2019 IL App (1st) 162757-U

No. 1-16-2757

Order filed February 1, 2019

Sixth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 274
	)	
HECTOR CASTELAN,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in summarily dismissing defendant's postconviction petition, which claimed ineffective assistance of appellate counsel, for not challenging his prison sentences for predatory criminal sexual assault and aggravated criminal sexual abuse on direct appeal.

¶ 2 Following a 2013 jury trial, defendant Hector Castelan was convicted of two counts of predatory criminal sexual assault (predatory assault) and one count of aggravated criminal sexual abuse (aggravated abuse) and sentenced to consecutive prison terms of 30, 30, and 7 years

respectively. We affirmed on direct appeal. *People v. Castelan*, 2015 IL App (1st) 131638-U (unpublished order under Supreme Court Rule 23). Defendant now appeals from the summary dismissal of his postconviction petition, contending that it raised an arguable claim that direct appeal counsel rendered ineffective assistance by not contending that his sentences were excessive. We affirm.

¶ 3 Defendant was arrested and initially charged with predatory assault (720 ILCS 5/12-14.1(a)(1) (West 2008)) of S.B. and A.L. while each was under 13 years old. He was later indicted for various offenses against S.B., including predatory assault and aggravated abuse (720 ILCS 5/12-16(c)(1)(i) (West 2008)), committed on various dates between June 15 and November 29, 2009, when S.B. was under 13 years old.[1] On the State's pretrial motion, the court allowed other-crimes evidence of defendant's sexual contact with A.L., in Illinois and earlier when they lived in Utah, to be admitted for the purposes of intent, motive, knowledge, and propensity.

¶ 4 At trial, Claudia B. testified that she married defendant in Utah in 2007 when she had three daughters, including S.B. and A.L. Defendant was not the natural father of S.B. or A.L. After they married, defendant lived with Claudia and her family. S.B. and A.L. accused defendant of sexual abuse in early 2009, and Utah authorities investigated but no charges were filed.[2] Claudia and her family, including defendant, moved to Illinois in mid-2009. They lived for a few months with a relative, then found a home. After Thanksgiving 2009, when S.B. and A.L. were nine and six years old, they told Claudia that defendant sexually abused them. Claudia reported the allegations to police.

[1] Defendant was charged separately with offenses against A.L. in case 10 CR 1838, but those charges were nol prossed after defendant's sentencing in this case.

[2] Defendant did not object to this testimony, and cross-examined Claudia regarding the allegations and lack of charges in Utah.

¶ 5 S.B. testified that she was nine years old in 2009. Defendant lived with her family, and she considered him "our father." While they were living in Utah, he put his penis and fingers into her vagina. She told Claudia that he did so.[3] When he and S.B.'s family lived with a relative upon arriving in Illinois in mid-2009, defendant put his penis into S.B.'s vagina while the other children slept in the same room. Once the family had a home in Illinois, he did so again on multiple occasions when he was watching the children while Claudia was at work, taking S.B. to the bedroom he shared with Claudia and placing his penis into her vagina. On multiple occasions, he took S.B.'s video game and used it to lure her into his bedroom where he placed his finger in her vagina. S.B. told Claudia about defendant's actions in November 2009 after Thanksgiving.

¶ 6 A.L. testified that she was six years old in 2009. Defendant was "our dad" when he lived with her family. Defendant repeatedly placed his penis into her buttocks when they lived in Utah, when they lived temporarily with a relative in Illinois, and when they had a home in Illinois. In that home, he did so in Claudia's bedroom while she was at work. He also touched her vagina. A.L. told Claudia about defendant's actions while in Utah, and again after Thanksgiving 2009.

¶ 7 Cinthia Molina, a friend of Claudia, testified that S.B. told her on November 29, 2009, that defendant had placed his penis in her vagina.

¶ 8 Dr. Ronald Kim, a physician, testified to examining S.B. on December 1, 2009. S.B. had inflamed skin around her vagina. S.B. told Dr. Kim that defendant had touched her vagina and buttocks with his finger and penis.

[3] Defendant did not object to S.B.'s testimony regarding occurrences in Utah.

¶ 9 Police detective Emily Rodriguez testified that she observed S.B.'s victim-sensitive interview where S.B. described in detail defendant's repeated sexual contact with her in Utah and Illinois. Detective Rodriguez and an Assistant State's Attorney (ASA) testified that defendant gave post-arrest statements admitting to sexual contact with S.B. and A.L. The ASA read defendant's two written statements, separately concerning S.B. and A.L., into the record.

¶ 10 In his statement regarding S.B., defendant admitted to touching her vagina with his hand three or four times when she was eight years old before they left Utah, touching her vagina twice in mid-2009 while living with a relative in Illinois, and placing his penis into her vagina in late November 2009. In his statement regarding A.L., defendant admitted to placing his finger into her buttocks sometime in November 2009.

¶ 11 The jury found defendant guilty of two counts of predatory assault and one count of aggravated abuse.

