

No. 1-10-3353

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
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 00 CR 2108
)	
JASON ATKINS,)	Honorable
)	Thomas J. Hennelly,
Defendant-Appellant.)	Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in sentencing defendant to 15 years in prison where the court properly considered the evidence presented at trial, the statutory factors in aggravation and mitigation, and defendant's statement. On appeal from a remand for resentencing, defendant's claim that his aggravated criminal sexual abuse conviction was a violation of the one-act, one-crime rule was not properly before this court.

¶ 2 After a jury trial, defendant Jason Atkins was convicted of aggravated criminal sexual assault and aggravated criminal sexual abuse. He was sentenced to consecutive terms of 20 and 5 years' imprisonment for these offenses. The trial court ordered that these sentences were to be consecutive to those imposed in case No. 00 CR 2106. On appeal, this court modified

defendant's conviction for aggravated criminal sexual assault to criminal sexual assault and remanded the cause for resentencing while also affirming defendant's conviction for aggravated criminal sexual abuse. See *People v. Atkins*, No. 1-04-3107 (2009) (unpublished order under Supreme Court Rule 23). On remand, defendant was sentenced to 15 years in prison for the criminal sexual assault conviction.

¶ 3 On appeal, defendant contends that the trial court abused its discretion in sentencing him to 15 years in prison, the statutory maximum for a Class 1 felony, when he originally received a "mid-range" sentence for a Class X felony. He also contends that his conviction and sentence for aggravated criminal sexual abuse must be vacated pursuant to the one-act, one-crime rule. We affirm.

¶ 4 BACKGROUND

¶ 5 The evidence at defendant's jury trial established that defendant worked at an afterschool program attended by the nine-year-old victim, J.P.B.¹ The victim testified that on one occasion while alone in the kitchen with defendant, defendant "put his hand on his private part" and "was rubbing." This resulted in defendant ejaculating. The victim further testified that on three separate occasions, defendant took out the victim's penis and inserted it into his mouth. The victim did not tell his mother or any staff members about these incidents.

¶ 6 The State also presented the testimony of J.B., F.B., and M.S. J.B., who was 13 years old at the time of trial, testified that when he was 7 years old, defendant unzipped J.B.'s pants and touched his penis. After that incident, he never saw defendant again. F.B. testified that after attending a movie with defendant, he took F.B. to his apartment to get his jacket. In the hallway, defendant asked F.B. to pull down his pants. Defendant then pulled out his own penis, rubbed it

¹ The facts of this case were laid out in detail in defendant's first appeal and will be repeated here only to the extent necessary to decide this appeal.

until he ejaculated, and then put F.B.'s penis in his mouth. F.B. reported this incident to a staff member at the field house and spoke to a police officer. M.S. testified that he knew defendant through a friend who lived in defendant's building. On one occasion, he was in the hallway with defendant when defendant pulled out M.S.'s penis and put it in defendant's mouth while touching defendant's own penis. M.S. was later contacted by, and spoke to, police about the incident. Although J.B. was unable to identify defendant at trial, both F.B. and M.S. made in court identifications of defendant.

¶ 7 The State published defendant's inculpatory statement in which defendant indicated that on two separate occasions he had performed oral sex on the victim while he masturbated and ejaculated, and that on four separate occasions he had fondled the victim's penis while also masturbating and ejaculating. Defendant had given the victim money a few times. The statement also "tended to corroborate F.B.'s testimony." See *Atkins*, No. 1-04-3107, Order at 5. Defendant's statements regarding M.S. and J.B. were also published to the jury.

¶ 8 Ultimately, the jury convicted defendant of aggravated criminal sexual assault and aggravated criminal sexual abuse. At sentencing, the State urged the trial court to impose an extended-term sentence. The court declined and sentenced defendant to 20 years in prison for the aggravated criminal sexual assault conviction and to a consecutive 5-year sentence for the aggravated criminal sexual abuse conviction.² These sentences were to run consecutive to the sentences imposed in case No. 00 CR 2106.

² Defendant's February 6, 2004 mittimus indicates that the 5-year prison term for the aggravated criminal sexual abuse conviction was to be served consecutive to the 20-year sentence imposed for the aggravated criminal sexual assault conviction. Defendant's February 11, 2004 mittimus indicates that defendant is entitled to 1,514 days of presentence custody credit but does not indicate that the sentences are consecutive.

