2014 IL App (5th) 120353-U

NO. 5-12-0353

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Clinton County.
	)	
v.	)	No. 09-CF-20
	)	
JAMIL JABER,	)	Honorable
	)	William J. Becker,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WEXSTTEN delivered the judgment of the court.
Justices Spomer and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion by considering hearsay evidence when imposing sentence on the defendant's conviction for aggravated criminal sexual assault, but the defendant was entitled to additional credit against his sentence.

¶ 2 On February 13, 2009, the State filed an information charging the defendant, Jamil Jaber, with one count of criminal sexual assault (count I) (720 ILCS 5/12-13(a)(1) (West 2008)) and one count of aggravated criminal sexual assault (count II) (720 ILCS 5/12-14(a)(2) (West 2008)). The charges stemmed from an incident during which the defendant forcibly placed his penis in the vagina of D.F., who was 17 at the time. On February 26, 2009, a superceding indictment charging the same counts followed.

¶ 3 On March 12, 2009, the State filed a motion *in limine* to allow the introduction of evidence that the defendant had committed sexually motivated offenses against other young females including J.D., T.B., T.K., E.B., and H.H. The motion alleged that the evidence

would be used to show the defendant's propensity to commit the offenses charged in counts I and II and was thus admissible pursuant to section 115-7.3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.3 (West 2008)).

¶ 4 On June 9, 2009, a hearing was held on the State's motion *in limine*, and the State advised that it was only seeking to introduce evidence of the incidents involving J.D., T.K., E.B., and H.H. The State then made offers of proof regarding each of those incidents and argued that their factual similarity demonstrated the following: "The defendant drives these girls out into the country, demands sex from them[,] and forces himself upon them when they don't comply." The trial court ultimately granted the State's motion and ruled that pursuant to section 115-7.3, the State could use the girls' testimony as propensity evidence at the defendant's trial.

¶ 5 On August 26, 2009, pursuant to negotiations with the State, the defendant entered a plea of guilty to count II. In exchange, the State dismissed count I and agreed that "he would be sentenced in the range of 6 to 17 years rather than 6 to 30." The factual basis for the negotiated plea established that on or about January 19, 2009, the defendant drove D.F. from a party to a rural location in Clinton County, where he demanded that she have sex with him. When D.F. refused, the defendant pinned her down and forcibly committed an act of sexual intercourse with her. As a result of the attack, D.F. "suffered bruising to her left forearm and also to her neck." When accepting the defendant's plea, the trial court stated that when later imposing sentence, it would honor the negotiated 17-year cap.

¶ 6 On December 1, 2009, the defendant filed a motion to strike evidence of his alleged commission of other crimes. The motion maintained, *inter alia*, that unless an offense results in a conviction, evidence of its alleged commission constitutes unreliable hearsay unsuitable for sentencing purposes. Referencing the contents of the defendant's presentence investigation report (PSI) and sex-offender assessment (SOA), the motion further maintained

that most of the stated information regarding his alleged commission of other crimes constituted such hearsay.

¶ 7 On December 2, 2009, the cause proceeded to sentencing. At the outset, the defendant renewed his request that most of the information concerning his alleged commission of other crimes be stricken from his PSI and SOA. The defendant again maintained that only offenses that result in convictions are relevant for sentencing purposes. The defendant also attacked the validity of the assessment instruments employed during the SOA assessment procedures. After entertaining arguments on the matter, the trial court denied the defendant's motion to strike. Notably, with respect to the PSI, the court made the following record:

> "After reading the entire [PSI], I'm satisfied that the evidence contained in the [PSI] is reasonable, reliable[,] and something that the Court can [and] should consider in imposing sentence. One instance of misconduct taken alone is one thing. Two instances, three instances maybe is one thing to consider. The entire [PSI] read as a whole, to me, suggests a pattern of [misconduct] ***. I think it's relevant, it's reliable, and it should be considered. I will say that if uncharged offenses are not supposed to be considered by the Court, the sentence would likely be less than the sentence the Court would be inclined to impose. So if the Appellate Court finds that I should not consider uncharged offenses or certain hearsay statements, the case should be sent back[,] and I should resentence it[,] and the sentence would be less. If I'm correct in being able to consider that which I think I can, then the sentence is going to be on the higher end."

