2019 IL App (1st) 160616-U

FIRST DIVISION
March 29, 2019

No. 1-16-0616

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 13 CR 10829
	)	13 CR 12009
	)	13 CR 12010
	)	
ELPIDIO CONTRERAS,	)	Honorable
	)	Lawrence E. Flood,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Mikva and Justice Walker concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in imposing consecutive sentences on counts one through six in case number 13 CR 12010. Cause remanded for resentencing.

¶ 2 Following a bench trial, defendant, Elpidio Contreras, was convicted of one count of predatory criminal sexual assault (count one) and three counts of aggravated criminal sexual abuse (counts three, four and five) in case number 13 CR 10829, one count of aggravated criminal sexual abuse (count one) in case 13 CR 12009, and six counts of aggravated criminal

sexual assault (counts one through six), four counts of criminal sexual assault (counts seven through 10), and eight counts of aggravated criminal sexual abuse (counts eleven through eighteen) in case 13 CR 12010, and was sentenced to an aggregate term of 61 years' imprisonment, with certain counts ordered to be served consecutively. Defendant now appeals and argues that the consecutive sentences imposed on counts one through six in case 13 CR 12010 are improper in that they violate the prohibition on *ex post facto* laws and the right to elect to be sentenced according to the law in effect at the time of the offense. Specifically, defendant claims that at the time the offenses were committed, Illinois law did not allow for the imposition of consecutive sentences for sexual assault offenses that did not occur in a single course of conduct. For the following reasons, we vacate defendant's consecutive sentences in counts one through six in case 13 CR 12010 and remand for resentencing.

¶ 3 BACKGROUND

¶ 4 Defendant does not challenge the sufficiency of the evidence against him. Therefore, we recite only those facts necessary for the disposition of this appeal.

¶ 5 Defendant was charged under indictment 13 CR 10829, with two counts of predatory criminal sexual assault of a child, and three counts of aggravated criminal sexual abuse. L.H. testified that when she was 11-years-old she took singing lessons from defendant. During those lessons, over a year period of time, defendant inappropriately touched her breasts and vagina and inserted his finger into her vagina. Defendant also took photographs of her in a bikini and naked.

¶ 6 Defendant was also charged in case number 13 CR 12009 with one count of criminal sexual assault and one count of criminal sexual abuse. In that case, I.G. testified that she also

took singing lessons from defendant. During her second and final lesson, defendant touched her breast and asked her to remove her bra and touched her breast. He also put his hand down her pants and touched her vagina. When she read a Facebook post about defendant's arrest in 2013, she contacted the police.

¶ 7 In case 13 CR 12010, L.G. testified that at the time of trial she was 32-years-old. She met defendant when she was 11 at a restaurant. Defendant offered to give her singing lessons. At one lesson, defendant touched her vagina. The next time, he made her take her shirt off and touched her breasts. At subsequent lessons, he penetrated her vagina with his fingers, and then later with his penis. She estimated that he put his penis in her vagina every time she saw him, which was at least four or five times a month until she was 19 or 20-years-old. He also on occasion put his penis in her mouth and his penis into her anus. L.G. estimated that defendant raped her 300 to 400 times. After she read a news story about defendant's arrest in May 2013, she contacted police.

¶ 8 Defendant was arrested in May 2013. During an interview with police, he admitted taking pictures of L.H. in her underwear. He also admitted touching her breasts and between the lips of her vagina during her singing lessons.

¶ 9 At trial, defendant denied inappropriately touching any of the complainants.

¶ 10 Defendant was found guilty and was convicted of one count of predatory criminal sexual assault (count one) and three counts of aggravated criminal sexual abuse (counts three, four and five) in case number 13 CR 10829, one count of aggravated criminal sexual abuse (count one) in case 13 CR 12009, and six counts of aggravated criminal sexual assault (counts one through six), four counts of criminal sexual assault (counts seven through 10), and eight counts of aggravated

criminal sexual abuse (counts eleven through eighteen) in case 13 CR 12010, and was sentenced to an aggregate term of 61 years' imprisonment, with certain counts ordered to be served consecutively. This appeal followed.

¶ 11 ANALYSIS

¶ 12 Defendant argues that the trial court erred in imposing consecutive sentences on counts one through six in case number 13 CR 12010 because the acts that formed the basis of those offenses occurred in 1994 and 1995, when Illinois law did not require mandatory consecutive sentencing for offenses that were not part of a single course of conduct. See 730 ILCS 5/5-8-4 (West 1995). Specifically, defendant asserts the trial court erred by not informing him of his right to elect to be sentenced under the law in effect on the date of the occurrence in violation of the prohibition against *ex post facto* laws. See U.S. Const., art. I, §§ 9, 10; Ill. Const. 1970, art. I, § 16. Defendant urges this court to vacate the consecutive sentences on counts one through six in 13 CR 12010 and order the mittimus corrected to reflect concurrent sentences on those counts. The State agrees that the court erred in sentencing defendant to mandatory consecutive sentences on counts one through six in case 13 CR 12010 because when those offenses occurred, Illinois law did not require mandatory consecutive sentencing for offenses that were not part of a single course of conduct. However, the State disagrees with defendant in that the State believes that the cause should be remanded to the trial court for resentencing on those counts.

¶ 13 We are aware that defendant has forfeited review of this error by failing to object to the imposition of consecutive sentences in the trial court. *People v. Jackson*, 2011 IL 110615, ¶ 10. However, as the State acknowledges, defendant's due process rights were violated when the court failed to allow defendant to elect whether to be sentenced under the law in effect at the

time the offense was committed or the law in effect at the time of sentencing. *People v. Hollins*, 51 Ill. 2d 68, 71 (1972). Therefore, we review for plain error.

