

# Illinois Official Reports

## Appellate Court

### *People v. Miller, 2021 IL App (2d) 190093*

Appellate Court  
Caption

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v.  
BENJAMIN ALEXANDER MILLER JR., Defendant-Appellant.

District & No.

Second District  
No. 2-19-0093

Filed

February 2, 2021

Decision Under  
Review

Appeal from the Circuit Court of Winnebago County, No. 14-CF-  
2748; the Hon. Randy Wilt, Judge, presiding.

Judgment

Affirmed.

Counsel on  
Appeal

James E. Chadd, Thomas A. Lilien, and Fletcher P. Hamill, of State  
Appellate Defender's Office, of Elgin, for appellant.

Marilyn Hite Ross, State's Attorney, of Rockford (Patrick Delfino,  
Edward R. Psenicka, Mary Beth Burns, and Lawrence M. Bauer, of  
State's Attorneys Appellate Prosecutor's Office, of counsel, and  
Alexandra Rogers, law student), for the People.

Panel

JUSTICE BRENNAN delivered the judgment of the court, with opinion.  
Justices McLaren and Jorgensen concurred in the judgment and opinion.

## OPINION

¶ 1 Defendant, Benjamin Alexander Miller Jr., appeals from his sentence of six years' imprisonment that the court imposed for defendant's violation of an order of protection (720 ILCS 5/12-3.4 (West 2014)) after he made a blind admission to a probation violation. He contends that the trial court's resentencing was an abuse of discretion because the court punished him for his conduct while on probation rather than for his original offense. Based on our review of the record, we disagree. By focusing on defendant's probation conduct in resentencing defendant, all of which concerned the victim of the original offense, the court was addressing defendant's lack of rehabilitative potential as evidenced by his continued abuse of the original victim. Accordingly, we conclude that defendant's resentencing was for the original offense, as opposed to the probation conduct, and we therefore affirm.

### ¶ 2 I. BACKGROUND

¶ 3 A Winnebago County grand jury indicted defendant on a single count of violation of an order of protection (*id.*). Defendant was extended-term eligible based on a conviction of the same offense in a 2008 case. In July 2015, defendant agreed to plead guilty to that charge in exchange for a sentence of 30 months' probation and the dismissal of the State's probation-violation petitions in two unrelated felony cases. According to the State's factual basis in support of the plea, defendant texted K.N. more than 30 times between October 29 and October 30, 2014, after having been served on October 28, 2014, with an order of protection precluding such contact. Significantly, the terms of defendant's probation required that he have no contact with K.N.

¶ 4 On September 25, 2017, the State filed a petition to revoke defendant's probation alleging, *inter alia*, that, on August 15, 2017, defendant committed the following probation violations, all of which involved K.N.: unlawfully restrained K.N. by preventing her from leaving her home, committed domestic battery by grabbing K.N., committed domestic battery by throwing K.N. to the ground, committed domestic battery by covering K.N.'s mouth with his hand, and had contact with K.N. in violation of his probation conditions.

¶ 5 In exchange for defendant's blind admission to having contact with K.N., the State agreed to dismiss the other violations, with the condition that it reserved the right to present evidence of that conduct at sentencing. The court admonished defendant about the possibility of sentencing *in absentia*.

¶ 6 Defendant's presentence report included the following description of the original offense:  
“ ‘On October 30, 2014 [a Loves Park police officer] was dispatched to \*\*\* Red Barn Rd. in reference to a violation of an order of protection. \*\*\* [K.N.] advised [that defendant] has been texting her. [K.N.] advised she had an active order of protection \*\*\* which prohibits [defendant] from having contact with her. [K.N.] advised that

[defendant] had texted her over 30 times since 10/29/14 and on 10/30/14 [defendant] sent a video of himself masturbating.’ ”

An excerpt from K.N.’s statement to the police clarified that defendant had contacted K.N. through Facebook rather than by text message.

¶ 7 The sentencing hearing took place on November 16, 2018. Defendant was not present, as he refused to leave his jail cell, asserting that he had already made his statement to the court. Over defense counsel’s objection, the court ruled that the hearing could proceed *in absentia*, which is unchallenged on appeal.

¶ 8 K.N. was the State’s sole witness. She testified that she had had an “[o]n and off” relationship with defendant for four years. She became romantically involved with defendant in 2013. She was living with defendant in 2014, but their relationship had started to become violent by then. Defendant committed several acts of domestic violence against her, which she did not report. When she tried to stay away from defendant, he harassed her, which led her to obtain a Winnebago County order of protection barring defendant from contacting her. It was the violation of this order that led to the original charge. Other than establishing that the violation of this protective order led to the original charge, the State did not ask K.N. to describe the offense. K.N. was aware that the State had prosecuted defendant for the order of protection violation, but he never told her that the terms of his probation barred him from contact with her. Moreover, the State failed to alert her to the existence of this condition of defendant’s probation.

