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2014 IL App (3d) 130083-U

Order filed October 29, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-13-0083
M.H.,	)	Circuit No. 11-CF-379
Defendant-Appellant.	)	Honorable Edward A. Burmila, Jr., Judge, Presiding.

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PRESIDING JUSTICE LYTTON delivered the judgment of the court.  
Justices Holdridge and McDade concurred in the judgment.

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**ORDER**

- ¶ 1 *Held:* Imposition of consecutive sentences was improper where the record gave no indication that the sentencing court found that consecutive sentences were necessary to protect the public from further criminal conduct of defendant.
- ¶ 2 Defendant, M.H., pled guilty to three counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(b) (West 2008)). The trial court sentenced defendant to terms of six years' imprisonment on each count. The court ruled that two of the six-year terms would run concurrently, with the third term running consecutively to the first two terms. The judgment of

the court also indicated that defendant would serve a two-year term of mandatory supervised release (MSR), though an inmate report subsequently published by the Department of Corrections (DOC) indicates that defendant will serve a four-year term of MSR. Defendant appeals, arguing that the imposition of consecutive sentences was improper absent an indication that the trial court found consecutive sentences necessary to protect the public from further criminal conduct of defendant. Defendant further contends that the proper term of MSR is two years. We modify the trial court's sentencing order, remand with instructions, and affirm the judgment in all other respects.

¶ 3

### FACTS

¶ 4

Defendant was charged by indictment with seven counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(b) (West 2008)), each a Class 2 felony. Defendant agreed to plead guilty to counts three, six, and seven, and the State agree to *nolle prosequi* counts one, two, four, and five. No agreement was made regarding sentencing.

¶ 5

At a plea hearing held on June 26, 2012, the State provided a factual basis for each of the three counts to which defendant was pleading guilty. Defendant's 14-year-old daughter would testify that between August 1, 2009, and April 1, 2010, defendant made her place fake male genitalia into defendant's vagina. Defendant's 13-year-old son would testify that in April 2010 defendant made him place his finger into defendant's vagina. Defendant's 12-year-old daughter would testify that in April 2009 defendant made her suck on defendant's breasts. Defendant agreed that the witnesses would testify as the State had represented. The court accepted defendant's guilty plea.

¶ 6

On October 25, 2012, the matter proceeded to sentencing. Before the court at sentencing were a presentence investigation report (PSI), an intensive probation supervision report, a

psychosexual evaluation, two victim impact statements, and four letters written on behalf of defendant. In the victim impact statements, defendant's daughters described the harm inflicted upon them and expressed their desires to focus on the future. In the letters written on defendant's behalf, defendant's friends and family urged the court to provide defendant with counseling and rehabilitation in lieu of incarceration. The PSI indicated that defendant had no prior felony convictions. The intensive probation supervision report concluded that defendant did not meet acceptance criteria. The psychosexual evaluation stated that "[defendant's] evaluation results place her in the high risk category of sexually reoffending, relevant to females."

¶ 7 The court sentenced defendant to terms of six years' imprisonment on each count. The first two terms would run concurrently, while the third term would run consecutively. In imposing the sentence, the court emphasized that defendant needed to be away from her children so that the children may deal with what had happened. "If you were on probation, I'm afraid that you would try to invade their lives before they could come to grips with this terrible thing that you inflicted on them," the court stated. The court issued a judgment reflecting the sentence, which indicated that a two-year term of MSR would attach to each count.

¶ 8 On January 29, the court held a hearing on defendant's motion to reconsider sentence. The court denied the motion, noting that defendant must have contemplated the serious harm her conduct would have caused to her children.

¶ 9 ANALYSIS

¶ 10 I. Consecutive Sentences

¶ 11 As a threshold matter, we point out that because defendant failed to take issue with the imposition of consecutive sentences in the trial court, the issue is initially considered waived for appeal. See *People v. Hicks*, 101 Ill. 2d 366 (1984). However, under plain error doctrine, a

court may review a waived issue if (1) the evidence in the case is closely balanced, or (2) the error "is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The first step in plain error analysis is determining whether an error occurred at all. *People v. Walker*, 232 Ill. 2d 113 (2009).