With respect to alleged hearsay contained in the SOA, the trial court indicated that it would limit its consideration of the assessment to "the evaluator's opinion on what kind of treatment or programs might be advisable."

¶ 8 For evidence in aggravation, the State called Detective Doug Maue to the stand.

Maue testified that he was employed by the Clinton County sheriff's department and had investigated the defendant's sexual assault of D.F. Maue further testified that during the course of that investigation, he had investigated or learned of other similar incidents involving the defendant. Over the defendant's hearsay objections, Maue was allowed to testify as to the statements of the alleged victims in some of those incidents.

¶ 9 Maue testified that he had personally interviewed E.B. and H.H. about a December 2006 incident that occurred in Madison County. Maue testified that the girls had told him that after agreeing to give them a ride home from a party, the defendant had driven them out into the country, where he demanded oral sex and became upset when his demands were denied. After he forcibly tried to get one of the girls to give him oral sex, both girls exited the vehicle and ultimately walked to a farmhouse, where they called a friend.

¶ 10 Maue testified that he had learned of a similar December 2006 incident involving T.K. Maue stated that the incident had occurred in Clinton County and had been investigated by another detective. Referencing what had happened to E.B. and H.H., Maue indicated that the incident involving T.K. was "pretty much the same sort of occurrence." The PSI notes that T.K. reported the following to the Highland police department, the Madison County sheriff's department, and the Clinton County sheriff's department: on December 31, 2006, she accepted an offer to go riding around with the defendant, and after driving out into "the country," he demanded that she give him oral sex. When she refused, the defendant became violent and physically molested her. He then threw her out of his car and threatened to leave her in the lurch if she did not comply with his sexual demands. The defendant ultimately gave T.K. a ride home, where she " 'went to bed terrified.' "

¶ 11 Maue testified that he had personally interviewed J.D. about an incident that occurred in Madison County in 2006 or 2007. Maue stated that J.D. had told him that she and the defendant had gone to high school together and that after she had moved out of her mother's

house, he had offered to let her stay at his apartment in Troy. J.D. accepted and spent part of a night there, but when the defendant made sexual advances towards her, she left after he had fallen asleep. A few months later, the defendant ran into J.D. in the downtown area of Highland and offered her a ride. After they rode around for a while, the defendant drove to a parking lot, where he forced himself on J.D. J.D. told Maue that she had been able to "fight her way out of the vehicle" but that the defendant had grabbed her, pinned her against the car, and made further sexual advances. When J.D. managed to free and distance herself from the defendant, he caught up with her, picked her up, carried her back to the car, and again made unwanted advances like "grabbing her breasts and stuff." J.D. was ultimately able to fight her way out of the situation and subsequently reported what had happened to the Highland police department.

¶ 12 Maue testified that during the course of his investigation, he had learned of several other incidents akin to those involving D.F., E.B., H.H., T.K., and J.D. The defendant's PSI notes that Maue obtained copies of the police reports and victim statements from many of those incidents and that "[t]he reports all listed [the defendant] as the suspect." The additional victims identified in the PSI include H.K., A.P., D.R., D.P., K.F., A.K., K.P., and T.B., and the PSI notes that the victims were all " 'young females between the approximate ages of 11 to 19.' " The PSI also notes that Maue, himself, either interviewed or reinterviewed many of the additional victims. The PSI includes copies of the police reports that Maue obtained and summaries of the incidents involving the victims. Briefly stated, the summaries and police reports generally relay the following: in the summer of 2008, the defendant attempted to lure H.K. into his car as she was walking home from a park in Highland; in May 2008, while riding around in rural Randolph County, the defendant pointed a gun at A.P. and chased after her when she subsequently fled his car and ran into some nearby woods; in May 2008, the defendant committed an act of public masturbation in the

presence of D.R. and D.P. in Mascoutah; in June 2008, the defendant attempted to lure K.F. and A.K. into his car as they were walking home from a park in Mascoutah; in June 2008, the defendant attempted to lure T.B. into his car as she was walking home near the police station in Trenton; in the summer of 2008, the defendant attempted to lure K.P. into his car as she was walking home from her grandmother's house in Trenton.

