2024 IL App (4th) 230677-U

NO. 4-23-0677

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
September 25, 2024
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Logan County
EDOUARD K. HYPPOLITE,	)	No. 19CF36
Defendant-Appellant.	)	
	)	Honorable
	)	Jonathan C. Wright,
	)	Judge Presiding.

JUSTICE VANCIL delivered the judgment of the court.
Justices Steigmann and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed defendant's cumulative six-year sentence for two counts of possession of child pornography, finding the trial court did not abuse its discretion by considering allegations of criminal sexual assault when imposing its sentence.

¶ 2 Defendant, Edouard K. Hyppolite, was convicted of two counts of possession of child pornography, a Class 2 felony (720 ILCS 5/11-20.1(a)(6), (c-5) (West 2018)). The trial court sentenced him to three years' imprisonment on each count and ordered the sentences to be served consecutively. Defendant appeals his sentence, arguing the court improperly punished him for alleged criminal sexual assaults, a Class 1 felony (*id.* § 11-1.20(a)(3), (b)(1)) instead of the crimes for which he was convicted. He asks us to vacate his sentence and remand for resentencing.

¶ 3 We affirm.

¶ 4 I. BACKGROUND

¶ 5 In March 2019, the State charged defendant with one count of filming child pornography, a Class X felony (*id.* § 11-20.1(a)(1), (c-5)), one count of criminal sexual assault, a Class 1 felony (*id.* § 11-1.20(a)(3), (b)(1)), and two counts of possession of child pornography, a Class 2 felony (*id.* § 11-20.1(a)(6), (c-5). Defendant pleaded not guilty and moved to sever the criminal sexual assault count. The trial court granted defendant's motion, the State dismissed the count of filming child pornography, and the case proceeded to a bench trial on the two counts of possession of child pornography. The proceedings were conducted using a Haitian Creole interpreter to translate for defendant.

¶ 6 At trial, the State presented evidence from two police officers. Detective Todd Koester of the Decatur Police Department testified as an expert in computer forensic data recovery and child pornography investigations. In February 2019, officers in Lincoln, Illinois obtained a search warrant to search defendant's iPhone. Detective Koester searched the iPhone and found two illicit videos in a messaging application with the account username "Prince Herbigens." The phone number associated with that account was defendant's phone number. Both videos depicted sexual contact involving adult men and very young children. The first video was sent to defendant in February 2018, and Detective Koester estimated the age of the minor in the video was about four to six years old. Defendant received the second video in July 2018, and Detective Koester estimated the minor in the video was between 9 and 13 months old. Detective Koester testified someone watched each video the same day it was sent and neither video was deleted. He could not determine if either video file was opened more than once, and he found no evidence that either video was sent to anyone else or that defendant requested the videos.

¶ 7 Detective Matthew Comstock of the Lincoln Police Department testified he interviewed defendant and reviewed Detective Koester's report. He also found two Facebook profiles associated with the name "Prince Herbigens" that had pictures of defendant.

¶ 8 Defendant testified on his own behalf. He was born in Haiti and moved to the United States when he was 27 years old. He admitted receiving the videos from his friends in Haiti, but he testified he did not send the videos to anyone or download them. He denied asking his friends to send the videos. He explained he never deleted the videos because he worked two jobs, and he was "always busy."

¶ 9 The trial court found defendant guilty of two counts of possession of child pornography. Before sentencing, a presentence investigation report (PSI) was submitted to the court. The PSI explained defendant moved from Haiti to Florida in 2016, and then to Illinois two years later. In 2019, the Illinois Department of Children and Family Services (DCFS) received a report that defendant's 14-year-old daughter alleged defendant had been sexually abusing her. The PSI also detailed the DCFS investigator's interview with defendant's daughter, in which she described the alleged assaults.