¶ 9 When K.N. discovered that she was pregnant with defendant’s child—which happened while defendant was on probation—she “dropp[ed]” the Winnebago County order of protection. Defendant saw her regularly during her pregnancy, and the two moved back in together in May 2017. On the night of August 16, 2017, they got into an argument. K.N. tried to leave the house, but defendant grabbed her as she tried to exit through the front door. He pulled her into the house, she kicked at him, and he threw her to the ground. He sat on her, putting one hand around her throat and the other over her mouth, making it difficult for her to breathe. To make the event less traumatic for defendant’s daughter, who lived with them, K.N. waited until the next morning when the children were at school to call the police. Three children lived with K.N. and defendant: their infant son, defendant’s daughter, and K.N.’s daughter. The incident left K.N. with bruising on her throat and a rug burn on her arm. It also prompted K.N. to obtain an order of protection in Ogle County, which barred defendant from contacting her and was in effect at the time of resentencing.

¶ 10 K.N. authenticated a letter that defendant had sent from jail while awaiting resentencing to an address where defendant believed she still lived with a friend. The letter was addressed to the friend and not K.N. The letter read in pertinent part, “I should have beat [K.N.] and busted her nose and knocked out some of her teeth, and \*\*\* tried to rape her and stuck her in the trunk and put a gun in her mouth.” In response to a question from defense counsel, K.N. agreed that defendant also said in the letter that he should have treated K.N. “like everyone else treated [her].” The court acknowledged that defendant had not asked K.N.’s friend to communicate the statement to K.N. but that he did ask the friend to give a message to K.N.’s son that she had with defendant. At the time of the letter, defendant was prohibited from contacting both K.N. and the son pursuant to the Ogle County order of protection.

¶ 11 Defense counsel introduced a written letter by defendant to K.N. in lieu of a statement in allocution. In the letter, defendant claimed that K.N. had threatened to kill Ch. (defendant’s

child with K.N.), Cy. (evidently, K.N.'s son from a previous relationship), and herself to get back at him. He said that he was "sorry for whatever he did that is worse then [sic] the men who [Cy.] saw abuse you." He then listed a series of things that he claimed that two men, D. and K.—the statement implies that they were other men with whom K.N. had relationships—had done to her. Most of the rest of the statement related to an accusation that an ex-boyfriend of K.N.'s had sexually abused K.N.'s daughter. Defendant claimed that the Ogle and Winnebago County court systems had treated him worse than murderers and others who had committed more serious crimes than his. He said his mistakes had kept him from preventing his "baby girl [from being] molested" and from preventing K.N. almost being raped by K. Defendant said that he was a failure as "a father, a husband, a man, a fighter, a provider, a protector, and a son."

¶ 12 The State asked the court to impose a six-year sentence on defendant, the maximum. It contended that defendant's written statement to the court and his letter to K.N.'s former roommate showed that he continued to intend harm to K.N. Moreover, his instability made him a "violent risk" to others. Finally, he showed no inclination to comply with any probation conditions placed on him.

¶ 13 Defense counsel argued that defendant was "struggling with severe depression and PTSD related to an assault on his daughter when she was three years old." He suggested that defendant needed mental health care that would not be available in prison.

¶ 14 The court stated that it was considering the presentence report, the exhibits, defendant's written statement, and the August 2017 incident that was the basis for the petition to revoke probation. Concerning the August 2017 incident, the court stated that it was "really bother[ed]" by the fact that defendant never told K.N. that the terms of his probation barred him from any contact with her. The court described K.N.'s ignorance of the no-contact order as a failure both of defendant and the system.

¶ 15 The court further indicated that it was weighing "a number of factors in aggravation and mitigation \*\*\*, mostly aggravation." It stated that it had "considered all the factors, both statutory and nonstatutory," but that it would "talk about some." It counted "50 criminal convictions of one sort or another including four felony convictions and at least 17 misdemeanor convictions," most of which were traffic offenses. It noted that defendant had multiple failures while on probation. It saw defendant's convictions for crimes of violence, of which it counted 14, as a particularly significant aggravating factor. It emphasized that the August 2017 incident included more crimes of violence:

"That [count of convictions] doesn't even include the [August 2017] incident \*\*\*, and I do find that [that] \*\*\* was properly proven. I am going to talk about that in a moment, but this gentleman is a violent individual, either violent or disregarding orders of protection or both. He is a danger to other people. He is clearly a danger to [K.N.]. He is a danger to society, as far as I am concerned. This gentleman with his record and his violent record is not only a career criminal, he is a violent career criminal. He has been a one-man violent crime spree for most of his life."

