2015 IL App (2d) 150270-U
No. 2-15-0270
Order filed December 29, 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. 14-CF-6 |
| JAVIER ROCHA-SOSA, | ) | Honorable Liam C. Brennan, |
| Defendant-Appellant. | ) | Judge, Presiding. |

---

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Jorgensen and Hudson concurred in the judgment.

**ORDER**

¶ 1 *Held*: Defendant's appeal is proper under Rule 604(d); however, defendant's arguments that the trial court considered improper factors at his sentencing hearing lack merit.

¶ 2 Defendant, Javier Rocha-Sosa entered a negotiated plea of guilty in the circuit court of Du Page County to two counts of predatory criminal sexual assault of a child (PCSA) (720 ILCS 5/11-1.40(a)(1) (West 2012)). In exchange for defendant's guilty pleas, the State agreed not to seek prison terms totaling more than 35 years and to nol-pros various other charges. (We note that the sentencing range for two PCSA convictions is between 12 and 120 years' imprisonment.

720 ILCS 5/11-1.40(a)(1) (West 2012); 730 ILCS 5/5-8-4(d)(2) (West 2012).) The trial court sentenced defendant to 15 years' imprisonment of each PCSA count, to be served consecutively. Defendant unsuccessfully moved to reconsider his sentence, arguing that the trial court considered improper factors in aggravation. This appeal followed.

¶ 3 Defendant entered his guilty plea before Judge Blanche Hill Fawell on September 30, 2014. As the factual basis for the plea, it was stipulated that, if the case proceeded to trial, G.A., who was born on November 14, 2000, would testify that defendant was her mother's live-in boyfriend; that on one occasion in August 2013, defendant made contact between his sex organ and G.A.'s; and that on one occasion between August 1, 2013, and November 13, 2013, defendant made contact between his mouth and G.A.'s sex organ. It was further stipulated that Robert Holguin, an investigator with the Du Page County State's Attorney's office who was assigned to the Children's Advocacy Center, would testify that he interviewed defendant; that defendant indicated that he was born on June 29, 1982; and that defendant admitted that he had engaged in a sexual relationship with G.A.

¶ 4 At defendant's sentencing hearing, Robert Holguin testified that he and another investigator conducted a "victim sensitive interview" of G.A. on January 2, 2014. A video recording of the interview was admitted into evidence and played during the hearing. During the interview, G.A. described several incidents occurring on the preceding Thanksgiving Day, on December 31, 2013, and on January 1, 2014, in which defendant had placed his penis in G.A.'s vagina, had her place her hand on his penis, had touched her breasts, and had kissed her on the mouth. G.A. estimated that, since August 2013, defendant had placed his penis in her vagina once or twice a month. The first time, he did so, she bled a lot. Defendant told her to throw away her pants, which had blood on them. He also told her not to tell her mother. G.A. stated that she

had been a virgin prior to the first assault and that "no other person had ever done such things to her." G.A. told Holguin that defendant had also at various times placed her mouth on his penis, had touched her vagina with his fingers, and had placed his mouth on her vagina.

¶ 5 Holguin testified that on January 2, 2014, he also interviewed defendant. Defendant had two children with G.A.'s mother, and he referred to G.A. as his stepdaughter (although the record indicates that he was not married to G.A.'s mother). Defendant admitted that he had touched G.A.'s breasts and her vagina and that he had sexual intercourse with her about five times. He had performed oral sex on G.A. and had her perform oral sex on him. G.A.'s mother discovered defendant engaged in sexual intercourse with G.A. during the early morning hours of January 2, 2014. She and defendant argued, and defendant then left the home.

¶ 6 On cross examination, Holguin testified that, at about 5 p.m. on January 2, 2014, he received word that defendant was on the telephone with G.A.'s mother and that defendant wanted to return home. Holguin proceeded to G.A.'s home and met with defendant. Defendant did not try to flee. He voluntarily accompanied Holguin to the Children's Advocacy Center, where Holguin interviewed him.

¶ 7 G.A. prepared a victim impact statement. In it, she wrote that defendant "destroyed" each member of her family and that her half-siblings (defendant's children) were "going to suffer the most." It hurt G.A. to hear her half-sister "cry and ask, [']Daddy, where are you.['] " G.A. further wrote, "I know that [defendant] needs to pay for what he did, but a part of me feels bad because my [half siblings] will not have a father in their lives."

¶ 8 Defendant presented witnesses who attested to his kindness, generosity, and supportiveness to family and friends. He also introduced evidence that he had heroically helped rescue people during a period of dangerous flooding in Mexico.

