2015 IL App (2d) 140856-U
No. 2-14-0856
Order filed June 23, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 12-CF-531
RICARDO TOLENTINO,	)	Honorable John J. Kinsella,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Despite entering a negotiated guilty plea, defendant was entitled to move to reconsider his sentence, as he asserted not that his sentence was excessive but that he was entitled to a new sentencing hearing because the trial court considered improper factors; (2) in sentencing defendant for predatory criminal sexual assault, the trial court did not consider factors implicit in the offense: the court noted the victim's age only in acknowledging the nature and circumstances of the offense, and there was evidence to support the court's inference that the victim suffered non-implicit psychological harm.

¶ 2 Defendant, Ricardo Tolentino, pleaded guilty to one count of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)), in exchange for the State's dismissal of a second count of the same offense and for a 17-year sentencing cap. The trial court

sentenced defendant to 11 years in prison. Defendant filed a motion for reconsideration of his sentence, which the trial court denied. Defendant timely appealed. Defendant argues that he is entitled to a new sentencing hearing, because the trial court considered improper factors in fashioning defendant's sentence. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On April 3, 2012, defendant was indicted on two counts of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)). Count I of the indictment alleged that, on or between February 14, 2012, and March 14, 2012, defendant, who was 17 years of age or older, placed his mouth on the sex organ of M.G., who was under 13 years old. Count II alleged that defendant placed his mouth on the anus of M.G.

¶ 5 On December 14, 2012, defendant and the State entered into a plea agreement whereby defendant agreed to plead guilty to count I, in exchange for the State's agreement to dismiss count II and to cap its sentencing recommendation at 17 years in prison. The factual basis of the plea established the following. The victim, M.G., would testify that she was born on September 19, 2007. On or between February 14, 2012, and March 14, 2012, defendant lived in her house and would sometimes babysit her. M.G. would testify that defendant placed his mouth on her sex organ and on her anus. Carmen Easton, an investigator with the Du Page County Children's Advocacy Center, would testify that she interviewed defendant, who told her that he was born on March 13, 1991, and that he touched and licked the sex organ of M.G. The trial court accepted defendant's guilty plea and set the matter for sentencing.

¶ 6 A sentencing hearing took place on April 12, 2013. Easton testified that, on March 14, 2012, she interviewed M.G., who was four years old. During the interview, M.G. identified the vagina as "cola" and the buttocks as "bootie." M.G. told Easton that defendant lived at her house

and that he "liked to play with her a lot." When Easton asked M.G. what defendant liked to play, M.G. pointed to the buttocks on an anatomical drawing and stated that defendant "licks it." M.G. told Easton that her cola and bootie hurt "because [defendant] licked it a lot." Easton asked M.G. how it felt when defendant did these things to her, and M.G. said "it was ugly." When M.G. told her mom about what defendant did, her mom started crying.

¶ 7 Easton testified that, on March 19, 2012, she spoke with M.G. a second time. During this interview, M.G. used the word "colita" to refer to her vagina and the word "chi-chis" to refer to her breasts. She told Easton that defendant had touched her chi-chis. When Easton asked her if anyone had touched her colita, M.G. said no. When Easton asked if her anyone had touched her bootie, M.G. said that defendant licked her bootie. Using dolls, M.G. demonstrated what defendant had done to her. M.G. laid the female doll on its stomach and placed the male doll's face on the female doll's buttocks. She also put the male doll's face to the female doll's vagina. M.G. told Easton that defendant had "sucked her bootie and he also licked her colita." M.G. told Easton that defendant had a three-year-old daughter and that the daughter was playing in the same room while this was occurring. M.G. did not think that defendant's daughter saw what defendant was doing, because defendant placed a blanket over M.G. M.G. told Easton that "it was ugly." M.G. told defendant that she was going to tell her mom. M.G. told Easton that her colita was red and that it hurt because defendant "licked it a lot."

¶ 8 Defendant presented three witnesses in mitigation: Virginia Lopez, Giovanni Pena, and Dr. Romita Sillitti. Lopez and Pena both testified that they were with Maranatha DuPage Church and visited defendant weekly in jail. Both testified that they had seen defendant make changes in life such as accepting God. Sillitti, a psychologist with the Du Page County probation department, testified that she conducted a sex-offender evaluation on defendant. Sillitti found

the following to be factors elevating defendant's risk of reoffending: (1) his history of substance abuse; (2) his chaotic childhood and home environment; and (3) his impulsivity and poor problem-solving skills. She assessed defendant's risk to the community as moderate.

