2018 IL App (1st) 172042-U

No. 1-17-2042

Third Division
November 21, 2018

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

*In r*e J.M., a Minor,	)	Appeal from the Circuit Court of Cook County.
(The People of the State of Illinois,	)	
Petitioner-Appellee,	)	
v.	)	No. 16 JD 2825
J.M.,	)	
Respondent-Appellant).	)	Honorable Colleen F. Sheehan, Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Justice Howse concurred in the judgment.
Justice Ellis specially concurred in the judgment.

O R D E R

¶ 1 *Held*: The juvenile court abused its discretion by imposing a probation condition requiring no gang contact or activity where there was no evidence in the record to support a finding that the respondent's conduct was gang related or that the respondent had any gang affiliation. We vacate the condition.

¶ 2 After a bench trial in juvenile court, 17 year old minor-respondent, J. M. was found guilty of two counts of aggravated battery and one count of battery. Respondent was adjudicated delinquent and sentenced to 18 months' probation. The juvenile court imposed several conditions of probation including that respondent engage in "no gang contact or activity." Respondent argues that his probation conditions are unreasonable, unconstitutionally over broad and vague. Respondent recognizes that the alleged errors are unpreserved, but contends that they are reviewable under plain error. For the reasons that follow, we vacate that portion of the sentencing order requiring no "gang contact or activity."

¶ 3 I. BACKGROUND

¶ 4 The facts are brief and undisputed. On December 19, 2016, S.A., a minor and the victim, was assaulted at Percy L. Julian High school by fellow students. S.A. testified that just before noon he was walking down the hallway to lunch when respondent and another student, S.S., approached him. S.S. punched him twice in the face, and when S.A. turned around, respondent punched him once more. S.S. testified that he was "knocked out" and "[a]sleep basically" after the blows.

¶ 5 The State showed a video of the attack which S.A. testified accurately depicted what happened to him. S.A. identified respondent and S.S., as well as another student, L.M.,[1] who joined in and began kicking S.A. in the head as he lay unconscious on the hallway floor. S.A. testified that he remained unconscious for one or two hours following the attack and regained consciousness at Christ Hospital.[2]

[1] Co-offenders S.S. and L.M. are not parties to this appeal.

[2] At J.M's arraignment the State's Attorney commented to the court that a month earlier respondent and his co-offenders were involved in a physical altercation with female students and S.A. had attempted to intervene on behalf of the female students. These comments were not introduced through testimony in any proceeding at trial and thus do not form a part of our analysis.

¶ 6 Lawrence Spaulding, a dean at Percy L. Julian High school, testified that at approximately 11:30 a.m. he responded to a radio report of an incident on the second floor. When he arrived at the second floor, Spaulding separated the attackers from S.A. and found S.A. was lying motionless on the floor completely unresponsive. He identified the attackers as respondent and the other co-offenders. After the conclusion of the State's evidence, respondent rested without presenting any evidence. The juvenile court found respondent guilty on two counts of aggravated battery and one count of battery.

¶ 7 Before sentencing, the court ordered a Supplemental Social Investigation Report. The report, which was prepared by the juvenile probation department, reflected that respondent lived with his great aunt, great uncle, 27-year-old cousin, and 16-year-old sister. His great aunt and cousin were employed and his great uncle was retired. No one in respondent's household had a criminal background or history of drug abuse. Respondent was expelled from the Chicago Public School System and was no longer enrolled in school. He was referred to Camelot Safe School for the duration of his expulsion, but he did not attend consistently and was dropped from enrollment. Prior to his expulsion, he attended Percy L. Julian High school with his sister.

¶ 8 Respondent reported to the probation officer that he spends his time hanging out with guys from his neighborhood and they play video games and basketball. His aunt reported that she approved of respondent's friends. He denied being involved with any gangs, however, he admitted to smoking marijuana on a daily basis. Additionally, respondent had a history of arrests, once for battery and once for criminal trespass of a vehicle. However, charges were not filed after either arrest. The probation officer recommended that respondent be sentenced

to 18 months' probation, 45 hours of community service and ordered to participate in a drug abuse evaluation and service, if necessary.

