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2018 IL App (3d) 160588-U

Order filed November 28, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-16-0588 Circuit No. 15-CF-234
KENNETH WILLIAMS,	)	Honorable Kathy S. Bradshaw-Elliott,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Circuit court did not abuse its discretion in sentencing defendant; (2) fines imposed after the circuit court lost jurisdiction are vacated; (3) DNA analysis fee is vacated.

¶ 2 Defendant, Kenneth Williams, appeals following his conviction for, *inter alia*, criminal sexual assault. He argues that the circuit court abused its discretion in sentencing him to 25 years' imprisonment. We affirm defendant's sentences but remand the matter so the circuit court

may enter a written order assessing fines in conformance with its oral pronouncement at sentencing.

¶ 3 FACTS

¶ 4 The State charged defendant with two counts of criminal sexual assault (720 ILCS 5/11-1.20(a)(1) (West 2014)), two counts of criminal sexual abuse (*id.* § 11-1.50(a)(1)), and resisting a peace officer (*id.* § 31-1). The indictment alleged that defendant held J.W. down on a bed, placed his penis in her vagina, placed his mouth on her vagina, fondled her breasts, placed his mouth on her breasts, and then struggled with two arresting officers.

¶ 5 The evidence at defendant's bench trial indicated that defendant was drinking with J.W.'s son, Damien, at J.W.'s apartment on May 7, 2015. At some point, defendant and Damien became locked out of the apartment, and J.W. returned from work to let them back in. When she arrived at the apartment, J.W. noticed that Damien was extremely intoxicated, and asked defendant to help bring him inside. When she entered the apartment, however, she noticed that defendant had followed her inside without Damien. J.W. testified that once inside the apartment, defendant began to grope her. She ran onto her balcony to yell for help, but defendant covered her mouth and dragged her back into the apartment.

¶ 6 J.W. testified that defendant dragged her down the hallway and into her bedroom, removed her clothing, and threw her onto her bed. She testified that defendant repeatedly threatened her, stating:

> "[He was] [t]elling me that you better not call the police after I leave. If you do, I'm going—he's like I'm going to have to come back and hurt you and then when I get ready—if I want to come back and have sex with you, you better let me—you better be ready to do it and you better not tell anybody about this."

J.W. testified that defendant's mouth made contact with her breasts and vagina and that defendant placed his penis in her vagina.

¶ 7 Damon Wirtz, who lived near J.W.'s apartment, testified that he heard a woman yelling for help on May 7, 2015. When he looked outside, he saw J.W. on her hands and knees on her balcony, with a man trying to drag her inside. Wirtz called 911. J.W. testified that the police arrived at her apartment door while defendant was on top of her. He jumped off of her and told her, "You better not say anything."

¶ 8 Defendant, testifying on his own behalf, disputed J.W.'s account. He testified that J.W. invited him into her apartment. He also testified that J.W. was "hysterical" about Damien's drinking problem. Defendant asserted that J.W. had a "blowup," in the course of which she fell through the doorway onto her balcony. He picked her up from the balcony in an effort to console her. She then began kissing him and then led him to her bedroom where they had consensual sexual intercourse. Defendant admitted that he had previously been convicted of a felony, aggravated criminal sexual abuse, because he "kissed a 14 year old."

¶ 9 When the police arrived at J.W.'s apartment, she initially stated that she just wanted defendant to leave. However, the officers then escorted defendant outside and spoke to J.W. privately, at which point she described a version of events similar to her testimony at trial. When the officers tried to arrest defendant, he refused to bring his hands together, prompting one officer to bring him to the ground.

¶ 10 The court found defendant guilty on all counts. The court noted that defendant's version of events was less credible than that presented by J.W.

