

No. 1-11-2542

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

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|--------------------------------------|---|---------------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 08 CR 298 |
| |) | |
| JORGE RODRIGUEZ, |) | Honorable |
| |) | Margaret Mary, Brosnahan, |
| Defendant-Appellant. |) | Judge Presiding. |

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not abuse its discretion in allowing prior sentencing hearing transcript into evidence at new sentencing hearing; sentence not excessive; judgment affirmed.

¶ 2 Following a jury trial, defendant Jorge Rodriguez was convicted of attempted aggravated criminal sexual assault, and sentenced to an extended term of 30 years' imprisonment. This court affirmed that conviction on appeal, but remanded the cause for a new sentencing hearing. *People v. Rodriguez*, No. 1-08-1252 (2010) (unpublished order under Supreme Court Rule 23).

Following that remand, defendant was sentenced to 28 years' imprisonment. He now appeals from that judgment, contending that the new sentencing hearing was unfair because the trial court

allowed the State to introduce the transcript from the original sentencing hearing where he was without representation, and that the 28-year sentence imposed by the court was excessive.

¶ 3 Defendant represented himself at trial, and was convicted of attempted aggravated criminal sexual assault. The evidence showed that on October 28, 2007, defendant, armed with a knife, grabbed and dragged the victim down a city block, stating that he wanted her "p*ssy," and also took her purse and cellular telephone. Following his conviction, the trial court asked defendant if he was ready for sentencing. In response, defendant stated that he should not have represented himself, and that he did not know how to proceed at a sentencing hearing, and the matter was continued.

¶ 4 At the sentencing hearing, defendant again informed the court that he did not know how to proceed on his own. The State presented two witnesses, Martin Stewart and Nancy Velazquez, who identified defendant as the man who robbed their homes in 1993, and the testimony of Assistant State's Attorney (ASA) Frank Marek that in 1993 defendant pleaded guilty in connection to five burglary cases, including the two testified to by Stewart and Velazquez, and was sentenced to 18 years' imprisonment. The instant victim read her victim impact statement, and additional testimony was presented by Officer Huertas that he had arrested defendant on August 10, 1993, after chasing him on foot. Detectives Kathleen Moriarty and Cruz Reyes testified to residential burglary cases that they had investigated, but did not specifically identify defendant as the offender in those cases.

¶ 5 Defendant exercised his right to allocution, and told the court that after he pleaded guilty to the burglaries, he "cleaned up" in jail, and paid for those crimes by being incarcerated. He also stated that he should have hired a lawyer, and probably made a lot of mistakes, while maintaining his innocence.

¶ 6 The court sentenced defendant to an extended term of 30 years' imprisonment. In doing so, the court noted that it considered defendant's criminal background which included seven residential burglaries, one attempted residential burglary, two armed robberies, one burglary, one robbery and a few misdemeanors. The court weighed the statutory factors in aggravation and mitigation, and found defendant caused or threatened to cause serious harm, and that sentencing him to prison was necessary to deter him from committing additional crimes.

¶ 7 On direct appeal, defendant argued, in relevant part, that the trial court deprived him of his right to counsel when it refused to appoint counsel for him at sentencing after he repeatedly expressed a desire for the assistance of counsel. *Rodriguez*, order at 7. This court found that defendant never directly asked for appointment of counsel post-trial, but repeatedly stated that he made a mistake in representing himself at trial, and that he did not know how to proceed on his own. *Rodriguez*, order at 10. This court presumed that these statements were defendant's attempt to revoke his previous waiver of counsel and request the appointment of counsel, and that the appropriate remedy was to remand the cause for a new sentencing hearing at which defendant would have the opportunity to have counsel appointed, if he so desired. *Rodriguez*, order at 11.

¶ 8 On remand, defendant was appointed counsel who filed a motion to require the State to produce witnesses at the sentencing hearing. Counsel alleged that the State intended to request the court to take judicial notice of the prior 2008 sentencing proceedings, instead of producing the witnesses, and that allowing the transcripts of the witnesses' testimony from the 2008 sentencing hearing, at which defendant did not have the benefit of counsel, would result in the same sixth amendment violation that caused the reviewing court to remand for a new sentencing hearing, namely, the denial of counsel. Counsel maintained that defendant has the constitutional

right to have witnesses presented, and that denial of counsel at a critical stage such as at a sentencing hearing is a structural error not subject to harmless error analysis.

