2018 IL App (5th) 140595-U

NO. 5-14-0595

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Fayette County.
	)	
v.	)	No. 13-CF-237
	)	
MICHAEL ARTHUR GARGAS,	)	Honorable
	)	Daniel E. Hartigan,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE BARBERIS delivered the judgment of the court.
Justices Welch and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's sentencing order is affirmed where the defendant waived on review his claim that the court considered an improper victim impact statement where he failed to object at the sentencing hearing or file a postsentencing motion, and the court did not improperly consider the victim's age as an aggravating factor.

¶ 2 The defendant, Michael Gargas, appeals the judgment of the circuit court arguing that the court erred by considering a psychiatrist's letter as a victim impact statement not authorized by the Rights of Crime Victims and Witnesses Act (Act) (725 ILCS 120/1 *et seq.* (West 2012)), and by considering the victim's age, an improper aggravating factor, at sentencing.

¶ 3 BACKGROUND

¶ 4 On October 24, 2013, the State charged the defendant with predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)). The information alleged that on or about September 26, 2013, or September 27, 2013, the defendant, who was 17 years of age or older, committed the offense of predatory criminal sexual assault of M.H., who was under 13 years of age, by placing his penis on or in her vagina. On November 18, 2013, the defendant waived the preliminary hearing.

¶ 5 On May 14, 2014, the defendant entered an open plea to predatory criminal sexual assault. The factual basis of the plea alleged that the defendant spent the night at his cousin's, M.H.'s, home where the defendant entered M.H.'s bedroom, requested her to touch his penis, and then placed his penis inside her vagina. The defendant admitted, in an interview with the Illinois State Police, that he may have put his penis inside M.H.'s vagina and that he was aware that she was under 13 years of age. The circuit court accepted the defendant's plea of guilty.

¶ 6 On August 6, 2014, the circuit court held the defendant's sentencing hearing. At the hearing, the State called M.H.'s mother, Kimberly Reynolds (Reynolds), to read two victim impact statements, one from M.H. and the second from M.H.'s psychiatrist, Dr. Rhoda Gottfried (Dr. Gottfried).

¶ 7 Reynolds first read M.H.'s victim impact statement, which stated that it was very difficult for M.H. to concentrate in school and that she took medication for nightmares and flashbacks as a result of the sexual assault. Next, Reynolds read Dr. Gottfried's letter, which stated that M.H. had started treatment at Heartland Human Services in January

2013 and was later diagnosed with autism spectrum disorder in August 2013. Additionally, Dr. Gottfried's statement alleged that M.H. had been diagnosed with attention deficit hyperactivity disorder and social anxiety disorder, which had been reasonably controlled through prescribed medication prior to the sexual assault. After the sexual assault, however, her disorders intensified and her behavior at home and school deteriorated. In particular, M.H. lashed out with verbal anger towards her mother, she lost weight and refused to eat, her self-care and hygiene declined, and her grades worsened. Moreover, M.H. started to chew her clothing and also spent an excessive amount of time at her pastor's home away from her own family. Furthermore, Dr. Gottfried's letter contained the following statements:

> "[M.H.] was a vulnerable target for a sexual predator, and this incident has caused her significant harm. She was already an anxious socially awkward child who was bullied by peers and this traumatic event further reinforced the idea that the world is dangerous and not to be trusted, as well as interrupting and damaging her psychological development."

¶ 8 Reynolds then testified about M.H.'s aggressive behaviors and aggravated demeanor after the sexual assault. Reynolds indicated that M.H., a disabled 12-year-old child at the time of the incident, needed medication to help her sleep and suffered from recurring nightmares after the sexual assault. Additionally, Reynolds stated that her oldest daughter, K.H., overdosed after Reynolds asked her to provide a victim impact statement on behalf of M.H. Reynolds explained that K.H. felt guilty because she was not there to prevent the sexual assault from happening. Reynolds further stated that K.H. took daily depression medication.

¶ 9 The defense then called the defendant's mother, Bernadine Gargas (Bernadine), who testified that the defendant was truthful and had cooperated with the police when questioned about the incident. Bernadine also testified that the defendant had no criminal history and that she did not believe he would reoffend.

¶ 10 The defense also called the defendant's uncles, Bernard Buchanan (Buchanan) and Don Brown (Brown), to testify. Buchanan testified that he had never been concerned with his children, ages 3, 6, and 14, being around the defendant, whom he described as a very hands-on father. Buchanan admitted that he, too, was a registered sex offender. Next, Brown testified that he had never been concerned in the past when the defendant was around his children, and that the defendant was an honest man. Lastly, the defendant testified that he did not forcibly penetrate M.H., but that the sexual encounter was consensual. The defendant stated that M.H.'s version of the events that he "pinned her down is untrue."