¶ 13 Describing the defendant as the quintessential "sexual predator," the State argued that he should be given the maximum available sentence of 17 years. In response, defense counsel argued that the minimum six-year sentence "with an order that [the defendant] receive sexual counseling so that he can have an opportunity to mend his ways" was more appropriate.

¶ 14 The trial court ultimately sentenced the defendant to a 15-year term of imprisonment, followed by a 3-year term of mandatory supervised release. When discussing the PSI, which the court indicated was among the most thorough and detailed it had ever seen, the court stated that the 15-year sentence reflected the court's consideration of the hearsay statements from the defendant's other victims. The court further indicated that the sentence imposed on the defendant's conviction would not have been more than 10 years had it not considered the hearsay information in the PSI.

¶ 15 In August 2012, after unsuccessfully moving to withdraw his guilty plea, the defendant moved for a reduction in sentence. The defendant's motion to reduce sentence alleged that the trial court should not have considered the hearsay evidence that he had objected to at the sentencing hearing and that a 15-year term of imprisonment was excessive under the circumstances. When denying the defendant's request that his sentence be reduced, the trial court again acknowledged that "[i]f [it] was not supposed to consider the prior similar acts at the sentencing hearing, [the defendant] would have got a lesser sentence." The defendant subsequently filed a timely notice of appeal.

¶ 16 DISCUSSION

¶ 17 The defendant first argues that when imposing sentence on his present conviction, the trial court erred in considering the hearsay evidence regarding the incidents involving J.D., T.K., E.B., H.H., H.K., A.P., D.R., D.P., K.F., A.K., K.P., and T.B. We cannot, however, conclude that the trial court abused its discretion in doing so.

¶ 18 "It is well settled that hearsay testimony is not *per se* inadmissible at a sentencing hearing as unreliable or as denying a defendant's right to confront accusers." *People v. Williams*, 181 Ill. 2d 297, 331 (1998). The rules of evidence are relaxed at a sentencing hearing, and "a sentencing judge is given broad discretionary power to consider various sources and types of information." *People v. Williams*, 149 Ill. 2d 467, 490 (1992). "The only requirement for admission of evidence in a sentencing hearing is that the evidence must be reliable and relevant as determined by the trial court within its sound discretion." *People v. Harris*, 375 Ill. App. 3d 398, 409 (2007); see also *People v. Hall*, 194 Ill. 2d 305, 352 (2000); *People v. Morgan*, 112 Ill. 2d 111, 143 (1986).

¶ 19 A defendant's prior criminal conduct provides insight into his character (*People v. Hudson*, 157 Ill. 2d 401, 452 (1993)) and is relevant to a determination of his propensity to commit crime (*People v. La Pointe*, 88 Ill. 2d 482, 498 (1981)). Evidence of a defendant's prior criminal conduct is thus relevant when fashioning an appropriate sentence, even if the conduct did not result in a prosecution and conviction. *People v. Burton*, 184 Ill. 2d 1, 33 (1998); *People v. Johnson*, 114 Ill. 2d 170, 205 (1986). Although it is preferable that evidence of uncharged offenses be presented by live witnesses (*People v. Jackson*, 149 Ill. 2d 540, 548 (1992); *People v. Harris*, 375 Ill. App. 3d 398, 411 (2007)), "[h]earsay evidence of unprosecuted crimes is admissible in sentencing hearings if it is relevant and reliable" (*People v. Alksnis*, 291 Ill. App. 3d 347, 359 (1997)). The hearsay nature of such evidence goes toward its weight rather than its admissibility. *Williams*, 181 Ill. 2d at 331; *People v.*

Rose, 384 Ill. App. 3d 937, 946 (2008).

¶ 20 Generally speaking, a PSI is considered a reliable source of information regarding a defendant's criminal history. *Williams*, 149 Ill. 2d at 491. Moreover, "*all* information appearing in a presentence report may be relied upon by the sentencing judge to the extent the judge finds the information probative and reliable." (Emphasis in original.) *People v. Powell*, 199 Ill. App. 3d 291, 294 (1990).

