2014 IL App (1st) 120928-U

FOURTH DIVISION
SEPTEMBER 30, 2014

No. 1-12-0928

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 20329
	)	
JOSE LOPEZ,	)	Honorable
	)	Angela Munari Petrone,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Epstein concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's convictions and sentences for two counts of criminal sexual assault affirmed where his aggregate 30-year sentence is not excessive; the $150 Crime Lab DUI Analysis fee vacated where it was erroneously assessed.

¶ 2 Following a jury trial, defendant Jose Lopez was convicted of two counts of criminal sexual assault and sentenced to consecutive prison terms of 15 years, for an aggregate sentence of 30 years' imprisonment. On appeal, defendant does not challenge his conviction, but contends that his 30-year sentence is excessive because the trial court imposed the maximum term allowed

and failed to give proper consideration to his lack of criminal history and substantial mitigating evidence. Defendant also contends that the $150 Crime Lab DUI Analysis fee must be vacated because he was not convicted of a DUI offense.

¶ 3 Because defendant does not challenge his convictions, a detailed discussion of the evidence presented at trial is not necessary. The evidence established that about 11 p.m. on October 6, 2008, defendant entered a bedroom where his two daughters were sleeping, removed the pajama bottoms and underwear from his 13-year-old daughter, A.L., got on top of her, and inserted his penis into her vagina for about five minutes. Defendant left the room, returned two minutes later, and again engaged in vaginal intercourse with A.L. for another three minutes, stopping when her sister, who was sleeping on another bed, turned around. When defendant left the room, A.L. woke her sister and the two girls barricaded themselves in a bedroom and called their mother, who was on her way home from work with their brother. Defendant was arrested that night, and after being advised of his *Miranda* rights, told police that he had been drinking and sexually penetrated his daughter.

¶ 4 Defendant gave a written statement to an assistant State's Attorney in which he stated that he had been drinking beer all day, entered his daughter's bedroom to see if she knew how to work the remote control, and then decided to touch her vagina. Defendant further stated that he became aroused, pulled down A.L.'s shorts and underwear, got on top of her, and inserted his penis inside her vagina for about three minutes. Defendant stated that he left the room for a few seconds, returned, and engaged in sexual intercourse with A.L. for another two minutes, ejaculating outside of her. Defendant also stated that he was sorry for what he had done because

he knew it was wrong, and he wanted A.L.'s forgiveness. Vaginal swabs taken from A.L. contained semen that matched defendant's DNA profile.

¶ 5 Defendant testified that he entered A.L.'s bedroom to have her reprogram the remote control, then returned to the living room. The remote still was not working, so he returned to her room for her to reprogram it again, then returned to the living room. Defendant denied that he sexually assaulted his daughter and denied making an inculpatory statement. He testified that he did not read the written statement because he did not have his reading glasses and cannot read English, and he signed the statement believing he was giving the police permission to investigate the case. Following deliberations, the jury found defendant guilty of two counts of criminal sexual assault.

¶ 6 At sentencing, defense counsel reviewed the presentence investigation report (PSI) and informed the trial court that defendant was taking prescription medication for his liver or kidneys. The court noted that the PSI indicated defendant was taking medication for high cholesterol. The State presented a victim impact statement from defendant's older daughter, C.L., who stated that her father's actions were influenced by alcohol and that he should not be in prison "for many years" because he was "getting old and soon will die." The State presented a second victim impact statement from Julia H., who is A.L.'s mother and defendant's common-law wife, who also asked that "his sentence not be long" because he was already in jail and paid for his actions by losing his family. Defense counsel presented several letters from family and friends in support of defendant, including one from his son, J.L., who stated that defendant was "a wonderful person" who was "taken away for something he didn't do."

¶ 7 The State asserted that none of the 13 statutory factors in mitigation existed in this case, but that several factors in aggravation did exist. The State argued that defendant's conduct caused or threatened serious harm, including extreme psychological harm to each member of his family. It further noted that defendant had two prior arrests for domestic battery and was placed on supervision for driving under the influence of alcohol. It also noted that defendant was arrested in Virginia in 1986 on charges that he abducted and raped a 15-year-old girl, but that case was dismissed. The State argued that a severe sentence was necessary in this case to deter others from committing similar crimes, and because defendant held a position of trust and authority over his daughter. It further noted that defendant refused to acknowledge what he did and showed no remorse, and therefore, he could not receive treatment, which rendered him a danger to his family and the public, and required a sentence as close as possible to the maximum.

¶ 8 Defense counsel argued that defendant was 53 years old, and given his high blood pressure, kidney and liver issues, a lengthy sentence would potentially be a life sentence. Counsel noted that defendant had no prior convictions and argued that this was an isolated incident which would not likely recur. Counsel acknowledged that the charges in this case were very serious, but pointed out that defendant did not use any physical violence during the offense and that the two incidents occurred within 10 minutes of each other.