¶ 9 The juvenile court adjudged respondent delinquent. Prior to pronouncing sentence, the court stated:

> "First, let me just say that this could have turned out so much worse. When somebody loses consciousness and when they have any kind of injury to their head, this could have ended in someone's death. You would be in a much, much different situation than here right now."

¶ 10 The court adopted the recommendations of the probation officer. In sentencing, the court noted that respondent admitted to smoking marijuana on a daily basis and ordered him to take a drug test and evaluation. Further, as a part of a 30-day mittimus, respondent was ordered to complete drug treatment, if it was deemed necessary. Additionally, the court informed respondent that he would be required to complete 45 hours of community service. No mention was made of any gang activity or any related restriction.

¶ 11 The court also entered a written sentencing order. Utilizing a standardized sentencing order form, the court checked box 5017, which indicated that the "minor is placed on probation, * * *, for Refer to a period of 18 month probation"; box 5014, which indicated "30 a stay of mittimus is entered," and, box 9581, which indicated "[a] restraining order is entered." Further down on the form order, in addition to checking the boxes indicating

"mandatory school" (box 4095) and "TASC program" (box 9292), the court checked the box for "no gang contact or activity" (box 5042).[3]

¶ 12 A separate written Probation Order, signed by respondent, imposed the 18 month term of probation and included the obligation of 45 days community service. Additionally, included as a check-off item was the requirement of mandatory school attendance, and as handwritten conditions, TASC, and the 30 day stay of mittimus, all of which were consistent with the probation officer's recommendations. No mention of gang contact or activity was included in the Probation Order.

¶ 13 II. ANALYSIS

¶ 14 Citing to *In re W.C.*, 167 Ill. 2d 307 (1995), the State argues that respondent's failure to object to the probation condition at sentencing and to file a post-trial motion bars him from raising this issue for appeal. Further, the State maintains, respondent has forfeited his constitutional claims challenging his probation condition as overbroad and vague by failing to raise them under an as-applied challenge in the juvenile court. Respondent acknowledges that he failed to preserve the issues below. He nonetheless entreats us to review his claimed error under the plain error doctrine.

¶ 15 In *In re W.C.*, our supreme court was asked to decide whether a claimed constitutional violation in delinquency adjudication was waived on appeal for the respondent's failure to also make such a claim in a written post-adjudication motion. 167 Ill. 2d at 312. Following a review of the Juvenile Court Act, and an extensive comparative analysis of juvenile and adult proceedings, the court concluded that an adjudicated delinquent minor is not required to

[3] A portion of the text in boxes 5042 and 4544 are illegible. The parties agree that the text in box 5042 is "no gang contact or activity." Although box 4544 is also checked, the parties do not offer the text. However, no issue is raised concerning its reasonableness.

include a claim of error in a written post-adjudication motion to preserve such error for review. *Id.* at 327. The court's holding in *In re W.C.* is clear and unambiguous, thus we are perplexed by the State's reliance. Further, more recently, in *In re Samantha V.*, 234 Ill. 2d 359, 367 (2009), the court, citing its earlier decision in *In re W.C.*, reiterated that unlike in adult criminal proceedings, minors are excused from filing a post-adjudicatory motion to preserve an issue for appellate review. They are not similarly excused, however, from failing to object to claimed errors at trial. *Id.* at 368.

¶ 16 Generally, errors not objected to at trial are waived for purposes of appellate review. See *In re T.L.B.*, 184 Ill. App. 3d 213, 219 (1989). However, the plain error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error. *People v. Fort*, 2017 IL 118966, ¶ 18. In *In re Omar F.*, the trial court entered an order prohibiting the respondent's involvement with gangs, guns, and drugs, including on social media. The respondent failed to raise his challenge to his probation conditions in the trial court. On appeal he argued that the conditions were overbroad and unreasonable as-applied to him. *Id.* ¶ 50. The State asserted that respondent had forfeited his argument. *Id*. ¶ 51. The court, however, deemed it appropriate to review the respondent's claims under the plain error doctrine. *Id* ¶ 53.; see also *In re J'Lavon T.*, 2018 IL App (1st) 180228, ¶ 13 (applying the plain error doctrine because the overriding concern in juvenile cases is to determine whether the probation conditions are reasonable); *In re K.M.*, 2018 IL App (1st) 172349, ¶ 41 (applying the plain error doctrine). We see no reason to depart from the reasoning in *Omar F*. Thus, we review respondent's claimed error under the doctrine.