¶ 9 The State asked for a sentence of 17 years. During the State's argument, defense counsel objected to the State's reference to the victim as "a four-year-old," arguing that the age of the victim is an improper aggravating factor. The court overruled the objection.

¶ 10 Defense counsel, at the outset of its argument, again pointed out that the court cannot consider the age of the victim in aggravation. The court stated: "I'm aware of the law and what the sentencing ranges are and what considerations should be taken into account." Thereafter, defense counsel argued for the minimum sentence of six years.

¶ 11 In allocution, defendant apologized to the court and stated that he learned his lesson.

¶ 12 In sentencing defendant, the court noted that the sentencing range was from 6 years to the cap of 17 years. The court then stated as follows:

> "The Court cannot gauge a sentence by the age of the child; the younger the child, the longer the term in the penitentiary. Any such argument and any such sentence would be inappropriate.
>
> However, when the State presents evidence of the age of the child, the conduct engaged in by the defendant to perpetrate the offense and offers arguments as to what motivations there may have been, all of that is appropriate. And so it's appropriate for the State to discuss what the age of the child was, what the age of his own child was and the circumstances of the offense. But you're correct, the Court cannot impose a sentence based solely on the age of the child because it's the age of the child which, by definition,

defines the offense since she is a child under the age of thirteen and he will be sentenced in accordance with the provisions of the law. So the Court is aware of that obligation.

However, all of the circumstances, facts, the manner in which the crime was perpetrated by the defendant is all relevant and important insofar as consideration in sentencing. And the other matters that were argued in mitigation are also correct. ***

***

However, as evidenced by the defendant's own comments and statements to the investigators, you perpetrate offenses upon children, they have life-long consequences. He, himself, described incidents with his own mother; which the very fact that it was brought up by him is something that had a real impression upon him and one of the levels of abuse that he suffered at the hands of his mother ultimately abandoning him.

So all of these things, whether the child was four, five, six, eight, ten years old, have consequences. And they have what I would characterize—and would in this case—as harm. There is real harm caused on children that have to suffer at the hands of adults who are exploring their sexual perversions or however you want to describe them.

I don't know why his mother victimized him in the ways she did. And it's not entirely clear why he victimized this child the way he did. But there is harm. There are consequences far more significant in these types of cases than a physical injury of someone punching someone in the nose or causing them some physical injury.

Children abused by adults for sexual purposes, engaged in sexual conduct, have life-long consequences to those children. And the defendant may in some measure be sitting here today as a result of his having been the victim of sexual acts committed upon

him. And so it's self-evident and it has a tendency to reemerge in the lives of the victims of these offenses.

So the Court is mindful of the harm caused on this child four years of age. She certainly, as evidenced by the testimony, is consciously aware of what happened to her and will always be aware of that and will have to deal with that. And I hope she'll get appropriate attention and counseling to her to place into some—if it's even possible, some perspective why adults abuse children. And there was clearly predatory criminal sexual abuse [*sic*] in this case.

The factors in mitigation certainly are there. ***

* * *

*** But I'm here to hold you accountable on behalf of the community for great harm you did to a little child who didn't deserve what introduction into adult thinking sometimes can lead to.

***

The Court's sentence in considering all the arguments I don't believe [*sic*] would tend to deprecate the seriousness of this crime given the conduct involved even on one occasion to consider the minimum sentence. The range is very large within the framework of the law, six to sixty years. The parties have, by agreement, narrowed that range to six to seventeen.

The sentence of this Court, weighing and considering all those factors, will be eleven years in the Illinois Department of Corrections which is followed by three years of mandatory supervised release up to natural life ***."

¶ 13 Defendant filed a motion for reconsideration of his sentence. Defendant argued that the trial court improperly emphasized the victim's age and improperly placed great weight on the psychological harm suffered by the victim despite the absence of any testimony showing that the victim was actually harmed.