¶ 11 Defendant's presentence investigation report (PSI) showed that he had prior convictions for aggravated criminal sexual abuse and burglary in 2006. The PSI also showed defendant had

worked a number of full-time jobs while not incarcerated. It further showed that defendant claimed to have received his general educational diploma, though that was not confirmed. Regarding his drug and alcohol consumption, the PSI indicated that defendant began drinking alcohol when he was eight or nine years old, and that "at his heaviest level of use he was drinking approximately 15-20 beers at a time or a half gallon of Crown Royal." He began smoking marijuana when he was 14 years old and also used cocaine and heroin. He had drunk alcohol, and used cocaine and the club drug "Molly" on the day he was arrested for the present offense. He successfully completed some kind of treatment in both 2000 and 2002, although the PSI does not indicate what the treatment was for.

¶ 12 Defendant's sentencing hearing was held on September 26, 2016. Neither the State nor the defense called any witnesses, but J.W. read a victim impact statement and defendant made a brief statement in allocution, in which he "apologize[d] that [he] wasn't in better control of the situation." In its argument, the State pointed out that defendant was intoxicated and on drugs at the time of the offense and emphasized his criminal history.

¶ 13 In his argument, defense counsel asserted that defendant's prior conviction for aggravated criminal sexual abuse resulted from him kissing a minor. Counsel also pointed out that defendant was intoxicated at the time of the instant offense, arguing: "Now obviously intoxication is not a defense but it's certainly a factor the Court can consider and to what *** his demeanor and intentions were at the time of this alleged offense." Later, counsel argued: "He was intoxicated on this, and I think you can consider that *** a mitigating factor in that he wasn't completely *** among his faculties at the time of this particular event ***."

¶ 14 Prior to announcing the sentence, the court stated:

> "[The] Court has to look at any factors in aggravation or mitigation. In terms of aggravation certainly it's his prior criminal sexual abuse. In mitigation—I'm not sure being drunk or high is a mitigating factor under the statute."

The court sentenced defendant to two 11-year terms of imprisonment for both counts of criminal sexual assault and 3 years' imprisonment for the first count of criminal sexual abuse, with those sentences each running consecutively. The court ordered a 3-year sentence for the remaining count of criminal sexual abuse and a 364-day sentence for resisting a peace officer to run concurrently. Finally, the court imposed four $200 sexual assault fines and a $500 sex offender registration fine. The court added, "[t]here will be costs," but did not specifically reference any further monetary assessments. The court issued a written sentencing order that same day, referencing only the imposed prison terms on the first four counts (criminal sexual assault and criminal sexual abuse).

¶ 15 Defendant filed a notice of appeal on September 29, 2016, three days after his sentencing hearing. On October 31, 2016, the circuit court issued a signed "Order Fixing, Assessing, and Executing Judgement for Fine, Fees, and Costs." That order reflected the $800 in sexual assault fines and a $500 sex offender registration fine referenced at sentencing. It also reflected a number of other fines, as well as a $250 DNA analysis fee.

¶ 16 ANALYSIS

¶ 17 On appeal, defendant argues that the circuit court abused its discretion in sentencing him to an aggregate term of 25 years' imprisonment. He also argues that the additional fines imposed after he filed his notice of appeal must be vacated. Finally, defendant argues that the circuit court erred in ordering him to pay a $250 DNA analysis fee. We address each argument in turn.

¶ 18 I. Sentencing

¶ 19 Defendant contends that the circuit court abused its discretion by placing undue weight on his criminal history. He further argues that "consequently," the court failed to adequately consider the following factors in mitigation: defendant's educational background, work experience, remorse, and his "issues with alcoholism and substance abuse."

¶ 20 A reviewing court may not disturb a sentence properly imposed within statutory guidelines absent an abuse of the circuit court's discretion. See *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). A sentencing court "is not required to detail precisely for the record the exact process by which the penalty was determined or articulate its consideration of mitigating factors." *People v. Powell*, 2013 IL App (1st) 111654, ¶ 32. Unless there is affirmative evidence to the contrary, a reviewing court will presume that the circuit court considered all of the relevant factors in mitigation. *People v. Scott*, 2015 IL App (1st) 131503, ¶ 52. It is not the role of the appellate court to reweigh the sentencing factors. *Alexander*, 239 Ill. 2d at 214.