¶ 12 The presentencing investigation report (PSI) indicated that defendant was born in January 1985 and had only one prior offense, driving under the influence of alcohol (DUI) in Utah. He was the youngest of five children, raised by both parents, and denied any abuse or neglect in his childhood beyond his father being "a very strict disciplinarian." He was married from 2007 to 2009 to a woman with three children, and they had two children in that marriage. He "described his relationship with his wife and all of the children as very close." He completed high school in Mexico and obtained his GED in 2012 while in jail. He was working "side jobs" since 2008, and before that in Utah. He described his physical health as "good" and denied having any diagnoses or treatment for mental or behavioral disorders. He denied abusing alcohol or using any drugs, except for trying cocaine in his youth, but acknowledged his 2008 DUI offense. When asked in

the PSI for his version of the offense, defendant "stated that he is innocent of this case," Claudia argued with him regularly, and she "often threatened to have [him] locked up or deported." He told the PSI preparer that he believed Claudia "made up these charges to have him locked up."

¶ 13 At the April 2013 sentencing hearing, the parties made no corrections or additions to the PSI. The State argued that defendant was subject to consecutive sentencing and eligible for an extended term for the two counts of predatory assault. The State argued defendant's acts towards A.L., and towards S.B. in Utah, as additional aggravating factors. The State argued that "defendant has not in any way, shape, or form accepted responsibility for his actions." Defense counsel noted that defendant had only one prior conviction, for misdemeanor DUI. He argued that the allegations of actions in Utah should not be considered in aggravation in part because "the charges in Utah were never filed, never litigated."

¶ 14 Defendant chose not to personally address the court.

¶ 15 The court stated that it read the PSI, found his criminal history was "not much," and stated that it considered his "rehabilitative potential" as well as "the facts of the case." The court found the facts of the case to be "the most aggravating thing," as "defendant abused the trust and his position as a stepfather to these young girls, to abuse them." The court also found that "defendant has not taken any responsibility for his actions" and that its sentence was intended to be "a significant penalty so that the defendant will not get an opportunity to inflict this type of damage to any other young girls." The court sentenced defendant to consecutive prison terms of 30 years each for two counts of predatory assault and 7 years for one count of aggravated abuse.

¶ 16 On direct appeal, defendant contended that the trial court erred in allowing the State to elicit testimony regarding his prior sexual contact with S.B. in Utah, and he sought to correct the

mittimus regarding his presentencing detention credit. *Castelan*, 2015 IL App (1st) 131638-U, ¶ 2. Noting that the defense had not objected to testimony regarding his abuse of S.B. in Utah, we found that counsel acquiesced in its admission under a sound trial strategy of examining the lack of charges in Utah. *Id*. ¶¶ 48, 54-61. We corrected the mittimus and otherwise affirmed. *Id*. ¶ 62.

¶ 17 Defendant filed his *pro se* postconviction petition in early June 2016 claiming, in relevant part, that his sentence was excessive and that appellate counsel failed to raise meritorious issues, including the excessiveness of his sentence, on direct appeal.

¶ 18 The court summarily dismissed the petition in August 2016. In relevant part, the court found that defendant's sentences were within the statutory ranges, that an excessive-sentence claim is not constitutional in nature, and that defendant was not prejudiced by appellate counsel not raising his claims on direct appeal.

¶ 19 On appeal, defendant contends that the summary dismissal of his postconviction petition was erroneous because it raised an arguable claim of ineffective assistance of appellate counsel for not challenging his sentences on direct appeal.

¶ 20 A postconviction petition may be summarily dismissed within 90 days of filing if "the court determines the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2016). A petition is summarily dismissed if it has no arguable basis in law or fact because it relies on an indisputably meritless legal theory or a fanciful factual allegation, including theories contradicted by the record. *People v. Boykins*, 2017 IL 121365, ¶ 9. We review *de novo* the summary dismissal of a postconviction petition. *Id*. In *de novo* review, we may affirm on any basis supported by the record. *People v. Shaw*, 2018 IL App (1st) 152994, ¶ 59.

¶ 21 Claims of ineffective assistance of counsel, including appellate counsel, are governed by the familiar two-prong test requiring a defendant to establish that counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by counsel's deficient performance. *People v. Dupree*, 2018 IL 122307, ¶ 44; *People v. Guerrero*, 2018 IL App (2d) 160920, ¶ 42. A petition claiming ineffectiveness is not summarily dismissed if counsel's performance was arguably unreasonable and the defendant was arguably prejudiced. *People v. Viramontes*, 2017 IL App (1st) 160984, ¶ 46. Appellate counsel need not brief every conceivable issue; that is, counsel is not incompetent for not raising contentions of error that are without merit in counsel's judgment unless that assessment is patently incorrect. *Guerrero*, 2018 IL App (2d) 160920, ¶ 43; *Viramontes*, 2017 IL App (1st) 160984, ¶ 72. "Thus, the prejudice inquiry requires the reviewing court to examine the merits of the underlying issue." *Id*.

