2018 IL App (2d) 160533-U
No. 2-16-0533
Order filed November 13, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MARQUISE ALEXANDER, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 14-CF-549 Honorable Randy Wilt, Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justices Burke and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not err in sentencing defendant upon the revocation of his probation, as the court punished defendant only for the underlying offense, mentioning his probation violations only as they related to his rehabilitative potential and whether a new sentence of probation would be appropriate; (2) we corrected the mittimus to properly reflect that the trial court did not impose a DNA analysis fee or a lab analysis fee.

¶ 2 Defendant, Marquise Alexander, appeals from a judgment revoking his probation and sentencing him to four years' imprisonment for domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2014)). Defendant argues that the trial court abused its discretion (or, alternatively, committed plain error) when it based the sentence on defendant's violation of his probation rather than on

his underlying conviction. In addition, defendant argues that a $200 DNA analysis fee must be vacated, because he had previously submitted a DNA sample, and that a $100 lab analysis fee must be vacated, because he did not commit a drug-related offense and thus was not subject to the fee. For the reasons that follow, we affirm defendant's sentence but we correct the mittimus to remove the fees.

¶ 3 I. BACKGROUND

¶ 4 On March 19, 2014, defendant was indicted on one count of domestic battery (*id.*) and one count of criminal damage to property (*id.* § 21-1(a)(1)).

¶ 5 On March 25, 2014, he pleaded guilty to domestic battery, which was a Class 4 felony given that he had previously been convicted of domestic battery (*id.* § 12-3.2(b)), in exchange for a sentence of 30 months' probation and 180 days in jail. The State dismissed the criminal-damage-to-property charge. The court sentenced defendant as agreed and imposed the following assessments: "Court costs in the amount of $308; a regular fine of $250; a probation fee of $25 a month; a Carrie Lynn Center fee of $10; a Victim Impact Panel fee of $10; domestic violence fine of $200; domestic battery fine of $10." The parties agreed that defendant had already submitted DNA for analysis. The probation order, entered March 25, 2014, imposed the fees in accordance with the court's oral ruling. There was a line through the DNA analysis fee, and the box for the lab analysis fee was not checked.

¶ 6 On December 12, 2014, the State filed a petition to revoke defendant's probation, based on defendant's failure to report to his probation officer. On May 27, 2015, defendant waived his right to a hearing and admitted to violating his probation. A presentencing investigation report (PSI) was prepared and, on July 27, 2015, defendant was resentenced by agreement to 30 months' probation. Defense counsel recited the assessments as follows: "Just court costs are

$308. Probation fee is $25 a month. The DNA has already been completed. Carrie Lynn Center fine of $10. General fine of $250. Victim Impact Panel fee of $10. Domestic violence fine of 200. Domestic battery fine of 10." The trial court imposed the assessments as recited and the written order was consistent with the court's oral ruling. The box for neither the DNA analysis fee nor the lab analysis fee was checked on the order.

¶ 7 On January 27, 2016, the State filed a second petition to revoke defendant's probation. The petition alleged that defendant missed numerous appointments with his probation officer, had been unsuccessfully discharged from the Partner Abuse Intervention Program (PAIP), was unemployed and not attending school, had violated an order of protection issued for the Rockford Housing Authority (RHA), and had committed the offense of criminal trespass to real property (*id.* § 21-3) by trespassing on RHA property.

¶ 8 The trial court appointed a public defender to represent defendant and, on February 18, 2016, counsel requested a conference pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 2012). On the next court date, after a conference had taken place, defendant informed the trial court that he wished to fire his attorney. After admonishing defendant regarding the challenges of self-representation, the court allowed defendant to proceed *pro se*.

¶ 9 On March 28, 2016, the State filed a second amended petition to revoke probation, adding new violations. The new violations included failing to complete a drug test, failing to verify employment, and failing to notify the probation department of a change of address within 24 hours.

¶ 10 The matter proceeded to a revocation hearing, at which defendant appeared *pro se*. The trial court advised defendant of the 10 counts alleged in the petition to revoke probation and defendant denied all 10 counts. The State presented testimony from Zach Adams, defendant's

probation officer. Defendant testified on his own behalf. At the close of evidence, the trial court found that the State had proven by a preponderance of the evidence that defendant had knowingly missed four probation appointments, was unsuccessfully discharged from PAIP, failed to reengage with PAIP, failed to complete a scheduled drug test, and failed to notify his probation officer of a change of address. The court ordered that a PSI be prepared and set the matter for sentencing.