¶ 21 Here, we initially note that all of the hearsay information at issue originated from named victims who were questioned during the course of official investigations. Arguably, that in and of itself supports the trial court's determination that the information was reliable for sentencing purposes. See *Morgan*, 112 Ill. 2d at 143-44; *People v. Alksnis*, 291 Ill. App. 3d 347, 359 (1997); see also *People v. Shafer*, 372 Ill. App. 3d 1044, 1050-51 (2007) (noting that the credibility of information obtained by police from a known individual derives from the criminal liability attendant to making a false report). We further note the following: the incident involving J.D. resulted in criminal sexual abuse charges and an unlawful restraint conviction; the incident involving A.P. resulted in an aggravated assault conviction; the incident involving E.B. and H.H. led to two battery convictions; the incident involving T.K. resulted in another battery conviction; and at the time of the sentencing hearing, there were disorderly conduct charges pending in connection to the incident involving D.R. and D.P. Additionally, when questioned by the authorities, the defendant voluntarily spoke of his encounters with D.R., D.P., J.D., T.B., T.K., E.B., and H.H., although he consistently attempted to minimize or explain away what had occurred. The trial court was also aware that J.D., T.K., E.B., and H.H. were willing to testify pursuant to the State's motion *in limine*. Lastly, as the State notes on appeal, the defendant used similar tactics with many of his victims, and a majority of the incidents were relatively close in time and space.

¶ 22 A trial court abuses its discretion where its decision is "arbitrary, fanciful, or

unreasonable, such that no reasonable person would take the view adopted by the trial court." *People v. Lovejoy*, 235 Ill. 2d 97, 125 (2009). Here, we cannot conclude that the trial court abused its discretion in considering the hearsay evidence regarding the incidents involving J.D., T.K., E.B., H.H., H.K., A.P., D.R., D.P., K.F., A.K., K.P., and T.B. "It was the [trial] court's function to give this evidence the appropriate weight," (*People v. Burton*, 184 Ill. 2d 1, 34 (1998)), and we accordingly affirm the 15-year sentence that the court imposed on the defendant's conviction for aggravated criminal sexual assault.

¶ 23 The defendant next contends that he is entitled to a 130-day credit against his sentence for time spent in the Illinois Department of Corrections (DOC) following his arrest. We agree.

¶ 24 As previously noted, the incident involving J.D. resulted in criminal sexual abuse charges and an unlawful restraint conviction. The defendant was sentenced to 18 months in DOC in that case, and he was on parole when he was taken into custody in the present case on February 12, 2009. The record indicates that on February 14, 2009, the defendant was remanded back to DOC for violating his parole, and that on June 25, 2009, he was returned to the Clinton County jail. The record further indicates that the defendant never posted bond. The defendant was sentenced on December 2, 2009.

¶ 25 At the defendant's sentencing hearing, defense counsel asked that the time the defendant spent in DOC for violating his parole be credited against his sentence. Without elaboration, the State countered that the defendant should not be given credit for "time he was serving as a consequence of the [unlawful restraint conviction]." The PSI's calculation of the credit that the defendant was entitled to receive does not include the 130 days that he was solely in DOC custody on his parole violation. The trial court ultimately awarded the defendant credit for 164 days spent in custody, and its calculation did not include the 130 days, either. The trial court did not order that the defendant's 15-year sentence be served

consecutively to the 130 days he spent in DOC.

¶ 26 By statute, a defendant is entitled to credit against his sentence "for time spent in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5-8-7(b) (West 2008). Additionally, a defendant who is in custody on two unrelated offenses is simultaneously in custody on both offenses and should receive sentence credit for both. *People v. Robinson*, 172 Ill. 2d 452, 459 (1996).

¶ 27 On appeal, the State suggests that the trial court rightfully relied on the PSI's calculation of the defendant's credit for time spent in custody, because "the laws in effect at the time of [the] defendant's crime and his sentencing specifically excluded time served for a revocation of parole in the calculation of credit time served on a new crime." As the defendant counters, however, the State's argument is at odds with supreme court precedent.