¶ 9 In defendant's first appeal, he claimed, *inter alia*, that his conviction for aggravated criminal sexual assault based on unlawful restraint should be reduced to criminal sexual assault because the restraint was inherent in the sexual assault. This court modified defendant's conviction for aggravated criminal sexual assault to criminal sexual assault and remanded the cause for resentencing while also affirming his conviction for aggravated criminal sexual abuse. See *Atkins*, No. 1-04-3107, Order at 18.

¶ 10 On remand for resentencing, the court acknowledged that it had not presided over defendant's trial and sentencing and that the matter was before the court pursuant to this court's mandate. The court noted the updated presentence investigation report and asked whether either party had any amendments or corrections. The State made one correction, indicating that in case No. 00 CR 2106, defendant had been convicted of two counts of predatory criminal sexual assault and sentenced to two consecutive terms of 27-and-one-half years in prison. The defense agreed to this correction.

¶ 11 The court indicated that the prison sentence for the aggravated criminal sexual abuse conviction was not being "disturbed," as it was not part of this court's mandate. Rather, the five-year sentence would be consecutive to whatever sentence defendant received upon resentencing.

¶ 12 The State then asked that defendant receive an extended-term sentence of 20 years in prison, or, in the alternative, the statutory maximum of 15 years. In mitigation, the defense argued that defendant was raised by mentally ill parents and that the State had not presented evidence of any "write-up's" since 1999, when defendant was taken into custody. The defense also highlighted that defendant had completed several religious studies courses while in prison. As defendant had not been previously sentenced to the statutory maximum, the defense asked that he not be sentenced to either an extended-term sentence or the statutory maximum of 15 years in prison. Defendant told the court that he was making every effort to better himself.

¶ 13 The court indicated that although the original sentencing court had intended that defendant serve a 20-year prison term, that option was not available at resentencing unless the court agreed with the State and sentenced defendant to an extended-term sentence. The court then stated that it had read the mandate issued by this court and reviewed the facts and evidence presented at defendant's trial. The court further indicated that it had familiarized itself with the presentence investigation report and the statutory factors in aggravation and mitigation and had considered the arguments presented by counsel and defendant's statement. Ultimately, the court sentenced defendant to 15 years in prison for the criminal sexual assault conviction. This sentence was to be served consecutive to the five-year prison term imposed on the aggravated criminal sexual abuse conviction. Defendant timely appealed.

¶ 14 ANALYSIS

¶ 15 On appeal, defendant contends that the trial court abused its discretion in sentencing him to 15 years in prison, the applicable statutory maximum for a Class 1 felony, when he had previously been sentenced to a "mid-range" sentence for the Class X felony of aggravated criminal sexual assault. He further contends that the resentencing court erred when it ordered that the sentence for criminal sexual assault was to be served consecutive to the previously imposed five-year sentence for aggravated criminal sexual abuse when the jury was permitted to base both of its verdicts on the same physical act in violation of the one-act, one-crime rule.

¶ 16 A trial court has broad discretion in determining the appropriate sentence for a particular defendant and its determination will not be disturbed absent an abuse of that discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). A sentence within the statutory range will not be considered excessive unless it varies greatly from the spirit of the law or is manifestly disproportionate to the nature of the offense. *People v. Brazziel*, 406 Ill. App. 3d 412, 433-34 (2010). When balancing the retributive and rehabilitative aspects of a sentence, a court must

consider all factors in aggravation and mitigation including, but not limited to, a defendant's age, habits, credibility, criminal history, character, education, and environment, as well as the nature and circumstances of the crime and the defendant's actions in the commission of that crime.

People v. Raymond, 404 Ill. App. 3d 1028, 1069 (2010). A reviewing court will not substitute its judgment for that of the trial court merely because it may have analyzed the sentencing factors differently. *People v. Streit*, 142 Ill. 2d 13, 19 (1991).

