

2011 IL App (2d) 100176-U
No. 2—10—0176
Order filed August 19, 2011

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of De Kalb County.
Plaintiff-Appellee,)	
v.)	No. 06—CF—738
CHRISTOPHER E. SWANSON,)	Honorable Robbin J. Stuckert,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

Held: The trial court did not err in sentencing defendant to 15 years' imprisonment for aggravated battery of a child: even if the court mistakenly believed that defendant was eligible for an extended term, the court did not impose one, and there was no indication that the mistaken belief affected the sentence; although the court did not impose an extended term on its finding that the offense—knowingly placing a child in scalding water—was exceptionally brutal and heinous, the evidence justified that finding, which in turn justified the 15-year sentence.

¶ 1 Defendant, Christopher E. Swanson, pleaded guilty to aggravated battery of a child (720 ILCS 5/12—4.3(a) (West 2006)). The trial court sentenced him to 14 years' imprisonment.

Defendant appeals, contending that the trial court's erroneous belief that he was eligible for an extended-term sentence requires a remand for a new sentencing hearing. We affirm.

¶ 2 An indictment alleged that defendant knowingly caused great bodily harm to G.W. by scalding her with water. The State sought an extended-term sentence on the ground that defendant's acts were exceptionally brutal and heinous. The matter was called for a jury trial, and two witnesses testified before defendant changed his plea to "guilty." The parties stipulated that the trial court could consider the two witnesses' testimony to decide whether the offense was exceptionally brutal and heinous. We thus summarize that testimony.

¶ 3 Tina Mende testified that she was the two-year old victim's grandmother. G.W. lived in Genoa with her mother, Kristy, who worked at the same Mobil gas station as defendant. Kristy and defendant were dating. On December 22, 2006, defendant babysat G.W. while Kristy and Mende went shopping.

¶ 4 When Mende returned from shopping, she looked at her cell phone, which she had left behind, and found three messages from defendant. She called defendant, who said that G.W. "had some blotches on her face." Defendant thought it might have been a reaction to bubble bath "or the water could have been too hot." Mende was not immediately alarmed. She thought it might be a skin rash and advised defendant to apply coconut oil.

¶ 5 Mende arrived at G.W.'s home at about 2:30 p.m. G.W. was on a couch, covered with blankets. Her forehead was red, with blisters that had broken, leaving peeling skin. G.W. was quiet, grayish, and "a little whiny." Mende thought G.W. was in shock. She removed the blankets and found that G.W. was "completely dressed ready to go." She pulled up G.W.'s shirt and saw some "smaller ones" on her chest.

¶ 6 Defendant ran water in the bathroom and said that it was the temperature he used for G.W.'s bath. Mende replied, "Yes, that's too hot for a child." Mende called Kristy and said that G.W. had to go to the hospital. She took defendant to work and picked up Kristy there. They took G.W. to Mende's mother-in-law, a retired nurse, who advised them to take G.W. to the emergency room.

¶ 7 Dr. Eric Benink examined G.W. in the emergency room. He testified that, when he examines a child in the emergency room, he evaluates whether the injury was accidental or the result of abuse. In answering that question, he looks for inconsistencies between the injury and what people have told him about what happened. In examining G.W., the first inconsistency was "the story about the child turning on the hot water faucet in the shower, because we all take showers and we know that the shower comes down and hits our entire body and goes down, so you would expect from a scalded burn that you would see burn marks on the head going all the way down the body, and that's not what I saw." Benink noted a recent bruise on G.W.'s neck, which appeared to be the result of a struggle.

¶ 8 Benink observed that G.W. had first- and second-degree burns. G.W. had second-degree burns on the right side of her forehead and first-degree burns on her cheeks. She had second-degree burns on her neck and on her back, just below the hairline, with an abrasion going down her back. She also had first-degree burns on her buttocks and on both feet. There was a clear line of demarcation on both feet, where the redness stopped, indicating that her feet had been immersed in hot water.