¶ 14 At the hearing on the motion, the trial court addressed both of defendant's claims. With respect to the age of the victim, the court stated:

> "Clearly, the child's age is what it is. I don't know that any comment that I made would suggest that a ten-year-old being victimized in the same manner would somehow be less aggravating than a four-year-old. I mean, there isn't and shouldn't be any distinction other than it's a child under the age of thirteen."

With respect to the harm suffered, the court stated: "[T]he molestation of a four-year-old is a significant event that that child will recall and has recalled according to the evidence in the case. And it is aggravating in my mind." The court continued: "I'm not aware that there's any such limitation on common sense. I think it's only commonsense to recognize that a four-year-old suffers harm as a result of being sexually molested." The court stated:

> "The victim in this case is not a fungible thing; that is, a human being under thirteen. The victim in this case was identified, described, discussed that the victim in this case is a four-year-old child. And one of the things the Court is called upon to do is determine to what extent there's any harm on the victim. And for anyone to suggest that a four-year-old is not harmed by being sexually assaulted—and I'm not saying you're suggesting that—that there has to be some proof or evidence of that, I think, is as absurd as saying that someone who got hit in the face and had their nose broken is not harmed. It's self-evident.

A four-year-old child who recalls and describes the sexual molestation has suffered harm. ***. *** I don't think there's anything inappropriate in making such a finding. And it isn't the four-year-old age of the child that's aggravating, it's that the Court can and in this case did recognize there is harm. And that was one of your arguments, there was no evidence of harm; and therefore, I should look at that as mitigation. So that's the reason the issue was addressed and I think addressed appropriately.

The Court wasn't placing any emphasis on the actual four-year-old age of the child, it was the emphasis on this victim, and that is how the child was generically referred to as a four-year-old little girl. That's what we're describing. That's the victim of the crime.

So I think the Court appropriately weighed all the factors in aggravation and mitigation."

¶ 15 Defendant timely appealed.

¶ 16 II. ANALYSIS

¶ 17 Defendant argues that the trial court improperly considered in aggravation factors that were inherent in the offense, specifically, the victim's age and the psychological harm suffered by the victim. In response, the State maintains that the appeal should be dismissed because defendant failed to file a motion to withdraw his plea. In the alternative, the State argues that the trial court did not consider improper aggravating factors.

¶ 18 We first consider whether the appeal should be dismissed. Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013) provides:

> "No appeal shall be taken upon a negotiated plea of guilty challenging the sentence as excessive unless the defendant, within 30 days of the imposition of sentence, files a motion to withdraw the plea of guilty and vacate the judgment."

In *People v. Evans*, 174 Ill.2d 320, 327 (1996), the supreme court held that, when a defendant pleads guilty to certain charges in exchange for the State's agreement to recommend a specific sentence, the defendant may not seek reconsideration of that sentence without moving to withdraw his plea. The court later extended this rule to include plea agreements involving sentencing caps. *People v. Linder*, 186 Ill. 2d 67, 74 (1999). The State maintains that, based on *Linder*, the appeal should be dismissed, because defendant failed to file a motion to withdraw his plea.

¶ 19 Defendant argues that he was not required to file a motion to withdraw his plea, because, unlike the *Linder* defendant, defendant is not arguing that his sentence is excessive and must be reduced; instead, his argument is that the trial court considered improper sentencing factors and that he is therefore entitled to a new sentencing hearing. We agree with defendant that, under such circumstances, a motion to withdraw his guilty plea is not required. See *People v. Palmer-Smith*, 2015 IL App (4th) 130451 (defendant who pleaded guilty in exchange for a 20-year sentencing cap was not barred from arguing in a motion to reconsider his sentence that the trial court improperly considered in aggravation a factor inherent in the offense, as his argument was that the court engaged in improper sentencing not excessive sentencing); *People v. Hermann*, 349 Ill. App. 3d 107, 114 (2004) (where the defendant's motion did not allege that the sentence was excessive but instead alleged that the trial court was without statutory authority to impose the sentence, the defendant was not required to file a motion to withdraw her plea); *People v. Economy*, 291 Ill. App. 3d 212, 219 (1997) (a defendant who enters a negotiated guilty plea can

still proceed on a motion to reconsider his sentence where the defendant argues that the trial court misapplied the law by considering improper sentencing factors). Accordingly, we reach the merits of defendant's argument.