¶ 17 In the sentencing context, a reviewing court will consider an unpreserved error when either (1) the evidence is closely balanced, or (2) the error is so fundamental that it may have

deprived the respondent of a fair sentencing hearing. *People v. Thomas*, 178 Ill. 2d 215, 251 (1997). Under both prongs of the plain-error analysis, the burden of persuasion remains with respondent. *In re Samantha V.*, 234 Ill. 2d at 368. As a reviewing court, we first determine under the plain error doctrine whether any error occurred. *Omar F.*, 2017 IL App (1st) 171073, ¶ 54. This requires us to give a "substantive look" at the issues raised. *People v. Johnson*, 208 Ill. 2d 53, 64 (2003). Absent an error, there can be no plain error, and thus, we must honor the procedural bar. *People v. Eppinger*, 2013 IL 114121, ¶ 19.

¶ 18 A. Abuse of Discretion

¶ 19 We begin our analysis of respondent's claim that the court's imposition of the "no gang contact or activity" condition was unreasonable and an abuse of the juvenile court's sentencing discretion. Respondent maintains that there is no nexus between his offense and gang activity nor is there any evidence that respondent had any affiliation with a gang or association with known gang members.

¶ 20 The State responds that the probation condition was reasonably related to respondent's rehabilitation and the juvenile court acted within its broad discretion when it imposed the restriction as part of respondent's probation for aggravated battery and battery. The State further argues that under the Juvenile Court Act, the State has a substantial and compelling interest in protecting respondent from the allure of street crime and the criminal lifestyle by preventing contact with members of criminal enterprises. Further, the State argues, the juvenile court was authorized to impose probation restrictions outside those enumerated by the Act if the condition was reasonable and had some connection to either the underlying crime or the respondent's attitude or behavior.

¶ 21 To begin, delinquency proceedings are intended to protect and rehabilitate rather than to punish minors. *In re Jawan S.*, 2018 IL App (1st) 172955, ¶ 16. Section 5-715(2)(s) of the Juvenile Court Act of 1987 (Act) (705 ILCS 405/5-715(2)(s) (West 2016)), sets out terms that the court may impose as conditions of juvenile probation. One of the terms is that a minor "refrain from having any contact, directly or indirectly, with certain specified person or particular types of persons, including but not limited to members of street gangs." 705 ILCS 5-715(2)(s) (West 2016). Furthermore, the court may order probation conditions not enumerated in the Act to "achieve the goals of fostering rehabilitation and protecting the public." *In re J.W.*, 204 Ill. 2d 50, 77 (2003); 705 ILCS 405/5-715(2)(u). "However, this wide latitude in setting conditions of probation is not boundless." *Omar F.*, 2017 IL App (1st) 171073, ¶ 53 (quoting *In re J.W.*, 204 Ill. 2d at 77). The court's discretion is limited by constitutional safeguards and therefore must be reasonable. *Omar F.*, 2017 IL App (1st) 171073, ¶ 53.

¶ 22 Similar to other aspects of sentencing, juvenile-probation conditions are reviewed for an abuse of discretion. *In re Jawan S.*, 2018 IL App (1st) 172955, ¶ 16. Abuse of discretion occurs when a ruling is "arbitrary, fanciful, unreasonable or where no reasonable person would take the view adopted by the trial court." (internal quotation marks omitted.). *Id.* (citing *People v. Patrick*, 233 Ill. 2d 62, 68 (2009)). In general, a condition will not be considered unreasonable if it has some connection either to the specific crime committed, or to the "behavior or attitude," more generally, that needs "adjusting" if the probationer is to rehabilitate. See *In re Jawan S.*, 2018 IL App (1st) 172955, ¶ 16; *In re J.W.*, 204 Ill. 2d at 79 (2003); *In re R.H.*, 2017 IL App (1st) 171332, ¶ 17.