¶ 9 Benink testified that the lines of demarcation between injured skin and uninjured skin were "right at about the mid leg and as well on the butt," which indicated "very firmly that the child was

placed in a hot tub of bath water and held in that spot with her butt down and her legs in the water.”

This was completely inconsistent with a shower.

¶ 10 After Benink testified, the trial court declared a recess. Following the break, the attorneys approached the court and stated that defendant wanted to plead guilty. The court admonished defendant pursuant to Illinois Supreme Court Rule 402(a) (eff. July 1, 1997) and found that the plea was voluntary. The prosecutor presented a brief factual basis and the court continued the case for sentencing. The parties stipulated that, prior to sentencing, the court could consider the two witnesses’ testimony in deciding whether defendant’s acts were exceptionally brutal and heinous.

¶ 11 Before the sentencing hearing, the trial court concluded that defendant’s acts were indeed exceptionally brutal and heinous. This made defendant eligible for an extended-term sentence of between 30 and 60 years’ imprisonment. Defendant moved the court to reconsider or, alternatively, to allow him to withdraw his plea. The court denied the motion and proceeded to sentencing. There, however, the State asked for a sentence of only 15 years. The court stated that, based on its finding of extended-term eligibility, the sentencing range was 6 to 60 years. The court sentenced defendant to 14 years’ imprisonment.

¶ 12 Defendant filed a motion to reconsider the sentence, which the trial court denied. On appeal, this court vacated the order denying the motion and remanded the matter because defense counsel did not file a certificate of compliance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2006). *People v. Swanson*, No. 2—09—0588 (2009) (unpublished order under Supreme Court Rule 23). Following remand, the court denied the renewed motion to reconsider the sentence, and defendant timely appealed.

¶ 13 Defendant's precise appellate contention is difficult to pin down. In his statement of the issue, defendant states, "Because of the lack of evidence that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty, the extended sentencing range was inapplicable, and the sentence imposed was excessive." Defendant first argues that a trial court's misapprehension of the sentencing range requires a new sentencing hearing where the court's misunderstanding might have influenced its sentencing decision. Defendant then cites cases in which findings of exceptionally brutal and heinous conduct have been affirmed and concludes that his conduct is not of that nature. Defendant then apparently takes issue with the factual basis for the trial court's finding that his conduct was exceptionally brutal and heinous.

¶ 14 The State responds that the issue is irrelevant because the court did not actually impose an extended-term sentence. The State argues that the court's remarks show that it was well aware of the statutory ranges for both extended-term and nonextended-term sentences. Moreover, the State continues, even if the court's finding of exceptionally brutal and heinous conduct was factually incorrect, it could not have influenced the court's sentencing decision. The State points out that, not only did the court not impose an extended-term sentence, the sentence it imposed was below the midpoint of the nonextended-term range. Finally, the State observes that defendant does not contend that the sentence was otherwise an abuse of discretion.

¶ 15 A trial court's misapprehension of the minimum sentence necessitates a new sentencing hearing only when it appears that the court's mistaken belief arguably influenced its sentencing decision. *People v. Eddington*, 77 Ill. 2d 41, 48 (1979); *People v. Quinones*, 362 Ill. App. 3d 385, 399 (2005). Defendant cites *People v. O'Malley*, 356 Ill. App. 3d 1038 (2005), to support his

argument that a court's mistaken belief about the proper sentencing range necessitates a new sentencing hearing. However, *O'Malley* is distinguishable.

¶ 16 In *O'Malley*, the trial court stated that court supervision was not an option and proceeded to sentence the defendant to probation. This court held that it was possible that the trial court would have imposed court supervision had it known that supervision was an available disposition. *Id.* at 1047. Here, the trial court's alleged mistake related to the maximum sentence, and there is no indication in the record that the court's belief that defendant was eligible for an extended term influenced its sentencing decision.

