2015 IL App (2d) 131025-U
No. 2-13-1025
Order filed July 23, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KURT J. SERZEN, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Du Page County. No. 03-CF-2457 Honorable Robert G. Kleeman, Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Zenoff and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's sentence was not excessive, but DNA fee was vacated.

¶ 2 After a bench trial, the defendant, Kurt Serzen, was found guilty of multiple counts of aggravated criminal sexual assault and criminal sexual assault. On July 2, 2013, the trial court merged the convictions relating to each of two separate sexual assaults and then sentenced the defendant to 30 years' imprisonment on each count. The defendant appeals, arguing that the sentence was excessive and that a DNA fee was wrongly imposed. We affirm the sentence but vacate the DNA fee.

¶ 3 BACKGROUND

¶ 4 At trial, the victim, Samantha T., testified to the following. During the late night or early morning hours of August 6-7, 1996, she awoke to the sound of her dog growling and someone moving around her apartment. She initially assumed it was a friend who was staying with her, but the next thing she knew a man was holding a pillow over her face, and she could feel a knife against her throat. The man told her that if she cooperated he would not hurt her, but if she did not do as he said, he would kill her. He made her take off her shorts and underwear while he continued to hold the pillow to her face and the knife to her throat. After she struggled to get her shirt off, he cut the shirt off her with the knife and then put the knife back to her throat. At some point, he stopped holding the pillow over her face, but she did not try to move it away because she was afraid.

¶ 5 The man licked her breasts and then performed oral sex on her while still holding the knife to her throat. After a few minutes, the man inserted an object into her vagina and moved it in and out of her. She assumed the object was a dildo. The man then made her move the object in and out of herself. As she was doing so, she heard a sound like a condom being ripped open and then heard him masturbate. When he was finished, the man left. Samantha called 911.

¶ 6 A sexual assault examination was performed on Samantha at Elmhurst Hospital. The doctor who examined Samantha observed that she had abrasions that were consistent with both forcible and non-forcible vaginal penetration. Swabs were taken from Samantha's mouth, breasts, and vagina. The swabs were analyzed by the Du Page County crime lab. No semen was found on any of the swabs. The vaginal swab was tested for the presence of saliva, but the test was inconclusive. The swab from Samantha's breasts tested positive for saliva. The swabs were stored in a freezer.

¶ 7 In 2003, the Du Page County crime lab was running DNA profiles from unsolved cases through the convicted-offender databases of the State of Illinois DNA Index. The search

indicated that the defendant should be considered a suspect in the 1996 assault of Samantha. Additional testing was performed, which showed that the saliva on the swab from Samantha's breasts was consistent with the defendant's DNA.

¶ 8 On September 18, 2003, the defendant was charged with 12 counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(1) (West 2002)), 4 counts of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2002)), and 6 counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(a)(1) (West 2002)). The sexual assault counts alleged various theories of two acts of penetration (tongue/vagina and object/vagina). The State later filed a superseding indictment that alleged the same counts but added to each count allegations of an extended statute of limitations pursuant to 720 ILCS 5/3-6(h), (i) (West 2002). The State ultimately voluntarily dismissed the aggravated criminal sexual abuse charges.

¶ 9 The case proceeded to a bench trial on the aggravated criminal sexual assault and criminal sexual assault charges. Advances in DNA testing during the time the case was pending had allowed further analysis of the swab from Samantha's vagina. The DNA of at least three males was found. The defendant's DNA matched that of the primary contributor; the remaining DNA profiles were incomplete, indicating either a very small amount of DNA from these contributors or that the DNA had degraded. At trial, the State presented the DNA evidence and testimony by police and the victim. The defendant testified that his saliva was found on Samantha's breasts because he had spoken forcefully to her and his spit landed on her breasts. He also presented pay stubs which he said showed that he had been at work at the time of the assault. When questioned about the fact that the pay stubs were dated 1998, not 1996, the defendant claimed there was a record-keeping glitch. The trial court found the defendant utterly unbelievable. On April 8, 2011, the trial court found the defendant guilty on all counts.