¶ 23 Here, respondent was adjudicated delinquent based on findings that he committed two counts of aggravated battery and one count of battery. The Social Investigation Report provided that respondent was truant from school, habitually smoked marijuana, and was unemployed and not seeking employment. As a condition of probation, the court ordered respondent to attend school and to participate in TASC, both of which would aid in adjusting his behavior, satisfying the rehabilitation goal of probation. The same cannot be said, however, of the "no gang contact or activity" condition.

¶ 24 There is not one scintilla of evidence that either the respondent or the victim were suspected of engaging in gang activity, had any ties to a gang or even that the offense which brought respondent within the jurisdiction of the juvenile court was gang inspired. The probation report indicated that the respondent was not in a gang and further, respondent's aunt informed the probation officer that she approved of respondent's friends. In sentencing, the trial court adopted the recommendation of the probation department, which made no recommendation regarding gang activity. With the exception of the "no gang contact or activity" condition, each of the checked probation conditions in the court's sentencing order, i.e., mandatory school, and the TASC program, are based on the evidence presented at trial and are clearly intended to adjust his attitude towards school and drug use. Interestingly, there is no mention in the Probation Order regarding the "no gang contact or activity" condition. As there was no evidence to support the prohibition as a probation condition, we find that the evidence satisfies the first prong of plain error doctrine. Thus we relax the procedural bar and address the issue on the merits. See *Omar F.*, 2017 IL App (1st) 171073, ¶¶ 67-68.

¶ 25 At first blush, it would seem that any warning to a youthful offender to avoid gang activity would be appropriate and consistent with the purposes of the Juvenile Court Act. Certainly, no one could reasonably argue with an admonishment regarding any anti-social behavior, including participation in gang activity. However, this is more than simply an admonishment. It is a condition of respondent's probation. Although courts enjoy broad discretion in fashioning conditions of probation, that discretion is not unfettered. Those conditions, to be reasonable, must relate either to the offense or to the desired rehabilitation. We are mindful that a violation of probation conditions carries with it consequences, including revocation. If conditions of probation should bear a connection to the crime committed and to the behavior or attitude to be adjusted, it fails here. Further, if a probation condition of "no gang contact or activity" is appropriate in a case where there is absolutely no evidence of gang affiliation, we are hard-pressed to identify a case in which such a condition would ever be inappropriate.

¶ 26 By our holding in this case, we intend no departure from this court's holding in *In re Jawan S.*, 2018 IL App. (1st) 172955. There, we rejected any notion that the court's discretion to impose a no gang activity condition requires either an admission or evidence to prove gang affiliation. The facts in *In re Jawan*, however, are notably different from those in this case. There, the evidence at trial did not reveal any gang activity and the only account of the respondent's delinquent conduct was given by the respondent himself. *Id.* ¶ 17. The respondent told the probation officer that his "enemies from a past incident in the neighborhood" had stumbled upon him while driving and tried to kill him. *Id.* Additionally, the Chicago Police Department claimed that the respondent had been identified as an "alleged" member of the Eight Tray Mob faction of the Gangster Disciples. *Id.* Thus, the

record belied any denial by the respondent of his gang affiliation. Based upon the record in *Jawan*, the court held that the respondent's gang affiliation could be readily inferred. Thus, the reviewing court deemed the juvenile court's imposition of the no gang activity condition appropriate as reflective of the court's concern for the respondent's rehabilitation and his prospects for a successful and productive life. *Id.* ¶ 20.