¶ 22 Predatory assault was and is a Class X felony punishable by 6 to 60 years' imprisonment. 720 ILCS 5/12-14.1(b)(1) (West 2008). Aggravated abuse was and is a Class 2 felony punishable by 3 to 7 years' imprisonment. 720 ILCS 5/12-16(g) (West 2008); 730 ILCS 5/5-4.5-35(a) (West 2016). Consecutive sentencing is mandatory for predatory assault. 730 ILCS 5/5-8-4(d)(2) (West 2016). A sentence within statutory limits is reviewed for abuse of discretion, and we may alter a sentence only when it varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Reed*, 2018 IL App (1st) 160609, ¶ 59. The trial court has broad discretion, so we cannot substitute our judgment merely because we would weigh the sentencing factors differently. *People v. Jones*, 2018 IL App (1st) 151307, ¶ 72. The trial court is accorded such deference because it has a superior opportunity to evaluate and

weigh a defendant's credibility, demeanor, character, age, mental capacity, social environment, and habits. *Id.*

¶ 23 While the court may not rely on bare arrests or pending charges in aggravation of a sentence, it may rely on evidence of a defendant's other criminal activity that has not resulted in a conviction if the court finds the evidence relevant and accurate. *People v. Minter*, 2015 IL App (1st) 120958, ¶ 148. This is so even when the defendant was acquitted of that conduct. *People v. Deleon*, 227 Ill. 2d 322, 340 (2008).

¶ 24 The court must consider both the seriousness of the offense and the defendant's rehabilitative potential. Ill. Const. 1970, art. I, § 11. While the court may not disregard mitigating evidence, it determines the weight of such evidence. *People v. Brown*, 2017 IL App (1st) 142877, ¶ 63. We presume the court considered all mitigating factors on the record absent an affirmative indication to the contrary. *Reed*, 2018 IL App (1st) 160609, ¶ 62. The most important sentencing factor is the seriousness of the offense, and the court need not give greater weight to rehabilitation or mitigating factors than to the severity of the offense. *Id*. Thus, the presence of mitigating factors does not require a minimum sentence or preclude a maximum sentence. *People v. Harmon*, 2015 IL App (1st) 122345, ¶ 123.

¶ 25 Here, we find that the circuit court did not abuse its discretion in sentencing defendant to consecutive prison terms of 30 years each for predatory assault and 7 years for aggravated abuse, the former being in the lower half of the applicable sentencing range. The trial evidence showed that defendant repeatedly abused S.B., his stepdaughter, over a period of several months when she was eight or nine years old. The evidence also showed that defendant repeatedly abused A.L., another stepdaughter, over a period of several months when she was only six years old.

Neither defendant's lengthy course of repeated abuse, nor the familial relationship he exploited, were inherent to predatory assault or aggravated abuse as charged. The abuse of A.L. at the tender age of six was another aggravating factor not inherent to the charges. We find ample basis for the court to find defendant's offenses and the surrounding circumstances to be particularly aggravating.

¶ 26 As to mitigation, the court expressly stated that it read the PSI and considered defendant's rehabilitative potential, and expressly noted that his criminal record was sparse. In light of the considerable deference we extend on direct appeal to the trial court's sentencing decision, we conclude that an excessive-sentence claim under these circumstances was not of arguable merit. Thus, appellate counsel was not ineffective for not raising such a contention, and the summary dismissal of defendant's petition was not erroneous.

¶ 27 In reaching this conclusion, we are not persuaded by defendant's argument that his sentencing as a whole is effectively a life sentence. Assuming *arguendo* that 67 years is effectively a life sentence for him, that by itself does not constitute an abuse of discretion or other reversible error. "[T]his court has held that where an adult defendant receives a sentence that approaches the span of the defendant's lifetime, that term does not implicate the eighth amendment right barring cruel and unusual punishment." *People v. Thomas*, 2017 IL App (1st) 142557, ¶ 28. We have similarly held that an adult "defendant's mandatory natural life sentence does not shock the moral sense of community and does not violate the proportionate penalties clause." *People v. Pittman*, 2018 IL App (1st) 152030, ¶ 42. While *Pittman* involved multiple offenses of first degree murder, the lengthy sentencing range and mandatory consecutive sentencing for predatory assault (as stated above) clearly demonstrate our legislature's intention

that predatory assault is among the gravest offenses and should bear some of the strictest penalties. Also, defendant's sentencing was not the result of mandatory minimums but consisted of discretionary sentences that in the aggregate were firmly in the middle of the applicable range; that is, 67 years out of a possible 127 years.

¶ 28 We are also not persuaded by defendant's reliance on *People v. Robinson*, 221 Ill. App. 3d 1045 (1991). We do not compare the sentences of defendants in unrelated cases. *Brown*, 2017 IL App (1st) 142877, ¶ 65 (citing *People v. Fern*, 189 Ill. 2d 48, 56 (1999)). "The propriety of the sentence imposed in a particular case cannot properly be judged by the sentence imposed in another, unrelated case. Simply because a lesser sentence was imposed in another case does not lead to the conclusion that the more severe sentence imposed in the case at hand is excessive." *Fern*, 189 Ill. 2d at 56.

¶ 29 Accordingly, the judgment of the circuit court is affirmed.

¶ 30 Affirmed.