¶ 10 The PSI also includes a sex offender risk assessment. The assessment stated, "According to the information reviewed, [defendant] had sexual contact with his teenage daughter," although it also indicated the information the author reviewed contained "no detail concerning the abuse, other than to say it occurred on multiple occasions." The assessment also stated that defendant provided information that was "statistically improbable and indicates a client is overly falsifying" his responses. Nevertheless, the assessment concluded defendant "should be considered a low to moderate risk to sexually reoffend" and "it seems likely that [defendant] could be safely supervised in the community without significant risk to the general public."

¶ 11 At the sentencing hearing, the trial court noted both of defendant's convictions were Class 2 felonies, and the sentencing range was a "possible minimum sentence of up to 48 months of probation or conditional discharge and a maximum sentence of up to three to seven years in the Illinois Department of Corrections with a period of mandatory supervised release," with mandatory consecutive sentences.

¶ 12 Defendant's attorney objected to the information in the PSI concerning the alleged sexual assaults. Defendant's attorney argued, under *People v. Richardson*, 123 Ill. 2d 322 (1988), evidence at a sentencing hearing must be both reliable and relevant, and the information in the report was not reliable. She then indicated she would withdraw her objection to the report's account of the DCFS interview if Detective Comstock confirmed it was accurate. The trial court overruled the objection but allowed the parties to present additional evidence. The State called then-Deputy Chief Comstock as a witness. He testified he observed defendant's daughter's interview with DCFS where she described the alleged assaults. He confirmed the summary of the interview in the PSI was accurate.

¶ 13 The State asked the trial court to sentence defendant to five years' imprisonment for each count. It argued the "videos possessed by the defendant are terrible. The victim's ages were extremely young." The State further argued, "Also aggravating is that he repeatedly sexually assaulted his daughter. *** Not only is he attracted to children as evidenced by the child pornography, but he has acted on those impulses and shown that he is a danger to the public, including his own daughter." The State claimed the risk assessment evaluator had not reviewed the details of the sexual assault allegations, so the risk assessment had "limited value."

¶ 14 Defense counsel argued there was "zero evidence" in the PSI or during the trial showing defendant was attracted to children or repeatedly viewed the videos. Defendant did not

request the videos, he did not distribute them, and the State did not prove he watched them more than once. Defense counsel argued defendant came "from a completely different culture and country and [was] entirely unaware of the laws in this country," so he had no "criminal intent." Considering defendant had no prior criminal convictions, defense counsel asked for a sentence of probation and sex offender treatment.

¶ 15 The trial court began by reviewing the mitigating factors. The court found defendant did not distribute any videos and did not request the videos. He also had no prior criminal convictions.

¶ 16 The trial court then discussed the alleged criminal sexual assaults. The court explained, "[T]he Court may rely on evidence of a defendant's other criminal activity, even if that conduct has not resulted in a conviction where the Trial Court finds the evidence to be relevant and accurate." The court found the comments in the PSI regarding the initial report of the assaults to DCFS were not reliable because they were hearsay within hearsay. However, the court found the report's account of the subsequent DCFS interview with defendant's daughter was reliable because it was recorded and Deputy Chief Comstock confirmed the report's accuracy. The court found the evidence of "multiple instances" of criminal sexual assault to be relevant and reliable.

¶ 17 The trial court also considered "the nature of the videos, specifically as it[ ] relates to defendant's testimony and attitude towards the offense." Regarding the evidence defendant was from another country and did not know the laws of the United States, the court found this was not a mitigating factor, explaining, "The videos that the Court saw as part of this trial, quite frankly, shocks the [conscience] no matter where a person comes from, culture or country."

¶ 18 Regarding the risk assessment, the trial court observed defendant's responses were "statistically improbable" and "he was overly falsifying his score." The court found this "ties in with [defendant's] efforts to minimize his possession of child pornography."

¶ 19 The trial court concluded:

> "Considering I have reliable evidence that he sexually assaulted his daughter on multiple occasions and that deterrence is an appropriate factor in aggravation, the Court finds probation or conditional discharge would deprecate the seriousness of [defendant's] conduct and would be inconsistent with the ends of justice."