¶ 20 Defendant argues that the trial court considered improper aggravating factors when fashioning defendant's sentence. Defendant was convicted of predatory criminal sexual assault of a child. Under section 11-1.40(a)(1) of the Criminal Code of 2012 (720 ILCS 5/11-1.40(a)(1) (West 2012)), a person commits predatory criminal sexual assault of a child if he is 17 years of age or older and commits an act of sexual contact with a person under the age of 13 years. According to defendant, because the victim's age is an element of the offense and because psychological harm is implicit in sex offenses committed against children, the trial court erred in considering those factors in aggravation.

¶ 21 It is well established that, generally, a factor that is inherent in the offense for which the defendant has been convicted cannot also be used as an aggravating factor in determining his sentence. *People v. Phelps*, 211 Ill. 2d 1, 11 (2004). The rationale for this prohibition against "double enhancement" is based upon the assumption that the legislature considered the factors inherent in the offense in designating the range of punishment. *Id*. at 12. However, " '[t]he rule that a court may not consider a factor inherent in the offense is not meant to be applied rigidly, because sound public policy dictates that a sentence be varied in accordance with the circumstances of the offense.' " *People v. Spicer*, 379 Ill. App. 3d 441, 468 (2007) (quoting *People v. Cain*, 221 Ill.App.3d 574, 575 (1991)). "In determining whether the trial court based the sentence on proper aggravating and mitigating factors, a court of review should consider the record as a whole, rather than focusing on a few words or statements by the trial court." *People v. Dowding*, 388 Ill. App. 3d 936, 943 (2009).

¶ 22 We first consider defendant's argument that the trial court improperly considered the victim's age in sentencing defendant. A review of the transcript makes clear that defendant's argument is without merit. First, we note that the trial court made very clear that it was aware of the law on this issue, expressly stating: "[T]he Court cannot impose a sentence based solely on the age of the child because it's the age of the child which, by definition, defines the offense since she is a child under the age of thirteen and he will be sentenced in accordance with the provisions of the law. So the Court is aware of that obligation."

¶ 23 However, as the trial court noted, the age of the child is, nevertheless, relevant to a discussion of the nature and circumstances of the case. See *People v. Raney*, 2014 IL App (4th) 130551, ¶¶ 36-37 (finding no improper double enhancement where the court referenced the victim's age during the sentencing hearing even though the age of the victim was an element of the charged offense, because it was evident from the record that the court's comments pertaining to the victim's age "related to the nature and circumstances of the offense"); *People v. Thurmond*, 317 Ill. App. 3d 1133, 1144-45 (2000) (trial court did not err in considering the age of the victim during the defendant's sentencing hearing because it pertained to the nature and circumstances of the offense, which is a relevant consideration).

¶ 24 Here, it is clear that the trial court considered the victim's age only as it relates to the nature and circumstances of the offense. The court stated: "The victim in this case was identified, described, discussed that the victim in this case is a four-year-old child." In addressing defendant's argument at the hearing on his motion for reconsideration, the court again clarified: "The Court wasn't placing any emphasis on the actual four-year-old age of the child, it was the emphasis on this victim, and that is how the child was generically referred to as a four-year-old little girl. That's what we're describing. That's the victim of the crime."

¶ 25 The cases relied on by defendant are readily distinguishable, because in each case it was clear that the trial court considered the victim's age in aggravation, whereas in the present case the trial court asserted multiple times that it could not consider age as an aggravating factor. For instance, in *People v. White*, 114 Ill. 2d 61, 65-66 (1986), in sentencing the defendant for aggravated battery of a child, the trial court specifically found that the fact that the victim was under the age of 12 years was an aggravating factor. In *People v. Freeman*, 404 Ill. App. 3d 978, 995-96 (2010), in sentencing the defendant for predatory criminal sexual assault of a child, the trial court referred to the victim's age of 12 years more than a dozen times and specifically found that the victim's age was one of many " 'aggravati[ng] circumstances' " in the case. In *People v. Edwards*, 224 Ill. App. 3d 1017, 1032-33 (1992), in sentencing the defendant for aggravated criminal sexual assault, the trial court asserted that the victim was under 12 years of age and that this fact was a basis to increase the defendant's sentence. Here, we find no evidence that the trial court considered the victim's age in aggravation.