¶ 10 A presentence report was prepared. The report indicated that the defendant was 55 years old, was an insulin-dependent diabetic, was diagnosed in 2005 with stage III colon cancer, and had undergone several surgeries and had a colostomy placed. He had hernia surgery and also reported having untreated hernias and herniated disks. The defendant had previous convictions for public indecency, window peeping, criminal trespass, stalking, criminal sexual abuse, criminal damage to property, and theft. He had been in the Marine Corps for two years in the 1970s and had received a general discharge.

¶ 11 Before the sentencing hearing was held, the State and the defense agreed that: (1) the defendant should be sentenced on only two counts, based on the two acts of penetration alleged; (2) the trial court was legally required to impose consecutive sentences; and (3) the defendant was entitled to day-for-day credit in serving his sentence. The State asked the trial court to impose the maximum 30-year sentence on each conviction, while the defense asked for a sentence less than the maximum.

¶ 12 To reflect that only two acts of sexual penetration had been alleged, the trial court merged the convictions on counts 2-6 and 13-14 into the conviction on count 1, and merged the convictions on counts 8-12 and 15-16 into the conviction on count 7. It then sentenced the defendant to 30 years on each count, and ordered the terms to run consecutively, for a total sentence of 60 years' imprisonment.

¶ 13 The defendant filed a motion to reconsider the sentence, which the trial court denied, and the defendant appeals.

¶ 14 ANALYSIS

¶ 15 On appeal, the defendant raises two arguments: first, that a DNA fee was improperly assessed against him, and second, that his sentence is excessive. As to the first argument, the State concedes that no DNA fee should have been assessed, as his DNA was previously collected

and analyzed. (Indeed, that is what led to his being charged with the offenses at issue in this case.) The State notes that, although the trial court vacated the portion of its order imposing the fee, records from the Du Page County Clerk's office continue to show the fee as being due and owing. If it has not already done so, the Du Page County Clerk's office is ordered to correct its records to show that the defendant does not owe the DNA fee in connection with this case.

¶ 16 The sole remaining argument is that the sentence is excessive. The defendant argues that, given his age and poor health, the trial court should have sentenced him to only 20 years on each count (for a total term of 40 years). The defendant argues that his 60-year sentence (of which, assuming that he loses no good time credit, he will serve 30 years because of the day-for-day credit) is so lengthy that it is virtually certain that he will still be imprisoned when he dies. He asserts that that prospect would not be so certain if he serves only 20 years.

¶ 17 In considering the defendant's challenge to his sentence of 60 years' imprisonment for two counts of rape, we begin with the principle that "the trial court is in the best position to fashion a sentence that strikes an appropriate balance between the goals of protecting society and rehabilitating the defendant." *People v. Risley*, 359 Ill. App. 3d 918, 920 (2005). Thus, we may not disturb a sentence within the applicable sentencing range unless the trial court abused its discretion. *People v. Stacey*, 193 Ill. 2d 203, 209-10 (2000). A sentence is an abuse of discretion only if it is at great variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *Id*. at 210. We may not substitute our judgment for that of the trial court merely because we might weigh the pertinent factors differently. *Id*. at 209.

¶ 18 In determining an appropriate sentence, relevant considerations include the nature of the crime, the protection of the public, deterrence, and punishment, as well as the defendant's rehabilitative prospects. *People v. Kolzow*, 301 Ill. App. 3d 1, 8 (1998). The weight to be attributed to each factor in aggravation and mitigation depends upon the particular circumstances

of the case. *Id*. There is a presumption that the trial court considered all relevant factors in determining a sentence, and that presumption will not be overcome without explicit evidence from the record that the trial court did not consider mitigating factors or relied on improper aggravating factors. *People v. Payne*, 294 Ill. App. 3d 254, 260 (1998).