The court concluded that a further sentence of probation would be inappropriate:

"I find that the statutory presumption of favoring probation no longer applies to this gentleman because he received the benefit of that presumption \*\*\*, and he thumbed his nose at the system. He thumbed his nose at me since it was my order, and he

immediately went out and had contact with the no contact victim and \*\*\* paid no attention to what he was obligated to do.”

It further emphasized that the letter to K.N.’s friend contained an attempt by defendant to communicate with his son, which was a violation of the Ogle County order of protection, but, “[m]ore importantly than that, it gave an insight as to [defendant’s] thought processes as it relates to [K.N.], and the ongoing threat that he is to her and to her safety.” It concluded:

“I do find that a period of probation would not be appropriate under the circumstances. To do so would deprecate not only the seriousness of the offense but \*\*\* in light of [defendant’s] lack of compliance would \*\*\* ignore his ongoing criminal conduct. That incident from August of 2017 involved multiple offenses. Aggravated domestic battery because of the strangulation. Unlawful restraint when this lady tried to \*\*\* leave the house, and he grabbed her and pulled her by her hair and by her throat back into the house. So we have the unlawful restraint. We have the aggravated domestic battery, and at that time, it was a violation of the probation in this case to have no contact with her.

It is the sentence of the Court that this gentleman is remanded to the Department of Corrections for the maximum sentence I can impose upon him, which is six years.”

¶ 16 As the parties were calculating the sentencing credit due defendant, the State asked whether it was a problem that the State’s petition did not indicate the subsection in the statutory citation describing defendant’s original offense. The court commented that it was very clear what the original offense had been.

¶ 17 Defendant moved for reconsideration of his sentence, asserting that (1) “the \*\*\* sentence is excessive in light of the nature and circumstances of the offense and history and character of the defendant,” (2) “defendant had no previous history of adult criminal activity except as noted in the Presentence Report,” and (3) “the Court’s sentence failed to take into consideration the rehabilitative potential of the Defendant, and the statutory factors in mitigation.” The court denied the motion, and defendant timely appealed.

## ¶ 18 II. ANALYSIS

¶ 19 On appeal, defendant contends that the trial court improperly imposed the maximum extended-term sentence as punishment for his conduct while on probation, as evidenced by its focus on the probation conduct and failure to address his original offense during sentencing. He contends that we must therefore remand the cause for a new sentencing hearing. In support, defendant relies primarily on our holdings in *People v. Varghese*, 391 Ill. App. 3d 866 (2009), and *People v. Vilces*, 186 Ill. App. 3d 983 (1989).

¶ 20 The State counters that during sentencing and shortly thereafter the trial court mentioned the original offense and that the original offense was detailed in the presentence report, which the court indicated it had considered in imposing sentence. The State suggests that these comments show that the court was aware that defendant was to be sentenced for the original offense. To the extent the court focused on defendant’s conduct while on probation, it did so as it relates to defendant’s rehabilitative potential.

¶ 21 Initially, we note that defendant potentially forfeited the sentencing claim he raises in this appeal in that he did not raise it in his written postsentencing motion. *People v. Harvey*, 2018 IL 122325, ¶ 15; see also 730 ILCS 5/5-4.5-50(d) (West 2018) (“A defendant’s challenge to

the correctness of a sentence or to any aspect of the sentencing hearing shall be made by a written motion filed with the circuit court clerk within 30 days following the imposition of sentence.”). However, the State has waived forfeiture in that it does not assert forfeiture. See, e.g., *People v. Bridgeforth*, 2017 IL App (1st) 143637, ¶ 46 (“The rules of waiver also apply to the State, and where, as here, the State fails to argue that defendant has forfeited the issue, it has waived the forfeiture.”). We thus consider defendant’s claim as though it had been preserved properly.

¶ 22 “A reviewing court may not alter a defendant’s sentence absent an abuse of discretion by the trial court.” *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). The general rule is that we may not reduce a sentence that is within the statutory range “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. Horta*, 2016 IL App (2d) 140714, ¶ 40. That said, some failures to apply the law properly may be treated as abuses of discretion. For instance, a court’s consideration of improper factors in aggravation or failure to consider statutory mitigating factors is typically an abuse of discretion. *People v. Roberts*, 338 Ill. App. 3d 245, 251 (2003). Nevertheless, the trial court is presumed to know the law and to follow it unless the record affirmatively indicates the contrary. *People v. Bishop*, 2014 IL App (1st) 113335, ¶ 13.