¶ 17 This court considers the record as a whole, rather than a few words or phrases, when determining whether the trial court relied on the proper factors in aggravation and mitigation when sentencing a defendant. *People v. Dowding*, 388 Ill. App. 3d 936, 943 (2009). It is presumed that the trial court properly considered all mitigating factors before it; the burden rests with the defendant to affirmatively show the opposite. *Brazziel*, 406 Ill. App. 3d at 434.

¶ 18 This cause was remanded for resentencing on the criminal sexual assault conviction, a Class 1 felony (720 ILCS 5/12-13 (West 1998)), with a sentencing range of between 4 and 15 years in prison (730 ILCS 5/5-8-1(a)(4) (West 1998)).

¶ 19 The record reveals that at resentencing, the court stated it had considered the statutory factors in mitigation and aggravation, as well as the information contained in the presentence investigation report, the rationale employed by the court at the original sentencing hearing, the arguments made by counsel, and defendant's statement. The court declined the State's request to sentence defendant to an extended-term sentence, and ultimately, sentenced defendant to 15 years in prison. This court cannot conclude that the prison sentence of 15 years was an abuse of discretion where the evidence at trial indicated that defendant engaged in sexual contact with the nine-year-old victim while working at the afterschool program the victim attended, and in defendant's statement he admitted that he had performed oral sex on the victim on two occasions

and had fondled the victim's penis on four separate occasions. See *Patterson*, 217 Ill. 2d at 448 (a trial court has broad discretion in sentencing).

¶ 20 Defendant, on the other hand, contends that because he was originally sentenced to 20 years for aggravated criminal sexual assault (720 ILCS 5/12-14 (West 1998)), a Class X felony with a sentencing range of between 6 and 30 years in prison (730 ILCS 5/5-8-1(a)(3) (West 1998)), he should have received a "mid-range" sentence when he was sentenced for the "less serious" offense of criminal sexual assault. He highlights that the State failed to present any new evidence in aggravation and that he had worked to better himself since being incarcerated. Defendant argues that he was sentenced to the statutory maximum as a punishment for succeeding on appeal.

¶ 21 There is a strong presumption that a trial court based its sentencing determination on proper legal reasoning. *People v. Donath*, 357 Ill. App. 3d 57, 72 (2005). Although a defendant's potential for rehabilitation must be considered, the trial court is not required to give more weight to a defendant's chance of rehabilitation than to the nature of the crime (*People v. Evans*, 373 Ill. App. 3d 948, 968 (2007)), or to explain the value the court has assigned to each factor in mitigation and aggravation (*Brazziel*, 406 Ill. App. 3d at 434). It is presumed that the court properly considered the mitigating factors presented and the defendant's potential for rehabilitation; it is the defendant's burden to show otherwise. *Brazziel*, 406 Ill. App. 3d at 434.

¶ 22 Here, the record indicates that at resentencing the experienced trial judge considered both the seriousness of the offense and defendant's statement that he was attempting to better himself. The court then stated that it had reviewed the testimony presented at trial and the presentence report and had considered the statutory factors in aggravation and mitigation, as well as defendant's statement to the court. Although defendant contends that his sentence of 15 years was punishment for succeeding on appeal, this court notes this sentence, while it may be the

statutory maximum, was five years shorter than the sentence he had received for aggravated criminal sexual assault. Additionally, the court declined the State's request to sentence defendant to an extended-term sentence. Thus, it is unclear how defendant was punished for his success on appeal when he was ultimately sentenced to five fewer years of imprisonment. Additionally, defendant points to nothing in the record to indicate that the trial court did not consider the fact that he had attempted to better himself while in prison at resentencing. See *Brazziel*, 406 Ill. App. 3d at 434. Defendant's sentence is not excessive when the trial court imposed a sentence of 15 years after properly considering factors in mitigation and aggravation. *Id.* The court did not abuse its discretion when sentencing defendant (*Patterson*, 217 Ill. 2d at 448), and, accordingly, its judgment is affirmed.

¶ 23 Defendant next contends that the court erred when it ordered the sentence for criminal sexual assault to be served consecutive to the previously imposed five-year sentence for aggravated criminal sexual abuse because the jury was permitted to base both verdicts on the same physical act in violation of the one-act, one-crime rule. Defendant admits that this issue was not raised before the trial court or in his previous appeal; however, he asks this court to review it pursuant to the plain error doctrine. He also contends that he was denied effective assistance of trial, appellate, and resentencing counsel because this issue has not previously been raised.

