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2011 IL App (3d) 091036–U

Order filed October 13, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Plaintiff-Appellee,	)	Peoria County, Illinois,
	)	
v.	)	Appeal No. 3–09–1036
	)	Circuit No. 09–CF–625
ERNEST ALLEN,	)	
	)	Honorable
Defendant-Appellant.	)	Michael Brandt,
	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Schmidt and Holdridge concurred in the judgment.

ORDER

¶ 1 Held: The trial court did not abuse its discretion in sentencing defendant to a 26-year term for aggravated criminal sexual assault where the facts and circumstances of the assault and other factors in aggravation necessitated a sentence at the high end of the sentencing range. Defendant is entitled to an additional day of presentencing custody credit; the day of his arrest was incorrect.

¶ 2 Defendant Ernest Allen was convicted by a jury of aggravated criminal sexual assault and criminal sexual assault and sentenced to a 26-year term of imprisonment. He appealed his sentence. We affirm.

¶ 3 **FACTS**

¶ 4 Defendant Ernest Allen was charged with aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2) (2008)) and criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2008). The charges arose from an incident in which Allen forced the victim into the basement of an abandoned building and sexually assaulted her. During the assault, Allen repeatedly hit the victim. She suffered a lump on her eye, facial swelling and scratches, a bite mark and swelling on her back, and abrasions on her inner thighs. Allen denied he assaulted the victim, testifying that it was a consensual encounter. The jury convicted Allen of both counts. The presentence investigation report indicated that Allen's criminal history included unlawful possession of a controlled substance, a class 4 felony. He had four convictions for misdemeanor domestic battery. At least three of the offenses involved violence against a woman. He violated the terms of his probation for his felony conviction and the terms of his sentences in three of the domestic violence cases. Other prior misdemeanor offenses include unlawful possession of cannabis, criminal trespass to residence, and two convictions for resisting a peace officer.

¶ 5 At Allen's sentencing hearing, he presented a statement claiming that he was denied a fair trial, framed by the crime laboratory, and was a political pawn in an election-year contest between the public defender and the assistant state's attorney. The trial court made the following findings, in part:

> "The formal items of aggravation, first, the Court stops upon the nature and circumstances of the offense. This was a rape, it was brutal rape, it caused extreme pain and discomfort, embarrassment, it was a brutal attack upon a woman that the jury found beyond a

> reasonable doubt occurred in this case. The circumstantial evidence bore out the fact that this woman was raped, and that this was not a consensual encounter.

¶ 6 The court noted Allen's criminal history of violence and violence toward women. It stated that the instant offense was a violent one. The trial court acknowledged in mitigation that Allen did not have an extensive felony record and that he maintained a connection with his family but determined that the "violent nature" of the offense and the need to "protect the public from further acts by this defendant upon women" necessitated a sentence in excess of the minimum. It sentenced Allen to 26 years' imprisonment. In its judgment order, the trial court granted Allen credit for time served from June 3, 2009, to November 19, 2009, for a total of 170 days. He appealed.

¶ 7 **ANALYSIS**

¶ 8 On appeal, Allen argues that his sentence is excessive and that he is entitled to an additional day of presentence credit. He submits that the circumstances of the offense merit a lesser sentence and that he was entitled to an additional day of presentencing credit.

¶ 9 The first issue is whether Allen's 26-year sentence was excessive. He argues it was disproportionate to the offense in that he was unarmed, the victim sustained relatively minor injuries, and he had only one prior felony conviction for a nonviolent, drug-related offense. He also argues that the trial court considered as a factor in aggravation that the offense was a rape, a factor inherent in the offense of sexual assault. He asks this court to remand for resentencing or to reduce his sentence pursuant to its authority under Supreme Court Rule 615(b)(4). Ill. S. Ct. R. 615(b)(4) (eff. Aug. 27, 1999).

¶ 10 In determining a sentence, the sentencing court should consider the nature and circumstances

of the offense, the defendant's conduct in committing the offense, and the defendant's personal history, including his age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education. *People v. Maldonado*, 240 Ill. App. 3d 470, 485-86 (1992). The trial court's consideration of an improper factor in aggravation when sentencing a defendant affects a defendant's fundamental right to liberty and requires a remand for resentencing, except where the factor is an insignificant element of the sentence. *People v. Joe*, 207 Ill. App. 3d 1079, 1085 (1991). An improper factor includes consideration in aggravation of an element inherent in the offense. *Joe*, 207 Ill. App. 3d at 1086. A sentence within the sentencing guideline is not an abuse of discretion unless it varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Stacey*, 193 Ill. 2d 203, 210 (2000). This court will not reverse a trial court's sentencing determination unless it is an abuse of discretion. *People v. Streit*, 142 Ill. 2d 13, 19 (1991).