¶ 19 In this case, the defendant concedes that the sentence was within the statutory sentencing range, and he does not argue that the trial court considered any improper factors in determining the appropriate sentence. However, he contends that, because of his age and poor health, the trial court should have given him a lower sentence, such as 20 years on each count. He cites federal census data suggesting that the life expectancy for a white male of his age is 79.2 years, and he notes that, under his current sentence, his projected release date is mid-December 2037, when he will be 79.9 years old. Quoting the court in *United States v. Wurzinger*, 467 F.3d 649, 652 (7th Cir. 1996), he argues that "a sentence of death in prison is notably harsher than a sentence that stops even a short period before," and thus "death in prison is not to be ordered lightly." Cutting 10 years off his sentence for each conviction, he argues, would allow him the potential opportunity to avoid dying while in prison, while preserving public safety because he would likely be too physically weak to reoffend. Finally, he adds, the Sexually Violent Persons Commitment Act (725 ILCS 207/1 *et seq.* (West 2014)) affords another level of community protection, because the State could seek to keep him in a secure detention facility even after he is released from prison.[1]

[1] He also adds a brief argument that releasing him earlier would save money, but we do not consider this argument, as he has cited no case law suggesting that cost is an appropriate factor to consider in fashioning a sentence. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (arguments must be supported by legal authority); *Mikolajczyk v. Ford Motor Co.*, 374 Ill. App. 3d 646, 677

¶ 20 None of these arguments persuade us to override the determination of the trial court as to the appropriate sentence for the defendant's offenses. Indeed, the very case he cites in support undermines his argument. Although "older offenders are generally less likely to commit crime, *** what matters is whether the [trial] court reasonably concluded that [the defendant] in particular is a risk for further crimes." *Wurzinger*, 467 F.3d at 653 (citing *United States v. Bullion*, 466 F.3d 574, 577 (7th Cir. 2006)). Here, the trial court reasonably concluded that, in light of the defendant's substantial history of offenses involving women, public safety required a sentence at the upper end of the range:

> "The defendant *** has a criminal history that is simply a laundry list of crimes. *** [T]here is evidence of public indecency beginning in his teenage years. There is [*sic*] multiple offenses of disorderly conduct involving window peeping. There is a stalking offense where the defendant made a threat of bodily harm to a woman and then placed her under observation. There is a criminal damage where, you know, maybe it was a wall, but was *** another -- offense involving a woman. I find there is sufficient evidence [of] *** obscene phone calls and telephone harassment where he says horrible things to a woman and then records, on at least some occasions, this woman's reaction to those things. He has got the criminal trespass and the abuse case *** from 1999. *** And he has a failure to register as a sex offender. His history, *** for the cases which I can consider, involves, almost every time, almost without exception, the defendant either frightening women for his own purpose or actually forcibly abusing or assaulting them. It just goes on and on."

(2007) (points not argued or appropriately supported are forfeited).

The trial court concluded, "Mr. Serzen is every woman's nightmare. *** Because Mr. Serzen is every woman's nightmare, I find he is society's nightmare and society has a right to be protected from Mr. Serzen." The defendant's criminal history also led the trial court to conclude that the defendant would be substantially likely to reoffend; the evidence showed that "the circumstances of this offense *** will occur again if the defendant is not incarcerated" and that the question "is not whether or not Mr. Serzen will re-offend, the question is when."

¶ 21 We also reject the defendant's argument that the Sexually Violent Persons Act offers a means of continuing his confinement even after his release from prison, thereby providing additional protection for the community. As the State points out, such confinement is uncertain, as it would require the State to bring a petition under that statute and prove that the defendant met the statutory criteria. Moreover, we presume that the trial court was well aware of the additional potential protection that would be offered by the Sexually Violent Persons Act after the defendant served his sentence. We defer to the court's decision to ensure that the defendant remained confined rather than accepting the mere possibility of the State's successful petition under the Sexually Violent Persons Act.

¶ 22 In light of the evidence presented, the trial court did not abuse its discretion in sentencing the defendant to the maximum time in prison despite his age and poor health. *Id*. The trial court took into account the nature of the crime, the need for public protection, the defendant's rehabilitative prospects, and the goals of deterrence and punishment, and the sentence was not manifestly disproportionate to the nature of the offense. *Stacey*, 193 Ill. 2d at 210; *Kolzow*, 301 Ill. App. 3d at 8. Accordingly, we decline to find that the sentence is excessive and we affirm the trial court's judgment.

¶ 23 CONCLUSION

¶ 24 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed. However, as noted, the Du Page County Clerk's Office is ordered to correct its records to reflect that the defendant does not owe the DNA fee in connection with the present case.

¶ 25 Judgment affirmed; DNA fee vacated.