¶ 24 The State responds that defendant's one-act, one-crime claim is not properly before this court because this court affirmed defendant's conviction and sentence for aggravated criminal sexual abuse on appeal and remanded the cause to the trial court for resentencing on the criminal sexual assault conviction only. See *Atkins*, No. 1-04-3107, Order at 18.

¶ 25 When a reviewing court issues a mandate, it vests the trial court with jurisdiction only to take action which conforms with that mandate. *People v. Abraham*, 324 Ill. App. 3d 26, 30

(2001); *People v. Gonzalez*, 407 Ill. App. 3d 1026, 1037 (2011) (on remand the court has no authority to act beyond the scope of the mandate). If the direction of the mandate is to proceed in conformity with the original opinion, then that opinion must be consulted in order to determine the appropriate course of action and the whole opinion is relevant. *Gonzalez*, 407 Ill. App. 3d at 1037. "When an appellate court reverses and remands the cause with a specific mandate, the only proper issue on a second appeal is whether the trial court's order is in accord with the mandate." *Petre v. Kucich*, 356 Ill. App. 3d 57, 63 (2005); see also *People v. Moore*, 389 Ill. App. 3d 1031, 1042 (2009), quoting *PSL Realty Co. v. Granite Investment Co.*, 86 Ill. 2d 291, 308 (1981) (the " 'trial court may only do those things directed in the mandate' ").

¶ 26 In the instant case, the mandate modified defendant's conviction for aggravated criminal sexual assault to criminal sexual assault and remanded the cause for resentencing while also affirming defendant's conviction for aggravated criminal sexual abuse. Thus, as the scope of remand was limited to resentencing on the criminal sexual assault conviction, the only issue before this court is whether the trial court's order resentencing defendant is in agreement with that mandate. *Petre*, 356 Ill. App. 3d at 63. Defendant's claim that his conviction and sentence for aggravated criminal sexual abuse violates the one-act, one-crime rule is not properly before this court and cannot be considered. See *People v. Hall*, 195 Ill. 2d 1, 34 (2001) (when an appeal is taken from a contested proceeding, the only errors which can be raised on appeal are those which occurred at "that proceeding").

¶ 27 *People v. Craig*, 313 Ill. App. 3d 104, 106 (2000), is instructive. In that case, the defendant argued that the trial court erred when, on remand for resentencing, the court did not vacate a conviction pursuant to the one-act, one-crime rule. On appeal, this court first noted that the defendant had not raised a one-act, one-crime claim at his first sentencing hearing or on direct appeal; rather, he raised it for the first time on remand. *Craig*, 313 Ill. App. 3d at 106. This

court then noted that the trial court had vacated the defendant's conviction for aggravated battery with a firearm. However, as the mandate in that case vacated the defendant's sentence for attempted murder and remanded the cause so that he could be resentenced, the trial court's action of vacating another of the defendant's convictions exceeded its jurisdiction and was an action beyond the mandate. *Craig*, 313 Ill. App. 3d at 106. Thus, this court vacated the trial court's order vacating the defendant's conviction, leaving the defendant to seek any further relief in a postconviction petition. *Id.*

¶ 28 Similarly, here, the mandate in this case modified defendant's conviction for aggravated criminal sexual assault to criminal sexual assault and remanded for resentencing on that issue only. Even if defendant had argued that his convictions violated the one-act, one-crime rule before the trial court, that issue would not have been properly before the court as it was beyond the scope of the mandate. See *Craig*, 313 Ill. App. 3d at 106. Moreover, a mandatory consecutive sentence must be imposed upon a defendant convicted of criminal sexual assault. 730 ILCS 5/5-8-4(a) (West 1999). Thus, the trial court did not err in imposing a consecutive sentence relating to defendant's convictions for criminal sexual assault and aggravated criminal sexual abuse. As defendant's contention regarding his conviction and sentence for aggravated criminal sexual abuse is not properly before this court (see *Moore*, 389 Ill. App. 3d at 1042), we need not address it further.

¶ 29 For the reasons stated above, we affirm the judgment of the trial court.

¶ 30 Affirmed.