¶ 11 A PSI was prepared, which included the PSI that had previously been prepared in July 2015. The PSI provided the following information concerning the underlying offense. On February 2, 2014, police officers responded to an address in Winnebago County to investigate a domestic battery. There, they encountered Precious Yarbor, who had a large bump on her forehead. She told them that she and defendant, who was her boyfriend, had an argument. During the argument, Precious stood up and told defendant to leave. Defendant placed his hands on Precious's neck and strangled her. Precious slapped defendant to get him to stop. Defendant punched Precious one time in the head. Defendant left and returned a short time later. He was not let inside. He threw an object at a window and broke it. Defendant had previously been convicted of domestic battery in Winnebago County on March 26, 2013.

¶ 12 The PSI indicated as follows concerning defendant's "Attitudes/Values":

> "When he was interviewed for the present matter, the defendant stated that he felt a sentence to another term of probation would be 'ridiculous.' He indicated that he has 'been dealing with this for two years,' referring to his probation terms. He reported that he felt serving time in the county jail would be a fair sentence in the present matter. He also felt that a prison sentence would be 'ridiculous,' stating that he felt the original offense being enhanced to a felony was unfair.

> He indicated that probation 'kept me going in a positive' direction, but that probation was 'designed for me to fail.' He indicated that he believed he was complying with his probation, and was unaware that 'all these violations were occurring.' He felt that his probation officer's claims that he failed to report were unfair, stating that he called to reschedule appointments he could not attend."

¶ 13 The sentencing hearing took place on May 26, 2016. The State began by noting defendant's criminal history. The State pointed out that defendant's first domestic battery offense, which occurred in 2013, resulted in a sentence of conditional discharge and that, while on conditional discharge, defendant committed the present domestic battery offense involving the same victim. The State further noted defendant's history of poor compliance with probation. The State argued that "defendant appears to have an excuse for everything. He's not taken responsibility for his actions or his crimes. He didn't believe that probation was fair to him. He blamed the victim for the domestic in this case." The State presented People's exhibit No. 1, a petition for an order of protection in a different case, as evidence of other bad acts. The State asked that defendant be sentenced to five years in prison.

¶ 14 Defendant, appearing *pro se*, argued that his criminal history showed that, with "minor" exceptions, he had been "out of trouble" since 2007. He stated that it was unfair that the "two minor misdemeanor cases [were] enhanced to a Class 4." He argued that he had "been compliant with probation, doing everything [he was] asked of." He stated that he had a new daughter and a child on the way. He stated: "[P]rison time to me is just—I feel like prison time just—that's just not me. And I have stayed out of trouble until now."

¶ 15 In imposing sentence, the trial court made the following opening comments:

> "All right. Well, in reaching my decision today I've taken into account a number of different matters that are before me. I take into account the [PSI]. I take into account the [PSI] that was prepared in July of last year. I take into account this gentleman's prior record. I take into account the information provided in People's Exhibit Number 1. I take into account his statement. I take into account the arguments of the parties. I have considered, I believe, all the factors in aggravation and mitigation that exist, both statutory and non-statutory factors. Just merely because I did not mention a specific factor does not mean that it was not considered by the Court."

¶ 16 Thereafter, the court stated: "First and foremost, sir, I am not sure exactly what you mean when you say you pretty much stayed out of trouble since 2007." The court detailed defendant's criminal history, which included a prior domestic battery offense for which he was sentenced to conditional discharge. The court stated: "[Y]ou picked up this domestic battery, which they did treat as a felony in 2014." The court noted that it put defendant on probation for the present offense, only to have the State file a petition to revoke after nine months. The court noted that it placed defendant on probation a second time, and again the State filed a petition to revoke due to continued noncompliance. The court stated, "I don't know how you believe that you complied." The court then noted that defendant missed probation appointments and PAIP classes. The court referred to the various excuses defendant made in the PSI for these violations, such as babysitting obligations or schedule conflicts. The court stated:

> "You said that, at Page 9 [of the PSI], I believe being put on any more probation would be ridiculous. I agree with you on that point. Putting you back on probation would indeed be ridiculous.

I do believe that, taking into account all the factors in aggravation and mitigation, that it would be a waste of time to place you back on probation.

Yes, I am aware that you're relatively young. Yes, I am aware that you had a tough childhood. Yes, I am aware and I sympathize that you have a couple different kids, one on the way and then one that's been born, a daughter, and I hope that you're being honest when you say that you want to be with them and you care about them, but you certainly have not evidenced that at this juncture. You're going to prison. When you get out of prison I hope that you have turned your life around, and I hope that at that point in time you do become a responsible adult."