¶ 9 At the proceeding on the motion, defendant's counsel argued that because the previous sentence was vacated, the State must produce its witnesses in aggravation. The State responded that anything that is relevant and reliable is admissible at a sentencing hearing. The court denied defendant's motion, finding that nothing precluded the State from presenting hearsay testimony including transcripts. Defendant's counsel then informed the court that she knew hearsay was allowable at sentencing, but that she could not effectively represent defendant if the transcript was allowed in as aggravating evidence. The court, however, was unpersuaded and stood on its initial ruling.

¶ 10 At the sentencing hearing, the court admitted the prior sentencing transcript at the State's request, and over defendant's objection. The State then called several witnesses in aggravation, including retired Chicago police sergeant Nathaniel Hill who testified that he arrested defendant on April 2, 1993, after observing him push an elderly man to the ground and remove cash from his pocket.

¶ 11 Chicago police detective Michael Dyra testified that on June 16, 1986, he responded to a call of a burglary in process, and a witness identified defendant as the person he had observed trying to pry open a window to a neighboring house. Defendant ultimately pleaded guilty to attempted residential burglary and was sentenced to six years' imprisonment.

¶ 12 Chicago sergeant Matthew Lipman testified that in December 2002, he was investigating a residential burglary of Kelly Kilpeo, that occurred on December 1, 2002. Kilpeo had interrupted the burglary and saw defendant fleeing in a vehicle. Kilpeo later identified defendant who pleaded guilty and was sentenced to eight years' imprisonment.

¶ 13 The instant victim read her original victim impact statement and also testified that she cannot go anywhere without being accompanied by a friend. She informed the court that for a year after the incident she carried a hockey stick because she was afraid something might happen to her.

¶ 14 In mitigation, defendant presented Monique Williams, a mitigation specialist, who testified that defendant was sexually abused as a child by a relative which played a role in his addiction to illicit drugs, and his mental health problems. Williams noted that defendant did not tell anyone about the abuse until he was incarcerated as an adult, and that he committed crimes to finance his drug addiction. Williams further testified that defendant was diagnosed with post-traumatic stress disorder and major recurrent depression. When defendant was released from prison in 2007, he received inpatient treatment for his mental and addiction issues at the Health Care Alternative Systems Program where defendant's dependency on alcohol, cannabis, cocaine and heroin was documented. Defendant did not attend the outpatient program recommended to him due to a long waiting list.

¶ 15 Williams further testified that defendant has a history of eight suicide attempts, and suffered a gunshot wound to his face which left him hearing impaired and caused epileptic seizures. Defendant told her, however, that he has figured out the "triggers" in his life which cause his destructive behavior.

¶ 16 On cross-examination by the State, Williams noted that defendant was a former gang member, his mother was very supportive of him, and that his daughter Arasellye told her that she liked defendant best when he was drug free, and did not like having him home because he would steal from her. Defendant's sisters told Williams that defendant was drug free and healthy right before the incident with the instant victim. Defendant had self-reported the drug addiction at the time of the incident, which was not documented by any professionals.

¶ 17 Defendant then introduced a letter from a chaplain at the Cook County Jail who stated that he believed defendant was capable of living his life successfully, and recognizes the consequences of his actions. Defendant's brother, Luis Alicea, also provided a letter stating that defendant is loving and caring, and needs professional help, and he did not believe defendant was a rapist.

¶ 18 Defendant's daughter, Araselle Rodriguez, testified that she has a good relationship with defendant, but wished he was around more. She stated that defendant was not a bad person when he was not doing drugs, and that it would be beneficial for her to have him home.

¶ 19 Marianelly Vazquez testified that she is defendant's sister and has a good relationship with him. He has provided her advice, but has not been around enough to be a role model for his daughter and grandchildren. Vazquez further testified that she has seen positive changes in defendant, and would like him home.

¶ 20 Araselle Ramos testified that defendant was her grandfather, and that she cherishes the time she has had with him. She further testified that defendant always made sure that he was not around her when he was on drugs.

¶ 21 The State argued in aggravation that defendant has not contributed back to society, noting that every time he is placed on probation, or parole, he commits another violent felony. The State also argued that defendant had no remorse, and noted that various members of his family were supportive and law-abiding, but defendant made the choice to commit these crimes. The State maintained that defendant posed a risk to society, that the instant offense was serious, that he had an extensive history of prior convictions, and that he had no rehabilitative potential.