The court sentenced defendant to three years' imprisonment for each count, to be served consecutively, plus a period of three years to natural life of mandatory supervised release.

¶ 20 Defendant filed a motion to reconsider his sentence, arguing the trial court excessively relied on the alleged criminal sexual assaults when sentencing defendant. At the hearing on defendant's motion, the court reiterated a sentence of probation would deprecate the seriousness of the offense and be inconsistent with the ends of justice. The court further stated, "The Court also considered the sex offender evaluation performed in this case. [Defendant] was considered to be a low to moderate risk to sexually reoffend. The Court also notes that in that evaluation, the evaluator had very limited details about the other allegations involving [defendant] and his daughter." The court denied defendant's motion to reconsider.

¶ 21 This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 On appeal, defendant argues the trial court improperly sentenced him to prison as punishment for the alleged criminal sexual assaults instead of for the possession of child

pornography charges for which he was convicted. He asks us to vacate his sentence and remand for resentencing.

¶ 24 Article I, section 11 of the Illinois Constitution provides, "All 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. "The trial court has broad discretionary powers when selecting an appropriate sentence." *People v. Garcia*, 2018 IL App (4th) 170339, ¶ 37. The court must base its sentence "upon the particular circumstances of an individual case, including (1) the defendant's history, character, and rehabilitative potential; (2) the seriousness of the offense; (3) the need to protect society; and (4) the need for deterrence and punishment." *Id.* "The appellate court defers to the trial court's decisions concerning sentencing and presumes that the trial court considered only appropriate factors in sentencing, unless the record affirmatively shows otherwise." *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002). "Generally, a reviewing court may not overturn the sentence the trial court imposed unless that court abused its discretion." *People v. Bouyer*, 329 Ill. App. 3d 156, 161 (2002). A court abuses its discretion only when its sentence is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 210 (2000). Nevertheless, defendant argues the consideration of his other bad conduct was improper and "the consideration of an improper aggravating factor is an abuse of discretion that requires resentencing unless the factor was an insignificant element of the sentence." *Id.* "The question of whether the trial court relied on an improper factor in imposing the defendant's sentence presents a question of law, which we review *de novo*." *People v. Williams*, 2018 IL App (4th) 150759, ¶ 18.

¶ 25 At sentencing, the trial court explained its rationale for imposing a prison sentence. The court found the evidence of defendant's alleged criminal sexual assaults was relevant and

reliable. The court considered that evidence and the "the nature of the videos, specifically as it[ ] relates to defendant's testimony and attitude towards the offense." In response to defendant's claim that he did not understand American law, the court explained, "The videos that the Court saw as part of this trial, quite frankly, shocks the [conscience] no matter where a person comes from, culture or country." The court concluded deterrence was an aggravating factor and probation would deprecate the seriousness of the offense and would be inconsistent with the ends of justice.

¶ 26 Defendant argues this ruling was improper. He contends the trial court improperly sentenced him as punishment for the alleged criminal sexual assaults and not the possession of child pornography convictions. Although he points out we should review whether the court considered an improper factor *de novo*, he also acknowledges a court has discretion to consider evidence of other crimes at a sentencing hearing. See *People v. Mertz*, 218 Ill. 2d 1, 85 (2005) ("[R]eliable evidence of serious uncharged offenses is also a proper, nonstatutory aggravating factor that must be taken in account in determining the appropriate sentence."); see also *Richardson*, 123 Ill. 2d at 361. But defendant contends a trial court cannot punish a defendant for those other alleged crimes, and he claims the trial court here did so.

¶ 27 In support of this argument, defendant first claims the default sentence for his convictions was probation or conditional discharge, and the trial court inappropriately deviated from this default sentence. Section 5-6-1(a)(1)-(2) of the Unified Code of Corrections (Code) (730 ILCS 5/5-6-1(a)(1)-(2) (West 2022)) provides as follows:

> "Except where specifically prohibited by other provisions of this Code, the court shall impose a sentence of probation or conditional discharge upon an offender unless, having regard to the nature and circumstance of the offense, and to the history, character and condition of the offender, the court is of the opinion that:

(1) his imprisonment or periodic imprisonment is necessary for the protection of the public; or

(2) probation or conditional discharge would deprecate the seriousness of the offender's conduct and would be inconsistent with the ends of justice."