¶ 28 The State relies on the following statutory language in support of its position that the defendant was not entitled to credit for the time spent in custody on his parole violation: "[a] sentence of an offender committed to [DOC] at the time of the commission of the offense shall be served consecutive to the sentence under which he is held by [DOC]" (section 5-8-4(f)) (730 ILCS 5/5-8-4(f) (West 2008)) and "[i]f the defendant was in the custody of [DOC] at the time of the commission of the offense, the sentence shall be served consecutive to the sentence under which the defendant is held by [DOC]" (section 5-8-4(d)(6)) (730 ILCS 5/5-8-4(d)(6) (West 2008) (eff. July 1, 2009)). In *People ex rel. Gibson v. Cannon*, 65 Ill. 2d 366, 370-71 (1976), however, the court explained that because the word "held" implies physical restraint, "section 5-8-4(f) must be construed so as not to apply to those who are on parole at the time of the commission of a subsequent offense." The same reasoning would apply equally to section 5-8-4(d)(6). We thus reject the State's contention that "[a]t the time the defendant committed the present crime and at the time he was sentenced, the court was required to make his sentence consecutive to his sentence for the parole violation." We also

note that section 5-8-4(d)(6) was not in effect when the defendant committed the offenses charged in the present case nor was the following provision, which specifically excludes time served for a revocation of parole in the calculation of credit time served on a new crime:

> "NO CREDIT; REVOCATION OF PAROLE, MANDATORY SUPERVISED RELEASE, OR PROBATION. An offender charged with the commission of an offense committed while on parole, mandatory supervised release, or probation shall not be given credit for time spent in custody *** for that offense for any time spent in custody as a result of a revocation of parole, mandatory supervised release, or probation where such revocation is based on a sentence imposed for a previous conviction, regardless of the facts upon which the revocation of parole, mandatory supervised release, or probation is based, unless both the State and the defendant agree that the time served for a violation of mandatory supervised release, parole, or probation shall be credited towards the sentence for the current offense." 730 ILCS 5/5-4.5-100(e) (West 2010) (added by Pub. Act 96-1000 (eff. July 2, 2010)).

¶ 29 If consecutive sentences are not mandated by statute and a trial court's judgment order does not provide for consecutive sentences, sentences run concurrently. *Cannon*, 65 Ill. 2d at 374; see also *In re Detention of Gavin*, 382 Ill. App. 3d 946, 950 (2008) (noting that "in the absence of a provision to the contrary in the judgment order," sentences are presumed to run concurrently); *People v. Schmitt*, 99 Ill. App. 3d 184, 189 (1981) (noting that "prison sentences are presumed to be concurrent unless otherwise indicated"). Here, we agree with the defendant that the trial court did not impose a consecutive sentence in the present case and that *People v. Newman*, 211 Ill. App. 3d 1087 (1991), is dispositive.

¶ 30 In *Newman*, while the defendant was in jail on pending charges, he was transferred to DOC, where he served time for violating his parole. *Newman*, 211 Ill. App. 3d at 1089, 1099. The defendant was subsequently transferred back to jail, convicted, and sentenced.

Id. "At no time did [the] defendant post bond for the offenses with which he was charged." *Id*. at 1099. When awarding the defendant credit for time spent in custody, the trial court relied upon the PSI's calculation of the defendant's sentence credit, which only reflected the time that the defendant had spent in jail. *Id*. On appeal, noting that the trial court did not order the defendant's sentence "to be served consecutively to [the] time [the] defendant spent incarcerated for [his] parole revocation," the appellate court held as follows:

> "Under these circumstances, [the] defendant is entitled to credit for the entire time he spent in [custody] between the day of his arrest and the day of his sentencing, notwithstanding that during this time he served approximately one month in [DOC] for a parole violation." *Id*.

¶ 31 CONCLUSION

¶ 32 For the foregoing reasons, we affirm the defendant's sentence and order that his mittimus be amended to reflect credit for an additional 130 days spent in custody prior to sentencing. See *People v. Starnes*, 374 Ill. App. 3d 132, 144-45 (2007); *Newman*, 211 Ill. App. 3d at 1099.

¶ 33 Affirmed; mittimus ordered corrected.