¶ 14 In 1994 and 1995, the time of the offense at issue in counts one through six of case number 13 CR 12010, section 5-8-4(a) of the Unified Code of Corrections provided that consecutive sentences for multiple convictions of aggravated criminal sexual assault were mandatory when committed in a single course of conduct. That section stated:

> "The court shall not impose consecutive sentences for offenses which were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective, unless, one of the offenses for which defendant was convicted was *** , or where the defendant was convicted of a violation of Section 12-13 [criminal sexual assault] or 12-14 [aggravated criminal sexual assault] of the Criminal Code of 1961, in which event the court shall enter sentences to run consecutively." 730 ILCS 5/5-8-4(a) (1995).

However, section 5-8-4(b) allowed for discretionary consecutive sentences when multiple convictions for aggravated criminal sexual assault were committed in separate courses of conduct. Subsection (b) stated:

> "The court shall not impose a consecutive sentence except as provided for in subsection (a) unless, having regard to the nature and circumstances of the offense and the history and character of the defendant, it is of the opinion that such a term is 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(b) (1995).

¶ 15 Our supreme court in *People v. Bole*, 155 Ill. 2d 188, addressed precisely the issue of whether consecutive sentences were mandatory for criminal sexual assault convictions where the defendant was convicted of three counts of criminal sexual assault for actions committed intermittently over the course of two weeks. In *Bole*, the defendant was convicted of each count and the trial court sentenced him to consecutive terms of 10, 10, and 8 years' imprisonment, interpreting section 5-8-4(a) (730 ILCS 5/5-8-4(a) (West 1995)), as requiring the imposition of consecutive sentences. This court reversed the trial court on the grounds that the multiple sexual assaults were not committed in a single course of conduct, and thus, consecutive sentences were not mandated by section 5-8-4(a). *People v. Bole*, 223 Ill. App. 3d 247 (1991). We remanded to the trial court expressly stating the trial court could consider discretionary consecutive sentences under section 5-8-4(b). *Id.*

¶ 16 Our supreme court affirmed the decision of this court, rejecting the State's argument that the consecutive sentence provision of section 5-8-4(a) applies whenever section 12-13 or section 12-14 offenses are committed, regardless of whether they were committed as part of a single course of conduct. The court stated that "the statute [section 5-8-4(a)] plainly requires the imposition of consecutive sentences only when the subject offenses are committed in a single course of conduct." *People v. Bole*, 155 Ill. 2d at 198. The court found that section 5-8-4(a) was a clear indication that mandatory consecutive sentences for convictions under section 12-13 or section 12-14 "are exceptions to the general rule to prohibiting such sentences when offenses are committed as part of a single course of conduct." *Id.* at 197. The cause was remanded to the trial court for resentencing. *Id.*

¶ 17 There is no dispute that counts one through six in 13 CR 12010 charged violations of section 12-14 and that the charges were not pled or proven as part of a single course of conduct. The State alleged in counts one through six that defendant committed separate acts. L.G. testified that defendant began to sexually assault her from the time she was 11 or 12 years old, in 1994 or 1995. L.G. testified that defendant had sexual intercourse with her about three or four times a month until she was 19 or 20 years old. Thus, the offenses did not occur as part of a single course of conduct and therefore, the imposition of mandatory consecutive sentences under section 5-8-4(a) was error. Although the State and the defendant agree that the trial court was of the mind that consecutive sentencing on these counts was mandatory, we are not as certain. However, out of an abundance of caution, we find that there is a reasonable basis for us to conclude that the trial court may have believed that it was required to impose mandatory consecutive sentences for the aggravated criminal sexual assault convictions in counts one through six because we see nothing in the record that suggests that the trial court was exercising its discretionary authority under section 5-8-4(b) in imposing the consecutive sentences in counts one through six. Therefore, a remand for resentencing on only counts one through six in 13 CR 12010 is required.

¶ 18 The only real contention between the State and the defendant is whether this court should correct the mittimus to reflect concurrent sentences on the counts in question, as requested by defendant, or whether we should remand for resentencing as requested by the State. Consistent with *People v. Bole*, 223 Ill. App. 3d 247 (1991), we vacate defendant's consecutive sentences on counts one through six in case 13 CR 12010 and remand to the trial court for resentencing. See also, *People v Falcon*, 292 Ill. App. 3d 538 (1997); *People v. Pence*, 267 Ill. App. 3d 461

(1994). Also consistent with *Bole*, we find that, on remand, the trial court may consider discretionary consecutive sentences for counts one through six in accordance with section 5-8-4(b), if it finds that such a term is required to protect the public from further criminal conduct by defendant and the court states the reason for the imposition of consecutive sentences on the record. 730 ILCS 5/5-5-8-4(b) (West 1995).

¶ 19 CONCLUSION

¶ 20 In light of the foregoing, we vacate defendant's consecutive sentences on counts one through six in case 13 CR 12010, and remand to the trial court for resentencing on those counts at which time the court may impose discretionary consecutive sentences under section 5-8-4(b). 730 ILCS 5/5-5-8-4(b) (West 1995); *Bole*, 155 Ill. 2d at 198. After sentence is imposed on counts one through six in 13 CR 1210, we order the court to clarify whether that sentence imposed is to be served concurrent with or consecutive to the sentences imposed on counts seven through eighteen in 13 CR 1210 and whether concurrent with or consecutive to the sentences imposed in cases 13 CR 10829 and 13 CR 12009. We affirm the judgment of the trial court in all other aspects.

¶ 21 Affirmed in part and vacated in part. Cause remanded with directions.