¶ 27 We have no doubt that the court in this case was equally concerned for this respondent's well-being. The same is evident from the judge's comments to respondent in quoting from the Probation Order that the court believed that if he "sincerely tr[ied] to obey and live up to the condition of [his] Probation/Supervision, [his] attitude and conduct will improve both to the benefits of the community and yourself." However, on this record, while an admonishment regarding the dangers of gang activity might have been appropriate, in the absence of any evidence or anything in the record to support an inference of gang affiliation, imposition of "no gang contact or activity" as a condition of respondent's probation was an abuse of discretion.

¶ 28 The State relies on *In re J'Lavon T.*, 2018 IL App (1st) 180228, to support its position that a minor need not be in a gang or affiliated with members of a gang for a juvenile court to include a reasonably valid "no gang contact or activity" condition in a probation order. However, the State's reliance on *J'Lavon T.* is misplaced. In *J'Lavon T.*, we concluded that the juvenile court's attempt to limit the respondent's contact with gang members was a valid condition of probation along with the juvenile court's responsibility under the doctrine of *parens patriae*. *Id.* ¶ 14.[4] There, the respondent lived in a gang infested area. *Id.* ¶ 4. The

[4] Courts have determined that the juvenile court as *parens patriae* "has an interest in safeguarding the lives of delinquent minors as persevering an orderly society and it would be largely hamstrung if it were precluded from depriving incorrigible minors of their liberty in the absence of the proof of their commission of substantive crimes." *In re Presley*, 47 Ill. 2d 50, 56 (1970).

respondent's mother believed he committed armed robbery because he was involved with the "wrong people." *Id*. Here, the Social Investigation Report makes no mention of gang activity in respondent's neighborhood, that respondent was gang affiliated or that he had friends with gang affiliations. Additionally, respondent's aunt approved of his friendship with people from his neighborhood and nothing suggests that his friends, like the individuals in *J'Lavon T*., were the "wrong people." In the present case, unlike in *J'Lavon T*., on this record the doctrine of *parens patriae* provides no support for the "no gang contact or activity" condition.

¶ 29 In sum, we conclude that the "no gang contact or activity" condition in this case bears no relationship to the offense. Neither can it be related to any identifiable rehabilitative need. Further, there is nothing to even infer gang activity. Thus, we find imposition of "no gang contact or activity" as a condition of this respondent's probation to be unreasonable and an abuse of the court's discretion. Accordingly, we vacate that portion of the court's sentencing order. See *People v. Johnson,* 327 Ill. App. 3d 252, 258 (2002) (vacating a condition of probation does not render the entire order of probation void, it merely renders the condition voidable).

¶ 30 B. In Person No-Gang-Contact Condition

¶ 31 Respondent argues that this court should consider his constitutional claims, that (1) the probation condition was unconstitutionally over broad; and (2) the probation condition was unconstitutionally vague. As we have vacated the "no gang contact or activity" condition, we need not reach this issue.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we reverse and vacate the trial court's entry of the "no gang contact or activity" probation condition and leave intact all other aspects of the court's sentencing order.

¶ 34 Reversed in part and vacated.

¶ 35 JUSTICE ELLIS, specially concurring:

¶ 36 As a condition of his probation, the juvenile court prohibited respondent from having any "gang contact or activity." I agree that this condition must be vacated, and so I concur in the majority's judgment. But I would vacate the condition because it is overly broad—it curtails respondent's liberty substantially more than is necessary to achieve its legitimate rehabilitative purpose—for the reasons we have given in several opinions recently. See, *e.g.*, *In re J'Lavon T.*, 2018 IL App (1st) 190228, ¶¶ 15-21; *In re K.M.*, 2018 IL App (1st) 172349, ¶¶ 23-38; *In re Omar F.*, 2018 IL App (1st) 171073, ¶¶ 57-63. The condition imposed here is identical to the one imposed in these other cases and invalidated by this court.

¶ 37 The majority does not reach the constitutional question, finding a nonconstitutional basis for vacating—that the condition was an abuse of discretion. I would reach the constitutional question, because I respectfully disagree that imposing this condition was an abuse of discretion in the first instance.