¶ 17 Defendant pleaded guilty to aggravated battery of a child, a Class X felony, with a nonextended-term range of 6 to 30 years' imprisonment. 730 ILCS 5/5—8—1(a)(3) (West 2006). Thus, defendant's 14-year sentence is below the midpoint for a nonextended-term sentence.

¶ 18 In *People v. Longoria*, 117 Ill. App. 3d 241 (1983), this court upheld the trial court's imposition of the maximum nonextended-term sentence where nothing in the record showed that the sentence resulted from anything other than proper consideration of the aggravating and mitigating factors. We thus did not consider the defendant's argument that the trial court might have mistakenly believed that the defendant was eligible for an extended term. *Id.* at 256; see also *People v. Bryan*, 159 Ill. App. 3d 46, 55-56 (1987); *People v. Rush*, 91 Ill. App. 3d 366, 370-71 (1980) (same).

¶ 19 Defendant insists that the trial court's belief that the offense was exceptionally brutal and heinous nevertheless influenced its sentencing decision, but defendant's precise argument on this point is unclear. Defendant does not explicitly contend that the sentence was an abuse of discretion, *i.e.*, that the court improperly balanced the aggravating and mitigating factors. Nevertheless,

defendant appears to argue that the court's allegedly mistaken belief that the offense was brutal and heinous caused the court to overstate the seriousness of the offense, resulting in a sentence that was longer than it otherwise would have been.

¶ 20 Defendant attempts to sum up his argument by stating that he “pled guilty to a Class X felony for putting [G.W.] in bath water that was too hot for a child.” From this, he seems to infer that, although his conduct technically fell within the aggravated-battery statute, he is really guilty of something more akin to reckless conduct and should have been sentenced accordingly.

¶ 21 We are somewhat perplexed by this argument. Defendant pleaded guilty to aggravated battery of a child, which requires that a defendant “intentionally or knowingly, and without legal justification and by any means, causes great bodily harm *** to any child under the age of 13 years.” 720 ILCS 5/12—4.3(a) (West 2006). By pleading guilty, defendant conceded that he acted with the requisite mental state. On appeal, he does not seek to withdraw his plea. Thus, he may not argue that his conduct was merely reckless.

¶ 22 Although defendant appears to concede that he acted knowingly—in the sense that he knew that placing a child in bath water that was too hot could injure her—he argues that his conduct was the minimum necessary to constitute the offense and, thus, he should have received a minimum sentence. First, defendant cites no competent evidence that this is in fact what happened. Defendant's self-serving statement to the victim's grandmother was an after-the-fact attempt to excuse or minimize his conduct. Defendant appears to have told a different story to emergency-room personnel, as Benink referred to an explanation about the victim having accidentally turned on the shower. Thus, there is no evidence to support defendant's theory that he only momentarily placed the victim in bath water that was too hot.

¶ 23 Moreover, Benink concluded that the victim's injuries were the result of abuse. Noting the presence of bruises and the burn patterns on her legs and buttocks, he concluded that the victim was held down in scalding water. However, defendant never objected in the trial court that the doctor's conclusions lacked an adequate factual basis. He stipulated—apparently without reservation—that the court could consider the evidence in deciding whether the conduct was brutal and heinous. Thus, he has forfeited the right to challenge the admissibility of Benink's conclusions. To the extent that defendant asks us to reweigh the evidence or to draw different conclusions from it than the trial court did, we must decline the invitation. The trial court was well within its province to find the offense serious enough to justify a 14-year sentence. See *People v. Campbell*, 146 Ill. 2d 363, 375 (1992) (reviewing court is not permitted to substitute its judgment for that of the trier of fact on questions involving the weight of the evidence, the credibility of the witnesses, or the resolution of conflicting testimony).

¶ 24 The judgment of the circuit court of De Kalb County is affirmed.

¶ 25 Affirmed.