¶ 22 In mitigation, defense counsel argued that the fact that defendant has earned the love and respect of his family "speaks volumes." Counsel maintained that defendant's prior convictions

for robbery and burglary were driven by his drug use, and that the instant offense was the first time he ever did anything of this nature.

¶ 23 Defendant then spoke in allocution. He stated that he was remorseful for the pain he has caused, and was looking forward to being a better person. He explained that since he has been incarcerated he has become healthy, less angry and capable of treating people as human beings.

¶ 24 The trial court subsequently sentenced defendant to 28 years' imprisonment. In doing so, the court stated that it heard from the mitigation specialist, and defendant's family members, and went through the mitigation report and the new pre-sentence investigation (PSI) report. It also noted that it reviewed the transcript from the prior 2008 sentencing hearing, and that it continued to find defendant subject to an extended term. The court explained that it considered "all of the statutory factors in aggravation, as well as in mitigation," including the hardship to defendant's family, but that defendant's actions in this case threatened serious physical harm to the victim, and that he has a very significant criminal history dating back to 1974. The court thus concluded that a significant sentence was necessary to deter defendant from committing additional crimes, and although defendant had expressed remorse and believes that he will not continue down this path, the court could not say with any certainty that this was the case.

¶ 25 Defendant filed a motion to reconsider sentence in which he alleged that his sentence was excessive, and that the court improperly considered testimony from a prior sentencing hearing. The trial court denied the motion, noting that it considered all the statutory factors in aggravation and mitigation, and that it believed the sentence imposed was appropriate.

¶ 26 On appeal, defendant first contends that in allowing the State to introduce transcripts of aggravation witnesses' testimony from the prior sentencing hearing, the trial court repeated the error that this court had previously found in remanding for resentencing, namely, that the trial court denied him his constitutional right to counsel. He, therefore, claims that his new

sentencing hearing was unfair, and requests this court to either reduce his sentence or remand for a new sentencing hearing.

¶ 27 A sentencing court has great latitude in determining the types and source of information that will be admitted to assist in determining a sentence to be imposed within the statutory limits. *People v. Williams*, 272 Ill. App. 3d 868, 878 (1995). The ordinary rules of evidence are relaxed, and evidence may be admitted so long as it is both relevant and reliable. *People v. Sims*, 403 Ill. App. 3d 9, 23 (2010). The source and type of admissible evidence is virtually without limits (*Sims*, 403 Ill. App. 3d at 23), and may include defendant's commission of other crimes or acts of misconduct even though defendant was not prosecuted or convicted of such conduct (*People v. Blanck*, 263 Ill. App. 3d 224, 234 (1994)).

¶ 28 Here, on remand, the trial court allowed the State, over defendant's objection, to admit into evidence the transcripts of the State's witnesses at the 2008 sentencing hearing instead of presenting live testimony of these witnesses. We review that decision for an abuse of discretion. *Williams*, 272 Ill. 2d at 878 .

¶ 29 Defendant maintains that the new sentencing hearing was rendered unfair by the admission of those transcripts which repeated the error which caused this court to remand the cause in the first place, *i.e.*, lack of counsel. In so arguing, defendant overstates the case.

¶ 30 In our prior decision, we did not find that defendant was denied the right to counsel. Rather, we found that the circuit court should have inquired into whether defendant was attempting to revoke his earlier waiver of counsel where he essentially indicated the desire to proceed with counsel, and remanded for a new sentencing hearing at which defendant would be provided the opportunity to have counsel appointed, if he so desired. *Rodriguez*, order at 10-11.