¶ 23 The parties agree generally that a court resentencing a defendant for a revocation of probation abuses its discretion where it imposes a sentence that is punishment for the conduct underlying the revocation, rather than punishment for the original offense. *Varghese*, 391 Ill. App. 3d at 876. Further, they agree that, under appropriate circumstances, a court may impose a more severe sentence than the original sentence of probation. *People v. Pina*, 2019 IL App (4th) 170614, ¶ 30 (citing *People v. Turner*, 233 Ill. App. 3d 449, 456 (1992)). Finally, they agree that the sentencing court may consider the defendant’s behavior while on probation to the extent that it evidences his rehabilitative potential. See *id.* ¶ 31; see also *Turner*, 233 Ill. App. 3d at 456 (“the defendant’s conduct on probation is to be considered by the trial court in assessing the defendant’s potential for rehabilitation”).

¶ 24 In disagreeing about whether the trial court improperly sentenced defendant for his conduct on probation as opposed to the original offense, both parties acknowledge two of our cases addressing the issue: *Vilces* and *Varghese*. In *Vilces*, we stated:

“ ‘[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 revocation, and *not* for the original offense.’ ” (Emphases in original.) *Vilces*, 186 Ill. App. 3d at 986 (quoting *People v. Young*, 138 Ill. App. 3d 130, 142 (1985)).

We pointed out that it was “[p]articularly telling” where the trial court had found that a further sentence of probation would deprecate the seriousness of the offense. *Id.* at 987. In *Varghese*, we reiterated the principles articulated above in *Vilces* and further observed that “the record must clearly demonstrate that the trial court considered [the] defendant’s original offense when fashioning his sentence.” *Varghese*, 391 Ill. App. 3d at 877.

¶ 25 Here, the record’s totality clarifies that the trial court did not impose sentence to punish defendant for his actions while on probation. The court specifically stated that it considered the presentence report, which described the charged order-of-protection offense as defendant Facebook messaging K.N. over 30 times, including him sending a video of himself

masturbating. Further, in asking for a maximum period of incarceration, the State emphasized that “the Court is resentencing the defendant today on the class 4 felony offense of violation of order of protection.” Before imposing its sentence, the court indicated that it considered (1) defendant’s extensive criminal history (which the court detailed), (2) defendant’s letter in allocution, (3) the various exhibits, (4) defendant’s historical noncompliance with other terms of probation, and (5) the statutory and nonstatutory aggravation and mitigation factors, only some of which the court discussed.

¶ 26 To be sure, the trial court commented on and found aggravating defendant’s noncompliance with probation. Generally, this noncompliance consisted of defendant’s continued contact with K.N., even though the terms of his probation prohibited contact with her. Specifically, as noted by the trial court, defendant’s noncompliance with probation included a series of criminal offenses against K.N.:

“[A]ggravated domestic battery because of the strangulation. Unlawful restraint when this lady tried to \*\*\* leave the house, and he grabbed her and pulled her by her hair and by her throat back into the house. So we have the unlawful restraint. We have the aggravated domestic battery, and at that time, it was a violation of the probation in this case to have no contact with her.”

This pattern of noncompliance vis-à-vis K.N., in conjunction with the other factors mentioned above, led the trial court to find that a further probation period would deprecate the seriousness of the offense. Thus, the trial court resentenced defendant to the maximum extended term.

¶ 27 Defendant points out that in *Varghese* we noted, “[w]ith only a passing reference to defendant’s original offense, it is apparent that the trial court improperly commingled defendant’s conduct while on probation with his original offense.” *Id.* Accordingly, defendant argues that, because the trial court here did not specifically mention the original offense in imposing sentence, we cannot say that the resentence was for the original offense. We disagree. Defendant’s mechanical counting of “mentions” is beside the point. What matters is that “the record \*\*\* clearly demonstrate[s] that the trial court considered [the] defendant’s original offense when fashioning his sentence.” *Id.* It is a mistake to mechanically equate “consider[ing]” with “mentioning.” As occurred here when the court emphasized defendant’s unceasing history of wrongful contact with K.N., a court can consider an original offense by implication.

¶ 28 Unlike the cases cited by defendant, here all of defendant’s criminal conduct while on probation concerned the *same victim* as in the original offense. None of this criminal conduct considered by the court would have occurred had defendant complied with his original sentence’s no-contact condition. While on probation, defendant’s criminal conduct (1) spoke directly to his rehabilitative potential and (2) was inextricably linked to his violation of probation conditions. Given the record’s totality and the trial court’s comments, we are not “ ‘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 revocation, and *not* for the original offense.’ ” (Emphases in original.) See *Vilces*, 186 Ill. App. 3d at 986 (quoting *Young*, 138 Ill. App. 3d at 142).

¶ 29 For the above reasons, we find that the trial court did not abuse its discretion in resentencing defendant to six years’ imprisonment.

¶ 30

### III. CONCLUSION

¶ 31

For the reasons stated, we affirm defendant's sentence.

¶ 32

Affirmed.