¶ 26 We next consider defendant's claim that the trial court erred in considering psychological harm to M.G. because, according to defendant, it too is a factor implicit in sexual assaults committed against children. Contrary to defendant's argument, many cases have held that the psychological harm inflicted on a child victim of sexual assault is a proper factor to consider in aggravation. See *People v. Kerwin*, 241 Ill. App. 3d 632, 636 (1993) (rejecting the defendant's argument that harm is inherent in the offense of aggravated criminal sexual assault and finding it proper for the trial court to consider the emotional harm to the nine-year-old victim as an aggravating factor); *People v. Nevitt*, 228 Ill. App. 3d 888, 891-92 (1992) (the psychological harm to the three-year-old victim was a proper consideration when sentencing for aggravated criminal sexual assault); *People v. Ulmer*, 158 Ill. App. 3d 148, 149-51 (1987) (the trial court's

finding that " 'this particular offense *** could very well leave a permanent scar on this young lady' " was a proper consideration in aggravation when sentencing for indecent liberties with a child); *People v. Lloyd*, 92 Ill. App. 3d 990, 995-96 (1981) (the trial court's inference of emotional injury to the three-year-old victim was an appropriate aggravating factor to consider when sentencing defendant for indecent liberties with a child); *People v. Fisher*, 135 Ill. App. 3d 502, 506 (1985) (rejecting the defendant's arguments that psychological harm should not be considered in aggravation because it is present to some degree in all sex crimes perpetrated on minors and that psychological harm could not be considered where it has not been proven; the court found that the defendant's act "created a strong probability of permanent psychological harm" and was thus properly considered as such); *People v. Burton*, 102 Ill. App. 3d 148, 150, 153-54 (1981) (the trial court's finding that " 'obviously [defendant's conduct] injected severe psychological trauma on the [eight- and nine-year-old] victims, a serious psychological trauma which may well be carried with them throughout their lives' " was properly considered in aggravation at sentencing).

¶ 27 Nevertheless, defendant argues that, absent specific evidence to support a finding that a child victim has suffered psychological harm, any psychological harm must be limited to that implicit in the offense itself. In support, defendant relies on *People v. Calva*, 256 Ill. App. 3d 865 (1993). In *Calva*, the defendant pleaded guilty to six counts of aggravated criminal sexual assault committed against A.G., a six-year-old girl. *Id*. at 867. At sentencing, the trial court told the defendant that he had "psychologically injured and scarred A.G. for life." *Id*. at 869. On appeal, the court found that it was improper for the court to consider any psychological harm to A.G. The court stated:

> "As for psychological harm, cases have held that it can be inferred that a child who is the victim of sexual assault has sustained psychological damage. [Citation.] However, no evidence was offered to show any psychological harm to A.G. Therefore, it would seem that the degree of any psychological harm used in aggravation would be minimal, as it would be limited to the degree of harm inherent in any aggravated sexual assault of a child." *Id*. at 875.

¶ 28 Here, however, unlike in *Calva*, there was evidence from which the trial court could infer psychological harm. Easton testified at the sentencing hearing about her interview with M.G. and about M.G.'s account of the sexual assault. M.G. was able to recall the details of the sexual assault. M.G. reported to Easton that her "cola" and "bootie" hurt, "because [defendant] licked it a lot." When asked by Easton how defendant's actions made her feel, M.G. responded: "[I]t was ugly." M.G. further reported that defendant's young daughter was playing in the same room when defendant sexually assaulted her and that defendant covered M.G. with a blanket so that his daughter could not see what he was doing. M.G. also reported that she told defendant that she was going to tell her mom what defendant was doing, and she described her mom's emotional reaction. The court specifically noted that M.G. was "consciously aware of what happened to her." The court also found that "[a] four-year-old child who recalls and describes the sexual molestation has suffered harm." Based on the foregoing, we find that the record raises a reasonable inference that M.G. suffered psychological harm, and therefore we find no error.

¶ 29 III. CONCLUSION

¶ 30 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 31 Affirmed.