¶ 31 As to the decision to admit this evidence, we observe that a trial court does not abuse its discretion, *per se*, by taking judicial notice of a prior sentencing transcript at a new sentencing

hearing. *People v. Lucas*, 215 Ill. App. 3d 148, 154 (1991). In this case, the trial court allowed the State to introduce the transcript of the prior sentencing hearing which related the testimony of ASA Marek who reported defendant's five prior burglaries, his plea of guilty to them, and resulting sentence of 18 years' imprisonment. Two other witnesses also testified regarding this criminal activity by defendant. This information was permissible (*Blanck*, 263 Ill. App. 3d at 234), and also redundant in that it was documented in the PSI report (*People v. Morrow*, 104 Ill. App. 3d 995, 1006 (1982)), which was properly considered by the court. The record also shows that defendant did not refute the accuracy of this information, and that the court did not specifically mention these burglaries as the main factor in sentencing defendant, but, rather, looked at his criminal history as a whole which dated back to the 1970's and continued to the present, and the seriousness of the offense. Under these circumstances, we find no abuse of discretion by the trial court in allowing the prior sentencing transcript into evidence at the second sentencing hearing. *Lucas*, 215 Ill. App. 3d at 154.

¶ 32 In reaching this conclusion, we find defendant's reliance on *Burgett v. Texas*, 389 U.S. 109 (1967), *People v. Carter*, 72 Ill. App. 3d 871 (1979), and *People v. Duncan*, 173 Ill. App. 3d 554 (1988), misplaced. In *Burgett*, and *Carter*, the Supreme Court and this court found that a prior conviction could not be used to support guilt or enhance punishment for another offense where that conviction was entered without defendant being represented by counsel and in the absence of an effective waiver of counsel. *Burgett*, 389 U.S. at 114-15; *Carter*, 72 Ill. App. 3d at 874-75. The Supreme Court explained that to do so would, in effect, result in the accused suffering anew from the deprivation of his sixth amendment right to counsel. *Burgett*, 389 U.S. at 114. Here, the evidence was not used to convict, but used in aggravation at a sentencing hearing. Further, unlike *Burgett* and *Carter*, defendant has not alleged that any of his five prior residential burglaries were entered without representation of counsel. Accordingly, those

convictions could properly be considered in determining defendant's sentence. *Blanck*, 263 Ill. App. 3d at 234.

¶ 33 In *Duncan*, the reviewing court held that defendant's testimony at a prior trial in which he was denied effective assistance of counsel, could not be used as substantive evidence at a subsequent trial, but could be used for impeachment purposes. *Duncan*, 173 Ill. App. 3d at 558. Here, unlike *Duncan*, the five burglaries were not being used as substantive evidence of a crime at a subsequent trial, but, rather, were used in aggravation at a sentencing hearing. Accordingly, we find no abuse of discretion by the trial court in admitting the transcript from the prior sentencing hearing regarding the five burglaries and correlating sentence which is documented in defendant's PSI report.

¶ 34 Defendant next contends that his sentence was excessive. He maintains that given his documented struggles with addiction and depression brought on by sexual abuse as a child, his strong and improving family ties, and his repeated expressions of remorse, the trial court failed to properly recognize his rehabilitative potential and impose a sentence that reflected the constitutional mandate of restoring an offender to useful citizenship.

¶ 35 There is no dispute that the extended term sentence of 28 years' imprisonment fell within the proper statutory range (730 ILCS 5/5-8-2, 730 ILCS 5/5-4.5-30 (West 2010)), and that we may not disturb that sentence absent an abuse of discretion (*People v. Bennett*, 329 Ill. App. 3d 502, 517 (2002)). We find none here.

¶ 36 The record shows that the court conducted a lengthy sentencing hearing where the parties presented aggravating and mitigating evidence. In reaching its sentencing decision, the trial court was not required to give greater weight to defendant's rehabilitative potential than to the seriousness of the offense (*People v. Phillips*, 265 Ill. App. 3d 438, 450 (1994)), which, in this case, involved defendant grabbing the victim, dragging her, and threatening to rape her. The trial

court was also not required to enumerate each factor it considered in imposing the sentence (*People v. Price*, 375 Ill. App. 3d 684, 696 (2007); *People v. Chambers*, 258 Ill. App. 3d 73, 92 (1994)), and we presume that where mitigating evidence is before the court, that the court considered it (*People v. Trimble*, 220 Ill. App. 3d 338, 355-56 (1991)).

¶ 37 With these principles in mind, we find that the court clearly considered defendant's struggles with addiction and mental illness, and also specifically noted that defendant was remorseful. The court weighed these factors with the statutory factors in aggravation and defendant's considerable criminal history and concluded that a term of 28 years was required. We find no abuse of discretion in the sentence imposed, and, therefore, affirm the judgment of the circuit court of Cook County.

¶ 38 Affirmed.