The court imposed a sentence of four years. The court specifically noted:

"Once again, in 14 CF 549 this gentleman pled guilty on Count 1 of that Bill of Indictment, which is a Class 4 felony domestic battery. The sentence of the Court will be four years in the Illinois Department of Corrections."

¶ 17 With respect to the assessments, the court stated:

"The financial terms that were previously ordered, I'm just going to reduce those down to judgment. Any unpaid fines and costs will be reduced down to judgment.

See Order on that."

The court summarized as follows:

"So 201 days credit time served.

Court costs $308 previously ordered are reduced to judgment.

Outstanding fines and fees to the extent that they are not satisfied by per diem will be reduced to judgment. I will give him a per diem of $605. I think that should be sufficient. So the only thing that should remain are the court costs."

¶ 18 A "Supplemental D.O.C. Financial Order" was signed by the trial court and filed on May 26, 2016. There were two dollar amounts handwritten on the pre-printed order: court costs of "$308 as previously ordered," and fines, fees and penalties of $605. Two additional assessments were preprinted on the order: "DNA Testing Fee=$200" and "Lab Fee=$100." The order further provided that defendant was entitled to a $605 credit toward his fines and that "[a]ll outstanding fines and costs are hereby reduced to judgment."

¶ 19 We granted defendant's *pro se* motion to file a late notice of appeal.

¶ 20 II. ANALYSIS

¶ 21 Defendant argues that the trial court abused its discretion (or, alternatively, committed plain error) in sentencing defendant for his violation of probation rather than for the underlying conviction. He asks that we reduce his sentence or vacate it and remand for a new sentencing hearing.

¶ 22 Initially, we note that defendant acknowledges that he forfeited this issue because he did not raise the issue below. See *People v. Reed*, 177 Ill. 2d 389, 393-94 (1997) (failure to file a motion to reconsider sentence forfeits any sentencing issue for review). Nevertheless, citing *People v. Dameron*, 196 Ill. 2d 156, 171 (2001), and *People v. Davis*, 185 Ill. 2d 317, 343 (1998), defendant argues that his forfeiture should be excused because the error was "solely caused by the court's actions." Thus, he contends that the issue is whether the trial court abused its discretion in sentencing him. See *People v. Rogers*, 197 Ill. 2d 216, 223 (2001) (a trial court's sentencing determination is reviewed for an abuse of discretion). Alternatively, defendant argues that the issue is reviewable as plain error. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). "To obtain relief under this rule, a defendant must first show that a clear or obvious error occurred. [Citation.] In the sentencing context, a 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. Hillier*, 237 Ill. 2d 539, 545 (2010). Whether we review the matter for an abuse of discretion or for clear or obvious error, defendant is not entitled to relief.

¶ 23 The Illinois Constitution requires that "[a]ll 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. A reviewing court should not disturb a sentence that is within the applicable sentencing range unless the trial court abused its discretion. *People v. Stacey*, 193 Ill. 2d 203, 209-10 (2000). In determining an appropriate sentence, relevant considerations include the nature of the crime, the protection of the public, deterrence, punishment, and the defendant's rehabilitative potential. *People v. Kolzow*, 301 Ill. App. 3d 1, 8 (1998). The weight that the trial court should attribute to each factor in aggravation and mitigation depends upon the particular circumstances of the case. *Id.* Provided that the trial court " 'does not consider incompetent evidence, improper aggravating factors, or ignore pertinent mitigating factors, it has wide latitude in sentencing a defendant to any term within the statutory range prescribed for the offense.' " *People v. Bosley*, 233 Ill. App. 3d 132, 139 (1992) (quoting *People v. Hernandez*, 204 Ill. App. 3d 732, 740 (1990)). Reviewing courts presume that a sentence within the statutory guidelines is proper. *People v. Boclair*, 225 Ill. App. 3d 331, 335 (1992).

¶ 24 Defendant's conviction was based on his plea of guilty to domestic battery, which was a Class 4 felony given that he had previously been convicted of domestic battery (720 ILCS 5/12-3.2(b) (West 2014)). He was eligible for an extended-term sentence of up to six years due to his

prior criminal history (730 ILCS 5/5-4.5-45(a) (West 2014)). Thus, the court's four-year sentence was well within the authorized range and we presume that it was proper.