Defendant directs our attention to the instruction that courts "shall impose a sentence of probation," unless certain factors are present. *Id.* Defendant also notes his sex offender risk assessment recommended a sentence like probation when it found defendant "could be safely supervised in the community without significant risk to the general public."

¶ 28 Defendant mischaracterizes the law. He was not entitled to a sentence of probation. See *People v. Hart*, 10 Ill. App. 3d 857, 860 (1973) ("Defendant had no absolute right to probation."). The Code does not require a sentence of probation if the trial court concludes imprisonment is necessary to protect the public, probation would deprecate the seriousness of the offense, or probation would be inconsistent with the ends of justice. 730 ILCS 5/5-6-1(a)(1)-(2) (West 2022).

¶ 29 The trial court rightly concluded those factors were present here. The court stated, "Considering I have reliable evidence that he sexually assaulted his daughter on multiple occasions and that deterrence is an appropriate factor in aggravation, the Court finds probation or conditional discharge would deprecate the seriousness of [defendant's] conduct and would be inconsistent with the ends of justice." By finding probation would deprecate the seriousness of the offense and would be inconsistent with the ends of justice, the court eliminated the potential for probation. This finding was particularly appropriate because defendant attempted to characterize his possession of the child pornography videos as almost accidental. He claimed he did not request the videos, he

watched them only once, and he did not remember he possessed them. In doing so, defendant attempted to make his possession offenses appear unserious. We agree with the court a sentence of probation for the possession of child pornography by someone credibly alleged to have sexually abused his child would fail to acknowledge the gravity of defendant's conduct.

¶ 30 Defendant next argues his sentencing hearing focused excessively on the alleged criminal sexual assaults instead of the possession of child pornography charges. At sentencing, the State relied on the sexual assault allegations extensively in its argument. The trial court cited the sexual assault allegations as a basis of its ruling. Defendant claims the court never connected the allegations to any permissible sentencing purpose, so it must have been punishing him for the alleged offenses.

¶ 31 We find the trial court properly sentenced defendant for the possession of child pornography charges for which he was convicted, and the court appropriately viewed those convictions in light of the allegations of criminal sexual assault. In sentencing a defendant, the trial court should consider the "particular circumstances of an individual case, including (1) the defendant's history, character, and rehabilitative potential; (2) the seriousness of the offense; (3) the need to protect society; and (4) the need for deterrence and punishment." *Garcia*, 2018 IL App (4th) 170339, ¶ 37. Evidence of defendant's other sexual offense is clearly related to his "history, character, and rehabilitative potential," "the need to protect society," and "the need for deterrence," apart from any "punishment." *Id.* The court explicitly connected "deterrence" to the "evidence that [defendant] sexually assaulted his daughter on multiple occasions." We agree with the court's conclusion. Indeed, we find it hard to imagine what evidence could better demonstrate defendant's character and the need to deter defendant's criminal sexual misconduct than evidence he sexually assaulted his child.

¶ 32 Defendant relies on *People v. Varghese*, 391 Ill. App. 3d 866 (2009). There, the State alleged the defendant had communicated with a 13-year-old girl in an online chat room, met with her, and sexually abused her. *Id.* at 868. The defendant pled guilty to aggravated criminal sexual abuse, and the trial court sentenced him to 28 days in jail and 2 years of sex offender probation. Later, the State petitioned to revoke the defendant's probation. *Id.* At the hearing on that petition, the State introduced evidence showing the defendant drove his vehicle while his license was suspended to meet a 16-year-old girl he had messaged online. *Id.* at 869. The trial court sentenced the defendant to seven years in prison, finding the sex offender probation had not prevented the defendant from engaging in the same type of behavior for which he was convicted. *Id.* at 872.