¶ 21 Defendant first contends that the circuit court gave "undue weight" at sentencing to his prior conviction for aggravated criminal sexual abuse. The court's only mention of that prior conviction, however, was quite brief, as it simply stated: "In terms of aggravation certainly it's his prior criminal sexual abuse." Defendant's argument, essentially, is that the court must have placed undue weight on that factor, given that it sentenced defendant to "near maximum terms" for criminal sexual assault and the maximum for criminal sexual abuse. No matter the formulation, we reject defendant's invitation for this court to reweigh the sentencing factors. *Id*.

¶ 22 Next, defendant insists that the circuit court failed to consider a number of factors in mitigation, including: his educational background, his employment history, and the remorse he showed for committing the offense. However, there is no affirmative evidence on the record that

the court failed to consider these factors. While the court did not reference those factors explicitly, it was under no obligation to do so. *Powell*, 2013 IL App (1st) 111654, ¶ 32.

¶ 23 Relatedly, defendant contends that the circuit court failed to consider his "issues with alcoholism and substance abuse" as a factor in mitigation. More specifically, he asserts that "the judge was wrong to reject the mitigating evidence in light of [defendant's] addiction-afflicted background." Defendant's argument indicates a misunderstanding of the court's comments at sentencing. There, after defense counsel had argued that the court should consider that defendant was intoxicated when he committed the offense, the court commented: "In mitigation—I'm not sure being drunk or high is a mitigating factor under the statute." The context makes clear that the court was rejecting as a factor in mitigation the fact that defendant was intoxicated at that specific time. There is no affirmative evidence on the record that the court failed to consider defendant's general background of substance abuse as a mitigating factor.

¶ 24 More generally, defendant argues that the relevant mitigating factors demonstrate that he is of great rehabilitative potential, and that the circuit court ignored this potential in imposing sentence. The proportionate penalties clause of the Illinois Constitution mandates that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. However, "the trial court need not give defendant's potential for rehabilitation greater weight than the seriousness of the offense, which is the most important factor in determining a sentence." *People v. Sandifer*, 2017 IL App (1st) 142740, ¶ 82.

¶ 25 The great majority of defendant's 25-year aggregate sentence consisted of two 11-year sentences for criminal sexual assault. The sentencing range for those Class 1 felonies was between 4 and 15 years' imprisonment. 730 ILCS 5/5-4.5-30(a) (West 2014); 720 ILCS 5/11-

1.20(a)(1), (b)(1) (West 2014). While defendant characterizes his sentences for criminal sexual assault as "near maximum terms," 11 years could just as easily be characterized as within the middle third of the Class 1 sentencing range. Moreover, defendant's offense was quite serious, even within the context of Class 1 felonies generally. Defendant followed J.W. into her home and groped her against her will. When she made an effort to escape, he dragged her inside, threw her onto her bed, and sexually assaulted her by force. As he did so, defendant threatened to harm J.W. further if she called the police and implied that he would assault her again in the future. Given the heinousness of the offense, the circuit court's decision to sentence defendant to eight fewer years of imprisonment than possible was within the trial court's discretion.

¶ 26 Finally, defendant briefly argues that his sentence was excessive in light of the fact that he will be subject to lifetime registration and other burdens under the Sex Offender Registration Act (SORA) upon his release from prison. See 730 ILCS 150/1 *et seq*. (West 2014). He asserts that these stringent requirements "should help ameliorate the circuit court's concerns about [defendant's] behavior." Defendant's argument, at bottom, is that sex offenders should be given comparatively lower sentences than offenders who commit a nonsexual offense of similar classification, because the strict monitoring inherent in SORA serves as a bulwark against recidivism. Defendant is unable to cite any case that would support his position. We reject it outright.

¶ 27 In sum, the record does not affirmatively show that the circuit court failed to consider any factors in mitigation, and this court will not reweigh those sentencing factors that the court did explicitly reference. Given this and the extreme seriousness of defendant's offense, we cannot say that the circuit court abused its discretion in imposing a 25-year aggregate sentence.

