B) Criminal background of the minor.

(C) Review of results of any assessments of the minor, including child centered assessments such as the CANS.

(D) Educational background of the minor, indicating whether the minor has ever been assessed for a learning disability, and if so what services were provided as well as any disciplinary incidents at school.

(E) Physical, mental and emotional health of the minor, indicating whether the minor has ever been diagnosed with a health issue and if so what services were provided and whether the minor was compliant with services.

(F) Community based services that have been provided to the minor, and whether the minor was compliant with the services, and

> the reason the services were unsuccessful.
>
> (G) Services within the Department of Juvenile Justice that will meet the individualized needs of the minor." 705 ILCS 405/5-750(1) (West 2016).

¶ 24 Respondent asserts two ways in which the trial court failed to comply with section 5-750(1) before ordering his commitment to the DOJJ. First, respondent contends that the court failed to review all of the individualized factors that must be considered before committing a minor. Specifically, he claims that there was no evidence presented on: "(1) whether [respondent] had ever been diagnosed with a health issue; and (2) whether services within the [DOJJ] would meet his individualized needs, which included a learning disability, drug abuse, and possible depression." He acknowledges that the court's written order checked the boxes indicating that it considered "Respondent's physical, mental and emotional health," corresponding to the factor stated in section 5-750(1)(E), and that "Service within DOJJ will meet the needs of the minor," corresponding to the factor set forth in section 5-750(1)(G)). However, he claims that the order could not "satisfy the statutory requirements merely by reciting in a conclusory fashion that the factors were reviewed," when the record does not include relevant evidence considered by the trial court.

¶ 25 In addition, he claims the court did not comply with the requirement that the court must find commitment is "the least restrictive alternative based on evidence that efforts were made to locate less restrictive alternatives *** and the reasons why efforts were unsuccessful in locating a less restrictive alternative." 705 ILCS 405/5-750(1) (West 2016). He asserts that the trial court failed to state any reasons why efforts to locate a less restrictive alternative to commitment were unsuccessful.

¶ 26 The State's appellate brief asserts, as a threshold matter, that respondent never raised these claims in the trial court, such that they are forfeited and may only be considered for plain error. "Any sentencing issue not raised in a postsentencing motion is forfeited on appeal." *In re Raheem M.*, 2013 IL App (4th) 130585, ¶ 51. "[S]entencing errors can still be reviewed for plain error as long as the reviewing court first considers whether the evidence was closely balanced and whether the error was sufficiently grave that the defendant was deprived of a fair sentencing hearing." (Internal quotation marks omitted.) *Id.*

¶ 27 Our review of the record indicates that respondent's counsel did not raise an argument that the court failed to review the factor of respondent's health, pursuant to section 5-750 (1)(E). Respondent's trial counsel also did not raise any objection that the court did not explain why there were not less restrictive alternatives to secure confinement. With respect to these arguments, the State is correct that they would be subject to plain error review.

¶ 28 However, we find that respondent's counsel properly preserved the issue of whether the court properly considered the factor set forth in section 5-750(1)(G): whether there were "Services within the [DOJJ] that will meet the individualized needs of the minor." 705 ILCS 405/5-750(1)(G) (West 2016). At the sentencing hearing, respondent's counsel specifically argued to the court that she did not believe "DOJJ can adequately address" respondent's "special education issues." Counsel also argued that, given the indication of "some history of depression and other issues like that," "an institution-like setting such as DOJJ might not be appropriate." We find that these statements sufficiently preserved the argument that the court had not properly found that DOJJ services could meet respondent’s individualized needs, pursuant to section 5-750(1)(G). As set forth below, we conclude that the trial court's failure to consider evidence

regarding this statutory factor warrants vacatur and a new sentencing hearing. Thus, we need not engage in plain error analysis with respect to the remaining forfeited arguments.

¶ 29 We also note that the parties dispute the applicable standard of review. A trial court's decision to impose a particular sentence under the Act is generally subject to a deferential abuse of discretion standard of review. *In re Gennell C.*, 2012 IL App (4th) 110021, ¶ 11. Thus, "[a] trial court's decision to send a minor to DOJJ is reviewed for an abuse of discretion." *In re Ashley C.*, 2014 IL App (4th) 131014, ¶ 22. However, "[t]he question of whether the court complied with statutory requirements is a question of law we review *de novo*." *Id.*; see also *In re Henry P.*, 2014 IL App (1st) 130241, ¶ 53 ("Whether the Juvenile Court Act requires the trial court to make a finding [in sentencing] is a matter of statutory construction that we review *de novo*."). In this case, respondent contends that the court did not consider evidence regarding all factors it was required to review under the Act. Accordingly, *de novo* review applies.

¶ 30 Our review of the record, as well as recent case law, leads us to agree that respondent's commitment order did not comply with the Act. Before committing a minor to the DOJJ, the court must find that secure confinement is necessary following review of individualized factors, including "Services within the Department of Juvenile Justice that will meet the individualized needs of the minor." 705 ILCS 405/5-750(1)(G) (West 2014). Respondent argues that the court's failure to consider evidence of this factor warrants a new sentencing hearing. He cites this court's recent decision in *In re Justin F.*, 2016 IL App (1st) 153257, which held "the Act requires the court to hear and consider evidence concerning services available to minors committed to [DOJJ] and the minor's particular needs before committing a minor" to DOJJ. *Id.* ¶ 1. We agree that *Justin F.* is controlling in this case.