¶ 38 The majority concludes that this condition was not reasonably related to respondent's rehabilitation, because there was no evidence that his offense was gang-related, or even that he had any gang affiliation at all. But it was not unreasonable for the juvenile court to be concerned that respondent, while not yet a member of a gang, could all too easily become one.

¶ 39 Respondent is a 17-year-old delinquent who is unemployed and no longer attends school, having first been expelled from his public school for violently attacking another student, and then having been dropped from enrollment at his alternative school for truancy. We do not know what he was doing with his time instead—nothing positive and productive, as far as the record shows. Regardless, whatever he's doing, given that school is not occupying his daytime, it was reasonable for the juvenile court to worry that respondent was taking (or was likely to take) to the streets, where the allure of gang life could easily prove to be a decisive obstacle to his rehabilitation.

¶ 40 I agree with the majority that steering a delinquent juvenile away from gang activity is always a salutary purpose, and consistent with the rehabilitative aims of the Juvenile Court Act. But I respectfully disagree that the judge had to wait until respondent was affiliated or likely to be affiliated with a gang before imposing this condition, at which point some or even considerable damage will already have been done. As we said recently in *In re Jawan S.*, 2018 IL App (1st) 172955, ¶ 20, "[t]he juvenile court, acting out of concern for respondent's rehabilitation and his prospects for a successful and productive life, could take steps to head these problems off at the pass." So too here.

¶ 41 As the majority notes, in *Jawan S.*, we did find that the minor's gang-affiliation could reasonably be inferred from the record, despite the lack of definitive evidence to prove it. See *id.* ¶¶ 17-20. But we also went further. We said that even if this reasonable inference turned out to be wrong, we still would not find that the juvenile court abused its discretion in imposing gang restrictions. *Id.* ¶ 19. That was because the juvenile court had "reason to worry" that the minor was all too susceptible to gang life, even if he had not already joined it. *Id.* Granted, those reasons may have been starker in *Jawan S.*, where the minor participated

in a midnight shootout with his "enemies" at a McDonald's. See *id.* ¶ 17. But those reasons are still present here. The juvenile court could reasonably conclude that respondent needed to be kept away from gangs.

¶ 42 The majority fears that, if the juvenile court could impose gang restrictions in *this* case, such restrictions would have no limiting principle: they could be imposed *whenever* a juvenile gets a pass on detention in exchange for probation with conditions. That's true. But I see nothing wrong with that. This provision is a prophylactic one that could well be applied to just about any juvenile who is adjudicated delinquent and is granted probation in lieu of detention.

¶ 43 Much like, for example, mandatory school, another standard probation condition, and one the juvenile court routinely imposes. (Like the no-gang-contact condition, it has its own pre-printed box on the standard sentencing order.) Would it be arbitrary or unreasonable for a judge to order a juvenile probationer to stay in school, even if that juvenile had no record of truancy? I think it would be perfectly reasonable. I doubt we would ever invalidate that condition on the ground that the minor was not shown to have a record of truancy. True, the condition might prove to be toothless in those circumstances. But that does not make it arbitrary or unreasonable. Staying in school is critical to *any* juvenile's prospects in life. So, too, is steering clear of gangs.

¶ 44 Of course, *some* probation conditions cannot reasonably be imposed unless they are responsive to problems that already plague the minor's life. Rehab, for example, is for treating people who already have drug or alcohol problems; it is not a tool for helping people avoid those problems in the first place. Sending a minor to rehab when he or she does not have a drug or alcohol problem is pointless, and could even impede the minor's real

rehabilitative goals (not to mention the inconvenience and restrictions on liberty). Since not every juvenile probationer needs rehab, imposing *that* condition as a matter of course would be arbitrary. But ordering every juvenile probationer to stay away from gangs is not like sending them all to rehab—it is like telling them all to stay in school, something they all need to do if they hope to find a productive path through life and stay out of prison.

¶ 45 I would find no abuse of discretion in imposing a gang restriction. I would instead hold that, as written, it is overbroad, but of course subject to revision, for reasons set out in the case law I cited in the first paragraph of this concurrence.