¶ 9 As defendant's appeal centers on two of the trial court's comments at sentencing, we set forth the court's comments (with the challenged comments in italics) as follows:

> "These kinds of cases are always very difficult for sentencing.
>
> There is nothing that I can do to change what happened. There is nothing that I can do to make [G.A.] and her family whole. I can't und[o] what happened.
>
> In this case, the minimum that the defendant could be sentenced to would be 12 years, and the State has agreed to a cap of 35 years.
>
> I have considered the factors in aggravation and mitigation; and in mitigation, I would point out that the defendant did not flee, after this happened.
>
> Listening to all of the testimony of the witnesses, the defendant is apparently very nice to his family. He is helpful as an uncle. He's generous to his family. He is a kind friend. The defendant in 1999 was brave and saved people from dying in a flooding incident.
>
> He does have a minimal criminal history. He certainly has no felony history; and most importantly, I believe the defendant deserves some credit for having pled guilty and accepted responsibility for these charges and made it so the victim, [G.A.] did not have to testify in a trial.
>
> Going to the factors in aggravation, the harm to the victim is tremendous. It has affected her relationship with her mother. It will impact every relationship she has in the future.
>
> In this case, [G.A.] considered the defendant to be her father. Something that I find to be of particular importance, when fashioning a sentence in this case, is that this was not a one time event. This was not an impulsive series of events, but they were planned.
>
> The defendant then, after he committed these acts, told [G.A.] not to tell. He had her throw away evidence.
>
> [(1.)] I don't believe that a minimum of 12 years in this case is appropriate. *In addition to the harm that [G.A.] has suffered, now, there's going to be two kids that grow up without their father; and the defendant has no one to blame but himself.*
>
> [(2.)] *And in this case, I find that the defendant stole [G.A.]'s innocence.* Her first kiss should have been with a boy that she thought was really cute. Her first sexual experience should have been a choice, and there's no amount of years that I can sentence you to that will give those things back to her." (Emphasis added.)

¶ 10 As noted, Judge Fawell imposed consecutive sentences of 15 years' imprisonment on each of the two counts of predatory criminal sexual assault of a child. Defendant filed a timely motion to reconsider his sentence. The motion was heard and denied by Judge Liam C. Brennan.

¶ 11 On appeal, defendant argues that the trial court relied on improper sentencing factors in aggravation—namely, the effect of his crime and punishment on victim's siblings and on the victim's innocence. Before turning to those issues, however, there is a threshold matter we must address.

¶ 12 The State initially contends that, because defendant did not move to withdraw his guilty plea, we must dismiss this appeal for lack of jurisdiction under Illinois Supreme Court Rule 604(d) (eff. Dec. 3, 2015). The State's argument, however, mischaracterizes defendant's claims on appeal and, therefore, misses the mark. Rule 604(d) prevents a defendant who enters a negotiated plea from challenging his sentence as excessive (see Ill. S. Ct. R. 604(d) ("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") (emphasis added)); it does not, however, prevent a guilty-plea defendant from challenging his sentence as improper. See *People v. Economy*, 291 Ill. App. 3d 212, 219 (1997) (a defendant who enters a negotiated plea and does not move to withdraw it "can still proceed on a motion to reconsider where the defendant appeals because the trial court misapplied the law by considering improper sentencing factors, and not merely because the sentence was excessive"). Here, because defendant asserts that the trial court relied on improper sentencing factors, we have jurisdiction to consider his appeal under Rule 604(d).

¶ 13 We note that the State argues we should not rely on *Economy* because *Economy* was

decided "pre-*Linder*"—referring to our supreme court's decision in *People v. Linder*, 186 Ill. 2d 67 (1999). This argument, too, is unavailing. In *Linder*, the court said "By agreeing to plead guilty in exchange for a recommended sentencing cap, a defendant is, in effect, agreeing not to challenge any sentence imposed below that cap *on the grounds that it is excessive*." (Emphasis added.) *Id.* at 74. Put differently, an improper sentence is *not* "a risk [the defendant] assumes as part of his [plea] bargain." *Id*. Thus, there is no support for the State's argument, either in *Linder* or in the plain language of Rule 604(d), that defendant was required to withdraw his plea before he could challenge his sentence as improper.