¶ 12 Under the Unified Code of Corrections, consecutive sentences may be mandatory or permissive. 730 ILCS 5/5-8-4 (West 2010). There is no contention in the case at hand that the sentences imposed were mandatorily consecutive. A court may, at its discretion, impose consecutive sentences if "having regard to the nature and circumstances of the offense and the history and character of the defendant, it is the opinion of the court that consecutive sentences are required to protect the public from further criminal conduct by the defendant, the basis for which the court shall set forth in the record." 730 ILCS 5/5-8-4(c)(1) (West 2010). The imposition of permissive consecutive sentences is a matter of the trial court's discretion, and will not be altered on review absent an abuse of that discretion. *People v. Buckner*, 2013 IL App (2d) 130083.

¶ 13 Our supreme court has held that a trial court is not required to recite the specific statutory language when determining that consecutive sentences are necessary. *Hicks*, 101 Ill. 2d 366. "What is required is that the record show that the sentencing court is of the opinion that a consecutive term is necessary for the protection of the public." *Id.* at 375 (quoting *People v. Pittman*, 93 Ill. 2d 169, 178 (1982)). This opinion may not be inferred from the mere imposition of consecutive sentences. *Pittman*, 93 Ill. 2d 169.

¶ 14 In the present case, we find no indication on the record that the consecutive sentences were motivated by the trial court's belief that they were required for the protection of the public.

Indeed, the court made no reference to any need to protect the public from further criminal conduct by defendant, either at initial sentencing or at the hearing on the motion to reconsider. Though the court stated that defendant's children would be better off without defendant in their lives, the court's concerns stemmed from the children's ability to recover from what happened to them, rather than a concern that defendant would continue to abuse the children.

¶ 15 The State argues that defendant's psychosexual evaluation, which placed her in a high risk category of reoffending, supports the notion that the public must be protected from defendant. The State's argument misconstrues the standard on appeal. Our goal is to determine whether the record indicates that the sentencing court believed the public needed protection from defendant, not whether the sentencing court *could* reach such a conclusion. At no point in imposing the consecutive sentences did the court reference the psychosexual evaluation.

¶ 16 The court's error in imposing consecutive sentences upon defendant triggers the second prong of the plain-error rubric. *E.g., People v. Wacker*, 257 Ill. App. 3d 728, 732 (2000) ("[S]ince the improper imposition of consecutive sentences might violate defendant's fundamental rights, we will consider the issue to the extent of determining whether plain error exists."). Because the trial court's imposition of consecutive sentences constituted plain error, we modify the trial court's sentencing order to make the terms of imprisonment imposed for each conviction run concurrently. See *People v. Cameron*, 2012 IL App (3d) 110020.

## II. Term of MSR

¶ 17 Defendant further contends that the proper term of MSR to which she is subject is two years. The four-year term of MSR currently reflected by defendant's DOC inmate report, she argues, is an error.

¶ 18 Conviction of a Class 2 felony requires that a two-year term of MSR be served following

the completion of the term of imprisonment. 730 ILCS 5/5-4.5-35(1) (West 2010). However, "if the victim is under 18 years of age, for a second or subsequent offense of aggravated criminal sexual abuse or felony criminal sexual abuse," the term of MSR shall be "4 years, at least the first 2 years of which the defendant shall serve in an electronic home detention program." 730 ILCS 5/5-8-1(d)(5) (West 2010). Defendant suggests that the additional two years of MSR may have been added to her sentence pursuant to this provision.

¶ 19 Because defendant did not have any prior felony convictions at the time of her guilty plea, defendant is only required to serve a two-year term of MSR. *People v. Anderson*, 402 Ill. App. 3d 186 (2010). The proper term of MSR was reflected in the court's sentencing judgment. Though defendant raises one possibility, we cannot be certain from the record why the DOC subsequently imposed a four-year term.

¶ 20 The State contends that the only remedy for an incorrectly applied term of MSR is a writ of *habeas corpus*. We disagree. Requiring defendant to file a habeas corpus petition to fix what may simply be a clerical error "would result in constant and unnecessary piecemeal litigation." *People v. Reedy*, 186 Ill. 2d 1, 8 (1999) (holding that defendant could challenge DOC calculation of good-time credit on direct appeal). The most efficient remedy here is to remand the matter with instructions that the mittimus be reissued to reflect a sentence of three concurrent terms of six years' imprisonment and a single two-year term of MSR.

¶ 21 CONCLUSION

¶ 22 The judgment of the circuit court of Will County is modified in part, remanded with instructions, and is affirmed in all other respects.

¶ 23 Modified in part, remanded with instructions, and affirmed in all other respects.