¶ 31 The respondent in *Justin F.* challenged his commitment to DOJJ after he was found guilty of assault and firearms offenses. *Id.* "At the sentencing hearing, the parties presented no evidence concerning the services available within [DOJJ] that could meet Justin's needs." *Id.* ¶ 1. The respondent claimed that the trial court "failed to consider most of the individualized factors listed" in section 5-750(1). *Id.* ¶ 27. Our court found that there was "some evidence in the record concerning all of the statutorily required factors, except one. No testimony or report in the record addresses the issue of whether [DOJJ] provides '[s]ervices *** that will meet the individualized needs of the minor.' " *Id.* ¶ 30 (quoting 705 ILCS 405/5-750(1)(G) (West 2014)). Our court proceeded to find that the lack of evidence on this single factor warranted remand.

¶ 32 *Justin F.* relied on a decision by the Fourth District of this court, *In re Raheem M.*, 2013 IL App (4th) 153257, which vacated an order for commitment due to the lack of evidence regarding efforts to locate less restrictive alternatives, pursuant to section 5-750(1). The *Raheem M.* court noted that although "the form sentencing order recite[d] the trial court received and reviewed evidence concerning efforts to identify a less restrictive alternative to commitment," there was no such evidence in the record, "either in the social history report or at the sentencing hearing." *Id.* ¶ 47. The Fourth District emphasized that "[p]ursuant to the statute, the trial court had to consider *evidence* efforts were made to find a less restrictive alternative." (Emphasis in original.) *Id.* ¶ 49. As "the trial court failed to follow the mandate of section 5-750 prior to committing respondent," our court vacated and remanded for a new sentencing hearing. *Id.* ¶ 50.

¶ 33 Citing *Raheem M.*, the court in *Justin F.* reasoned: "Here, similarly, the record includes no evidence concerning the availability of services for Justin in D[O]JJ, one of the factors the trial court needed to consider before committing Justin to D[O]JJ. Because the trial court failed to follow the mandate of section 5-750 of the Act, we must vacate the order for commitment and

remand for full compliance with the Act. [Citation]." *Justin F.*, 2016 IL App (1st) 153257, ¶ 31. Our opinion directed the trial court "to comply fully with section 5-750 of the Act, by hearing evidence and taking into consideration the services available through DoJJ to assist Justin." *Id.* ¶ 33.

¶ 34 Our review of the record in this case, including the SSI and the sentencing hearing, leads us to the same result reached in *Justin F*. That is, there was no evidence presented to the trial court as to whether "[s]ervices within the [DOJJ] *** will meet the individualized needs of the minor." 705 ILCS 405/5-750 (1)(G).

¶ 35 The State's brief argues that *Justin F*. is distinguishable, because in this case "the trial court discussed at length the services the DOJJ offered to meet respondent's needs, including his mental health, as well as educational assessments, and available treatment for drug and mental health issues, as well as academic vocational training." Based on these comments, the State contends that the trial court "considered all statutorily required factors."

¶ 36 We recognize that the court commented at length about how, upon commitment, respondent would be evaluated for, and have access to, various mental health and educational services. However, as noted by respondent’s reply, the court's comments did not constitute evidence. Furthermore, our review of the record indicates that no evidence was presented as to whether DOJJ services "will meet the individualized needs" of respondent, as required by the Act. 705 ILCS 405/5-750(1)(G) (West 2016). The SSI report, while briefly referencing respondent's drug use, depression and difficulties in school, does not discuss whether DOJJ services could meet his individualized needs. The record does not include any other documents addressing that issue. Officer Brown, the only witness at the sentencing hearing, also did not discuss any services that DOJJ could provide to respondent.

¶ 37 In urging respondent to "take advantage of what they have to offer," the trial court commented on the DOJJ's procedures and described services generally available to any minor committed to DOJJ. However, there was simply no evidence presented that DOJJ's services would meet respondent's "*individualized* needs," as required by section 5-750(1)(G). 705 ILCS 405/5-750(1) (West 2016). In *Justin F.*, the court clearly held that the failure to consider record evidence regarding this factor mandates remand for resentencing, notwithstanding the presence of evidence regarding the remaining statutory factors. *Id.* ¶¶ 30-31. Moreover, although the trial court's order checked the box indicating it had considered whether "Service[s] within [DOJJ] will meet the needs of the minor," that statement does not overcome the absence of relevant record evidence. See *Raheem M.*, 2013 IL App (4th) 130585, ¶ 47.

¶ 38 Consistent with the holding in *Justin F.*, the lack of evidence as to whether DOJJ services would meet respondent's individualized needs — which must be considered pursuant to section 5-750(1)(G)—mandates remand for resentencing. Thus, we need not review respondent's separate claims that the trial court did not consider respondent's health pursuant to section 5-750(1)(E), or that the the court did not make the requisite findings that commitment is "the least restrictive alternative based on evidence that efforts were made to locate less restrictive alternatives." 705 ILCS 405/5-750 (1).

¶ 39 As in *Justin F.*, we vacate the order of commitment and remand for the trial court "to comply fully with section 5-750 of the Act, by hearing evidence and taking into consideration the services available" through DOJJ to assist respondent. 2016 IL App (1st) 153257, ¶ 33.

¶ 40 For the foregoing reasons, we affirm the finding of guilty of possession of a stolen motor vehicle but we vacate the trial court's order of commitment, and remand for resentencing.

¶ 41 Affirmed in part, vacated in part and remanded.