¶ 28 II. Fines

¶ 29 Defendant next argues that the circuit court's written order assessing fines must be corrected because it does not conform with the court's oral pronouncement of sentence.

¶ 30 At the sentencing hearing held on September 26, 2016, the circuit court orally imposed $1300 in fines (four $200 sexual assault fines and a $500 sex offender registration fine). Defendant filed his notice of appeal three days later. On October 31, 2016, the court issued a signed, written order imposing the original $1300 in fines, but also an additional $215 in fines.

¶ 31 "When the notice of appeal is filed, the appellate court's jurisdiction attaches *instanter*, and the cause is beyond the jurisdiction of the trial court." *People v. Bounds*, 182 Ill. 2d 1, 3 (1998). Thus, the circuit court may not issue any order modifying its sentence after the notice of appeal has been filed. *People v. McCray*, 2106 IL App (3d) 140554, ¶ 23. The court retains, however, the power to complete the ministerial act of filing a written order reflecting the pronounced sentence. *Id*. ¶ 25.

¶ 32 The State does not dispute that the circuit court's written order in this case was filed well after it had lost jurisdiction. Nor does it dispute that the written order imposed $215 in fines that had not been explicitly named when the court pronounced the sentence. The State argues, instead, that the court's comments that "[t]here will be costs," "referred to those additional costs reflected in the October 31, 2016 written order." In other words, the State argues that the written order was not a modification of defendant's sentence, but merely a permissible order reflecting what the court had previously announced.

¶ 33 The State's position relies upon an incorrect interpretation of the term "costs." Costs, as used in this context, is synonymous with the term "fees." *People v. Jones*, 223 Ill. 2d 569, 581 (2006) (" 'A "cost" is a charge or fee taxed by a court such as a filing fee, jury fee, courthouse fee, or reporter fee.' " (quoting *People v. White*, 333 Ill. App. 3d 777, 781 (2002)). The *Jones*

court further explained that "[b]roadly speaking, a 'fine' is a part of the punishment for a conviction, whereas a 'fee' or 'cost' seeks to recoup expenses incurred by the state—to 'compensat[e]' the state for some expenditure incurred in prosecuting the defendant." *Id*. at 582. The *Jones* court, in a footnote, even added that "[b]ecause this case does not require us to differentiate between a 'fee' and a 'cost,' we will hereinafter simply refer to them both as 'fees,' as opposed to a 'fine.' " *Id*. at 582, n.1.

¶ 34 Based on this well-settled interchangeability of the terms cost and fee, and their distinction from fine, this court has rejected the very argument made here, that a court's reference to costs allows it to later impose unmentioned fines after the notice of appeal has been filed. *McCray*, 2106 IL App (3d) 140554, ¶ 25. The result here is the same; the circuit court's modifications to defendant's sentence, imposed without jurisdiction, must be vacated. Accordingly, we remand the matter to the circuit court so that it may issue a new written order that does not impose any fines other than those originally imposed at sentencing.

¶ 35 III. DNA Analysis Fee

¶ 36 Finally, defendant argues that the circuit court erred in imposing a DNA analysis fee because he had already been ordered to submit his DNA and pay the corresponding fee in a prior case.

¶ 37 A defendant may only be made to submit his DNA and pay the DNA analysis fee once, as collecting multiple samples of the same DNA would serve no purpose. *People v. Marshall*, 242 Ill. 2d 285, 296-97 (2011). The record in this case contains a report from the Illinois State Police DNA database, which indicates that defendant's DNA was previously collected in 2006. The State concedes that the fee was imposed erroneously and should be vacated. As we have

already vacated the court's written order imposing monetary assessment (*supra* ¶ 34), we simply note that the court's corrected order on remand should not included the $250 DNA analysis fee.

¶ 38 CONCLUSION

¶ 39 The judgment of the circuit court of Kankakee County is affirmed in part, vacated in part, and remanded with directions.

¶ 40 Affirmed in part and vacated in part.

¶ 41 Remanded with directions.