¶ 11 In the instant case, the trial court considered that the nature and circumstances of the offense, noting that "it was a brutal rape" that caused the victim "extreme pain and discomfort, [and] embarrassment." Although the trial court referred to the fact that the offense was a rape and not a consensual encounter, it did so as an express consideration of the nature and circumstances of the offense, not as a consideration that the offense itself was a rape. The trial court stated that the jury found Allen guilty beyond a reasonable doubt of the offenses of aggravated criminal sexual assault and criminal sexual assault, which supports that its other statements were reflections on the specifics of the offense and its effects on the victim, not that the offense was a rape. We thus conclude that the trial court did not consider an element inherent in the offense as a factor in aggravation.

¶ 12 Moreover, the trial court's emphasis on the brutality of the attack corresponds with its mention

of Allen's criminal history that included four convictions for domestic violence, at least three of which were directed at a woman, as well as two convictions for resisting peace officers. While Allen did not have an extensive history of felony convictions, the misdemeanors indicated a repeated pattern of violence, particularly against women. Allen's penchant for violence against women was reinforced by the injuries he inflicted on the victim in this case. He characterizes her injuries as minor, suggesting that the offense did not result in "much harm beyond the assault itself." Contrary to Allen's characterization, the victim was treated at the hospital following the assault. The victim testified to Allen's repeated beating of her during the assault and the treating nurse testified as to the victim's injuries, which included facial swellings and scratches, a bite mark and swelling on her back, and abrasions on her inner thighs. In addition, the effects of the assault were so severe as to prevent medical personnel from performing an internal examination because it was too painful for the victim. Lastly, Allen did not express any remorse for his conduct, testifying that the victim offered to perform sex for money and then tried to flee with his money. He asserted that he was framed, denied a fair trial, and was a political pawn in a match between the prosecution and defense. Allen was sentenced within the sentencing range, albeit at the high end. 730 ILCS 5/5-8-1(a)(3) (West 2008) (sentencing range is 6 to 30 years for aggravated criminal sexual assault). Based on the factors presented at Allen's sentencing and the trial court's proper consideration of them, we find that the trial court's imposition of a 26-year sentence was not an abuse of its discretion.

¶ 13 The second issue is whether Allen is entitled to an extra day in calculating credit for time he spent in presentence custody. He claims the mittimus improperly lists his arrest date as June 3, 2009, and his presentencing custody credit as 170 days.. According to Allen, he was taken into custody on June 2, 2009, and is entitled to an additional day of credit for a total of 171 days.

¶ 14 A defendant is entitled to credit for each day spent in presentencing custody. 730 ILCS 5/5-8-7(b) (West 2008). This credit includes credit for the day a defendant is arrested. *People v. Ligons*, 325 Ill. App. 3d 753, 759 (2001). However, the day the mittimus is entered and a defendant's sentence commences is not calculated for presentencing credit. *People v. Williams*, 239 Ill. 2d 503, 509 (2011). The date the mittimus is issued is to be considered as a day of sentence. *Williams*, 239 Ill. 2d at 509. We review a trial court's determination of a defendant's presentencing credit *de novo*. *People v. Robinson*, 172 Ill. 2d 452, 457 (1996).

¶ 15 Allen was given credit for 170 days he spent in presentencing custody. The mittimus reflects the calculation was based on a June 3, 2009, arrest date and included November 19, 2009, the day he was sentenced. The State agrees with Allen that the mittimus improperly listed June 3 as his arrest date. Allen was arrested on June 2, 2009, and that day counts as one day in calculating presentencing credit. However, Allen's total credit of 170 days, as reflected on the mittimus, remains correct based on the supreme court's recent decision in *Williams*. In *Williams*, the supreme court held that because a defendant's sentence commences on the date the mittimus issues, the sentencing date counts as a day of sentence, not for presentencing credit. *Williams*, 239 Ill. 2d at 509. The trial court's inclusion of the day of Allen's sentencing in its calculation of presentencing credit was in error. Granting him one day credit for the improper date of arrest and excluding the date of sentencing from the calculation, Allen is entitled to 170 days credit for time he spent in presentencing custody. Accordingly, we determine that although the trial court erred in how it reached its calculation that Allen was entitled to 170 days presentencing custody credit, it ultimately granted him the proper amount of credit of 170 days.

¶ 16 For the foregoing reasons, the circuit court of Peoria County is affirmed.

¶ 17 Affirmed.