¶ 33 The defendant challenged his sentence on appeal, arguing the trial court improperly punished him based on conduct for which he was not convicted. *Id.* at 875. The appellate court agreed, finding "a trial court may never punish a defendant for the conduct that gave rise to the probation violation." *Id.* at 876. The trial court did not discuss the original offense at resentencing and focused solely on defendant's conduct while on probation. Therefore, the appellate court concluded the trial court sentenced the defendant as punishment for his conduct on probation rather than for his original offense, and it vacated the defendant's sentence and remanded for resentencing. *Id.* at 877-79.

¶ 34 We do not find *Varghese* applicable. Most obviously, *Varghese* involved a revocation of probation, not an initial sentence. Defendant insists this distinction is irrelevant because both revocation of probation and an initial sentencing follow the same procedures. See 730 ILCS 5/5-6-4(h) (West 2022) ("Resentencing after revocation of probation, conditional discharge, supervision, or a sentence of county impact incarceration shall be under Article 4.").

We disagree. *Varghese*'s reasoning focused on whether the defendant was improperly punished for behavior he committed on probation instead of for his original offense. This reasoning simply does not apply to a defendant who was not on probation.

¶ 35 More importantly, here the trial court did not rely exclusively on defendant's other alleged crimes at sentencing. The court explained it considered "the nature of the videos, specifically as it[ ] relates to defendant's testimony and attitude toward the offense." The court considered and rejected defendant's argument that his ignorance of the United States' laws mitigated his possession of the videos. The court stated, "The videos that the Court saw as part of this trial, quite frankly, shocks the [conscience] no matter where a person comes from, culture or country." Unlike the trial court at resentencing in *Varghese*, here, the trial court clearly imposed the prison sentence for the crimes for which defendant was convicted.

¶ 36 Finally, defendant claims the State and trial court mistakenly believed the evaluator who conducted his sexual offender risk assessment did not have access to the evidence of his alleged criminal sexual assaults. Defendant argues, because of this mistake, the court gave insufficient weight to that evaluator's recommendation. The evaluator specifically noted the allegations of abuse of defendant's daughter but still considered defendant "a low to moderate risk to sexually reoffend." The evaluator recommended defendant "could be safely supervised in the community without significant risk to the general public." Defendant argues the court unreasonably discredited the assessment, which shows the court was preoccupied with punishing defendant for the alleged assaults.

¶ 37 We are not persuaded. Although the trial court, at the hearing on defendant's motion to reconsider his sentence, commented that the evaluator had "very limited details" on the assault allegations, at sentencing, the court gave little weight to the risk assessment because the assessment

itself concluded defendant was "overly falsifying" his responses. Moreover, the court has the discretion to set the defendant's sentence. See *People v. Nussbaum*, 251 Ill. App. 3d 779, 781, 783 (1993) (emphasizing "the discretion to impose a sentence is vested *solely* in the trial court" (emphasis in original) and finding the court has "wide latitude in determining and weighing factors in mitigation or aggravation" of a sentence). Furthermore, although defendant's rehabilitative potential is one factor for the court to consider, that potential is "not entitled to greater weight than the seriousness of the offense, the protection of the public, and punishment." *People v. Grace*, 365 Ill. App. 3d 508, 513 (2006). Therefore, the court was not obligated to sentence defendant to probation simply because the risk assessment suggested he could be "safely supervised in the community."

¶ 38 Finally, we note defendant was convicted of two Class 2 felonies, so the sentencing range for a term of imprisonment was between three and seven years in prison. 730 ILCS 5/5-4.5-35(a) (West 2022). The trial court sentenced defendant to three years' imprisonment for each offense, the shortest possible prison sentence. The court did not consider any improper factors at sentencing, and it did not abuse its discretion in sentencing defendant to six years' imprisonment.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we affirm the trial court's judgment.

¶ 41 Affirmed.