¶ 9 In allocution, defendant stated that when he drank, his wife did not want to sleep with him, so she slept in another room, and he would find her, remove her clothes, and sleep with her. Defendant stated that on the night of this incident, he fell asleep, and when he awoke, he thought it was the middle of the night and went to look for his wife, but she was not in her room. Defendant said that he went to his daughter's bedroom and mistakenly thought it was his wife

sleeping in the bed, so he removed her clothes. He then felt ill, went to the kitchen and drank two beers, returned to the bed, hugged the person he thought was his wife, and realized it was his daughter. Defendant denied having sex with his daughter and said that the witnesses' testimony was not true. He claimed that he told police that nothing happened and his daughter told them that she was dreaming, but the police then said that he admitted that he committed the offense.

¶ 10 The trial court thoroughly reviewed all the information contained in the PSI, noting that defendant had some work history, but that he indicated that his frequent drinking caused him to lose his job. The court expressly stated that it considered the fact that defendant had no prior convictions, and it would not consider his prior arrests because those cases were dismissed or resulted in supervision. The court found that A.L.'s testimony was credible and that there was no doubt that defendant had sexually assaulted her because his semen was found inside her body. The court noted that defendant was in a position of trust and authority, and that he should have been protecting his daughter rather than defiling her. The court further found that defendant's conduct caused harm and adversely affected his entire family, and that a severe sentence was necessary to deter others. The court added:

> "I will also state that the harm to [A.L.] and her family is far reaching, and it was also aggravated by the defendant's statements that he made today still refusing to acknowledge what he has done and still claiming that he did not do what he was charged with doing. I find that to be very aggravating. The defendant is not repentant in the least for what he had done."

The court sentenced defendant to consecutive prison terms of 15 years for an aggregate term of 30 years' imprisonment.

¶ 11 On appeal, defendant contends that his 30-year sentence is excessive because the trial court imposed the maximum term allowed and failed to give proper consideration to his lack of criminal history and substantial mitigating evidence. Defendant argues that due to his age and his health, the sentence is most likely a natural life sentence for him, and effectively precludes any possibility of rehabilitation. He claims that his odds of committing a new offense after the age of 65 are extremely low, and those odds are further reduced by the restrictions placed on sex offenders. Defendant asserts that he committed the offense under very specific circumstances when he was drunk and alone in the house with his daughters, and it is very unlikely that he would ever find himself in similar circumstances again. Defendant notes that those who provided statements at sentencing indicated that they wished to see him receive a shorter sentence, and claims that his sentence is against the spirit and purpose of the law.

¶ 12 Criminal sexual assault is a Class 1 felony with a sentencing range of 4 to 15 years' imprisonment. 720 ILCS 5/12-13(b)(1) (West 2008); 730 ILCS 5/5-8-1(a)(4) (West 2008). The trial court has broad discretion in imposing an appropriate sentence, and where, as here, that sentence falls within the statutory range, it will not be disturbed on review absent an abuse of discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). An abuse of discretion exists where a sentence is at great variance with the spirit and purpose of the law, or is manifestly disproportionate to the nature of the offense. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010).¶ ¶

¶ 13 Here, we find that defendant's sentence was not excessive and that the trial court did not abuse its discretion when it imposed the aggregate 30-year prison term. The record shows that the trial court considered all of the factors in aggravation and mitigation, the victim impact statements in which a short sentence was requested, letters submitted on defendant's behalf, and

all of the information contained in defendant's PSI, which included his age and his medical conditions. The court expressly stated that it considered the fact that defendant had no prior convictions, and it declined to consider his prior arrests. The trial court found, however, that a severe sentence was warranted in this case based on the seriousness of the offense where defendant, who should have been protecting his 13-year-old daughter, instead sexually assaulted her and caused harm to his entire family. The court also found that a severe sentence was necessary to deter others from committing similar offenses. We observe that a sentencing court need not give defendant's potential for rehabilitation greater weight than the seriousness of the offense (*People v. Anderson*, 325 Ill. App. 3d 624, 637 (2001)), and when the trial court determines that a severe sentence is warranted, defendant's age has little import (*People v. Rivera*, 212 Ill. App. 3d 519, 526 (1991)).

¶ 14 Significantly, the court found it "very aggravating" that, although his semen was found inside his daughter, defendant maintained that he did not assault his daughter, refused to acknowledge his actions, and was "not repentant in the least for what he had done." The record shows that defendant further maintained that the State's witnesses, including his daughters, did not testify truthfully about what had occurred. This court will not reweigh the sentencing factors or substitute our judgment for that of the trial court (*Alexander*, 239 Ill. 2d at 213), and based on the record before us, we cannot say that the sentence imposed by the court is excessive, manifestly disproportionate to the nature of the offense, or that it departs significantly from the intent and purpose of the law. *People v. Fern*, 189 Ill. 2d 48, 56 (1999).

¶ 15 Defendant also contends, the State concedes and we agree that the $150 assessment for the Crime Lab DUI Analysis fee (730 ILCS 5/5-9-1.9 (West 2008)) must be vacated because he

was not convicted of a DUI offense. Accordingly, we vacate that fee from the Fines, Fees and Costs order.

¶ 16 For these reasons, we vacate the $150 Crime Lab DUI Analysis fee from the Fines, Fees and Costs order, and affirm defendant's convictions and sentences in all other respects.

¶ 17 Affirmed as modified.