¶ 25 Defendant contends that the four-year sentence was improper, because it was based on his conduct while on probation. According to defendant, the trial court never considered the underlying offense. In *People v. Varghese*, 391 Ill. App. 3d 866, 876 (2009), this court set forth the following principles that guide our review of a sentence imposed upon the revocation of probation:

> "When sentencing, a trial court may properly consider a defendant's conduct while on probation as evidence of rehabilitative potential. [Citation.] In doing so, it may even give the defendant a more severe sentence than it originally imposed. [Citation.] But a trial court may never punish a defendant for the conduct that gave rise to the probation violation. [Citation.] 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. [Citation.] In general, a sentence within the statutory range for the original offense will not be set aside on review *unless* the reviewing court is strongly persuaded that the sentence imposed after revocation of probation was *in fact* imposed as a penalty for the conduct which was the basis of the revocation, and *not* for the original offense. [Citation.]" (Emphases in original and internal quotation marks omitted.)

¶ 26 Here, the totality of the record makes clear that the trial court did not impose sentence to punish defendant for his actions while on probation. At the outset of the sentencing hearing, the court specifically stated that it considered both of the PSIs that had been prepared, defendant's criminal history, defendant's statement in allocution, exhibit No. 1, the arguments of the parties, and the statutory factors in aggravation and mitigation. To be sure, the court commented on

defendant's noncompliance with probation; however, the court did so to indicate its agreement with defendant's statement that "[p]utting [him] back on probation would indeed be ridiculous" and in response to defendant's claim that he had "stayed out of trouble." Indeed, the court began by stating: "First and foremost, sir, I am not sure exactly what you mean when you say you pretty much stayed out of trouble since 2007." It was then that the court commented on defendant's criminal history and the various ways in which defendant violated his probation. Defendant also asserts that the court "did not even mention the original offense" when imposing sentence. However, the PSIs, which the court stated it considered, included the facts and circumstances of the underlying offense. In addition, the State had pointed out that defendant's first domestic battery offense resulted in a sentence of conditional discharge and that, while on conditional discharge, defendant committed the present domestic battery offense involving the same victim. The court reiterated this fact, noting that defendant had a prior domestic battery and that he "picked up this domestic battery, which they did treat as a felony in 2014." Further, the court specifically stated that it was sentencing defendant for "a Class 4 felony domestic battery." Thus, it is clear that the court was imposing sentence on the underlying offense. Given the totality of the record and the court's comments, we cannot say that we "[are] strongly persuaded that the sentence imposed after revocation of probation was *in fact* imposed as a penalty for the conduct which was the basis of the revocation, and *not* for the original offense." (Emphases in original.) *Id.* at 876.

¶ 27 The three primary cases relied on by defendant are distinguishable, because in each case the defendant's probation violation was premised on the commission of criminal conduct that the trial court improperly commingled with the offense for which the defendant was being sentenced. For instance, in *People v. Carney*, 3 Ill. App. 3d 24 (1971), the defendant pleaded

guilty to robbery, based on taking $2 and a money changer from an individual, and was placed on probation. A petition to revoke probation was filed, based on the defendant's having been found guilty of unlawful possession of narcotic drugs and bail jumping for which he was sentenced to two to three years. The defendant's probation was revoked and the trial court sentenced him to 8 to 10 years to be served concurrently with his other sentence. The reviewing court stated: "For the trial judge to impose the sentence of eight to ten years in the penitentiary in view of the defendant's convictions for unlawful possession of narcotic drugs and bail jumping was to inflict multiple punishment." *Id.* at 27.

¶ 28 In *People v. Gaurige*, 168 Ill. App. 3d 855 (1988), the defendant committed the offense of voluntary manslaughter while on probation for residential burglary. *Id.* at 858. His probation was revoked as a result of the subsequent offense. When sentencing the defendant for residential burglary, the court commented:

> " 'A life was taken. I certainly did not find you guilty of murder, but I found you guilty of a lesser included offense of voluntary manslaughter. That in itself is a crime of violence.
>
> Accordingly, based upon those facts I had previously stated, I think I have a duty to protect the general public.' " *Id.* at 871.

The reviewing court reversed and remanded for resentencing, finding that the trial court's comments did not clearly show that the sentence was imposed for residential burglary.

¶ 29 In *Varghese*, the defendant pleaded guilty to aggravated criminal sexual abuse (stemming from multiple allegations that he met a 13-year-old girl online and engaged in various sexual acts with her in a library parking lot), and he was placed on two years of sex-offender probation. *Varghese*, 391 Ill. App. 3d at 868. The State filed a petition to revoke probation, alleging that

the defendant drove while his license was suspended. At the resentencing hearing, the State presented evidence that when the defendant was arrested for driving without a license, he was attempting to meet a 16-year-old girl to have sex. *Id.* at 868-72. In sentencing the defendant, although the trial court mentioned that the defendant had been placed on sex-offender probation pursuant to a plea agreement, the trial court provided an extensive and lengthy discussion of the defendant's subsequent conduct in attempting to meet the 16-year-old girl. *Id.* at 872. We vacated the defendant's sentence and remanded the case for resentencing, finding that the trial court improperly commingled uncharged conduct with the original offense. *Id.* at 877. We stated:

> "Here, the remarks of the trial court in their totality clearly indicate that it never expressly considered defendant's original offense when fashioning his sentence. Rather, the trial court's concluding comments, by focusing on defendant's conduct while on probation, demonstrate that it improperly commingled uncharged conduct with his original offense. Immediately prior to imposing sentence, the trial court chastised defendant for the reprehensible nature of his conduct while on probation. It stated in summation: 'This conduct is intolerable. This conduct is dangerous.' Read in context, the phrase 'this conduct' clearly referred to defendant's conduct while on probation. That the trial court's final sentencing determination immediately followed this statement and a lengthy discussion about the certainty of the uncharged conduct strongly indicates that defendant was sentenced for such particular 'dangerous' and 'intolerable' uncharged conduct. If this conduct constitutes another offense, defendant should be tried, convicted and sentenced 'under orderly criminal processes.' [Citation.]" *Id.* at 877.

¶ 30 In the present case, unlike in *Carney*, *Gaurige*, and *Varghese*, although the trial court commented on the ways in which defendant failed to comply with probation, there is no indication that it based the sentence on that conduct. Accordingly, we find no error.

¶ 31 Defendant next argues that the trial court erred in assessing a $200 DNA analysis fee (730 ILCS 5/5-4-3(a) (West 2016)), because defendant had previous felony convictions that would have required him to pay the fee, and a $100 lab analysis fee (*id.* § 5-9-1.4(b)), because defendant was not convicted of any drug offense. The State concedes that defendant is not subject to these assessments, but it argues that the trial court never actually imposed them and thus no error occurred.

¶ 32 We agree with the State that the trial court never actually imposed the two fees. Although the May 26, 2016, "Supplemental D.O.C. Financial Order," signed by the trial court, includes the challenged fees by way of preprinted dollar amounts, the record makes clear that the trial court did not actually impose those fees. On May 26, 2016, when defendant was resentenced to four years in prison, the trial court stated:

> "The financial terms that were previously ordered, I'm just going to reduce those down to judgment. Any unpaid fines and costs will be reduced down to judgment.
>
> See Order on that."

The "financial terms that were previously ordered" on March 25, 2014, and again on July 26, 2015, did not include either the $200 DNA analysis fee or the $100 lab analysis fee. In fact, the parties agreed that defendant was not subject to the DNA analysis fee. On the March 25, 2014, probation order, the DNA analysis fee was specifically crossed out and the box for the lab analysis fee was unchecked. On the July 27, 2015, probation order, the box for each fee was unchecked.

¶ 33 "Although a written order of the circuit court is evidence of the judgment of the circuit court, the trial judge's oral pronouncement is the judgment of the court." (Internal quotation marks omitted.) *People v. Carlisle*, 2015 IL App (1st) 131144, ¶ 87; see *People v. Truesdell*, 2017 IL App (3d) 150383, ¶ 15. When the court's oral pronouncement conflicts with its written order, the oral ruling controls. *Carlisle*, 2015 IL App (1st) 13114, ¶ 87; see *Truesdell*, 2017 IL App (3d) 150383, ¶ 15. Here, given the totality of the record along with the court's oral ruling at sentencing, we find that the DNA analysis fee and the lab analysis fee were never actually imposed.

¶ 34 The State argues that, because the fees were not ordered, the trial court did not commit any error and thus we have no basis to correct the sentencing order. However, given the State's concession that the fees were not ordered and our finding that the trial court never actually imposed them, we correct the mittimus to remove the DNA analysis fee and lab analysis fee. See *People v. Young*, 2018 IL 122598, ¶ 29 (the appellate court is authorized to correct the mittimus where it is inconsistent with the trial court's judgment).

¶ 35 We note that this case does not involve the improper recording of a fine by the circuit clerk. See *People v. Vara*, 2018 IL 121823, ¶¶ 12-23 (the appellate court lacks jurisdiction to review the clerk's recording of mandatory fines that were not included in the trial court's judgment). Here, the trial court issued a written order that conflicted with its oral pronouncement. Thus, contrary to the State's argument, we do not lack jurisdiction over the issue.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we affirm defendant's four-year sentence for domestic battery and we correct the mittimus to eliminate the $200 DNA analysis fee and the $100 lab analysis fee.

As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 38 Affirmed; mittimus corrected.