¶ 14 Turning to the merits, we note that, when imposing sentence, the trial court "must consider 'the nature and circumstances of the crime, the defendant's conduct in the commission of the crime, and the defendant's personal history, including his age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education.' " *People v. Martin*, 2012 IL App (1st) 093506, ¶ 48 (quoting *People v. Maldonado*, 240 Ill. App. 3d 470, 485-86 (1992)). Considerations bearing on the determination of an appropriate sentence also include "the protection of the public, deterrence, and punishment." *People v. Chirchirillo*, 393 Ill. App. 3d 916, 927 (2009). Moreover, "[t]he weight to be accorded each factor in aggravation and mitigation in setting a sentence of imprisonment depends on the circumstances of each case" and "[a]s long as the court does not consider incompetent evidence, improper aggravating factors, or ignore pertinent mitigating factors, it has wide latitude in sentencing a defendant to any term within the statutory range prescribed for the offense." *People v. Hernandez*, 204 Ill. App. 3d 732, 740 (1990). We review defendant's sentence under the abuse-of-discretion standard. *People v. Miller*, 2014 IL App (2d) 120873, ¶ 37.

¶ 15 Defendant first contends that the trial court's statement that, as a result of his

incarceration, there would "be two kids that grow up without their father [(G.A.'s half-sibilings)]; and the defendant has no one to blame but himself" shows that it improperly considered his incarceration as a factor in aggravation. According to defendant:

> "Whether *** children [other than the victim] will suffer because their father goes to prison as a matter of law cannot be aggravation. If it were, a defendant with no other children would presumably get a lesser sentence than one with many children. [Defendant] committed no criminal acts against his other children, and it was wrong for the court to treat the other children as if they had been victims.
>
> Further, the court by its own language found aggravation in the fact that [defendant] would be going to prison, *i.e.*, the sentence to be imposed upon him was itself aggravation. Under the latter logic, a high prison sentence would be more aggravating than a lesser sentence and theoretically could itself justify a still higher prison sentence. A low prison sentence would itself be mitigating and theoretically could itself justify a still lower prison sentence. Such logic is arbitrary, and inherently wrong."

¶ 16 This argument is not well taken and, after carefully reviewing the transcript of the trial judge's comments at sentencing, we reject its central premise: that "the sentence to be imposed was itself [considered in] aggravation." As Judge Brennan concluded when he denied defendant's motion to reconsider, Judge Fawell's comment was clearly a response to G.A.'s victim impact statement, and an attempt to reassure G.A. that she should not blame herself for "taking" her half-siblings' father away from them. This comment by Judge Fawell was not improper. The court was not required to refrain from mentioning the nature and extent of the offenses committed by the defendant or its impact on the victim's family, which in this case was also his family. See *People v. Andrews*, 2013 IL App (1st) 121623, ¶ 16. Accordingly, defendant has failed to show that the trial court improperly considered his incarceration as an aggravating factor.

¶ 17 We likewise find no merit to defendant's contention that Judge Fawell improperly considered a factor inherent in the offense—that defendant "stole [G.A.'s] innocence"—to be an

aggravating factor. The gist of defendant's contention is that the same could be said of anyone who commits PCSA, but that is not the case. To the extent that by "innocence" the trial court was referring to G.A.'s first sexual experiences, while it is often the case that victims of PCSA are sexually inexperienced, there is no requirement that they need be so. Thus, a reference to the victim's innocence would not be consideration of a factor "inherent" in the offense of PCSA. See 720 ILCS 5/11-1.40(a) (West 2012). Moreover, we also think it likely that the reference to G.A.'s "innocence" referred not just to her first sexual experiences, but also to the psychological stress she endured as a result of her family's loss of defendant due to his crimes and incarceration. That, too, would not have been improper. See *People v. Avila*, 2014 IL App (2d) 121311, ¶ 30 ("The psychological harm to the victim may also be considered as an aggravating factor.") (internal quotation marks omitted).

¶ 18 At any rate, even if "innocence" were inherent in the offense, we would not find the reference warranted reversal. See *Andrews*, 2013 IL App (1st) 121623, ¶ 15 ("the trial court is not required to refrain from any mention of the factors which constitute elements of an offense, and the mere reference to the existence of such a factor is not reversible error"). Instead, in context, we find that the trial court, by referring to the victim's innocence, was "commenting on proper factors, including the nature and extent of the offense[s] committed by the defendant *** and his propensity to prey on [a] vulnerable victim[ ]." *Id.* ¶ 16. Accordingly, the comment does not indicate that the trial court abused its discretion.

¶ 19 For the reasons stated, we affirm the judgment of the circuit court of Du Page County. As part of our judgment, we grant the State's request for State's Attorneys fees and hereby assess defendant $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014).

¶ 20 Affirmed.