¶ 11 The State argued in aggravation that the defendant had taken advantage of an autistic family member, and that he had not taken responsibility for his actions where he claimed that the sex was consensual, even though M.H. was unable to consent at her age. Additionally, the State argued that the evidence, specifically text and Facebook messages, showed that the defendant had attempted to continue a sexual relationship with M.H. after the incident. Moreover, the State argued that the defendant had tried to persuade M.H. not to tell authorities what had happened. The State concluded by requesting the imposition of a 28-year prison sentence.

¶ 12 Defense counsel argued in mitigation that the defendant had, from the very beginning, taken responsibility for his actions, even though he had claimed that the sexual encounter was consensual and that he did not use force. Moreover, defense counsel asserted that the State had misconstrued the text messages between the defendant and M.H., arguing that the defendant had not attempted to continue a sexual relationship with M.H. Further, defense counsel argued that the defendant had no prior criminal history, and that the sex offender evaluation indicated that he was at low risk to reoffend.

¶ 13 Following a brief recess, the circuit court found in aggravation that the defendant's actions caused or threatened serious harm to M.H.; that M.H. was a 12-year-and-2-month-old autistic child, his cousin; and that the sentence was necessary to deter others. The court took into consideration the cost of confinement, the significant text and Facebook messages that had been exchanged after the incident, and the defendant's sex offender evaluation that considered him at low risk to reoffend, as long as he was not unsupervised around minor children. Based on the above information and the State's recommendation, the court sentenced the defendant to 15 years' imprisonment, mandatory supervised release with an indeterminate 3 years to natural life, and credit for time served. The court then stated that it had also considered the two victim impact statements and the trauma that M.H. had been put through and will continue to be put through for the rest of her life.

¶ 14 On August 28, 2014, the defendant filed a motion for reduction or reconsideration of sentence arguing that the circuit court's sentence of 15 years' imprisonment was excessive, especially given that the sex offender evaluation had concluded that he was at

low risk to reoffend. Moreover, the defendant, referencing *People v. Ferguson*, 132 Ill. 2d 86 (1989), argued that the court improperly considered M.H.'s age as a factor in aggravation. In particular, the defendant referenced the court's following statement:

> "The factors in aggravation, as the court sees it, is No. 1, the defendant's conduct caused or threatened serious harm. It certainly did that to the minor who was 12 years and 2 months. No. 7, the sentence is necessary to deter others from committing the same crime. And the court also considered the fact that the offense was committed against an autistic child."

¶ 15 On September 22, 2014, defense counsel filed an Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013) certificate of attorney. On December 2, 2014, defense counsel filed an amended Illinois Supreme Court Rule 604(d) certificate of attorney, and the court also held a hearing on the defendant's motion for reduction or reconsideration of sentence. In particular, defense counsel argued:

> "I think the court then, as part of its ruling and its position of why it was a 15 year sentence, by making reference to the child's age and the fact that it was a child specifically I think was an improper consideration of aggravation when that age is an element of the offense. So specifically we believe that the court incorrectly enhanced the sentence based upon the age since it was already taken into account as part of the element of the offense, and so we would ask that the court then reconsider and reduce the 15 year sentence accordingly."

In response, the court stated that *People v. Ferguson* and the case at issue were dissimilar. First, the court noted that unlike *Ferguson*, the present case was not a case of an extended term sentence, given that the defendant was sentenced to 15 years' imprisonment and the crime carried a maximum possible punishment of up to 30 years' imprisonment. Second, "the court specifically referred to an aggravating factor that this caused or threatened serious harm, regardless of age" in this case. The court denied the defendant's motion, stating the following:

> "I read and listened to the transcript of the proceedings to indicate that the court took into consideration that this could have harmed someone, not necessarily saying the age of the minor child had anything to do with the harm or threatened harm that could come to a victim in any type of a sexual assault situation or a sexual abuse type of case, simply that the aggravating factor caused or threatened serious harm and that it did so to the victim in this case. I don't read the court as saying because of that child's age, I am sentencing you to as opposed to understanding that the court considered the appropriate statutory factors, aggravating and mitigating, considered appropriately the sex offender evaluation and the presentence investigation, that the court observed and listened to the testimony presented, and that based on that, that the court made in its own discretion the appropriate sentence for this defendant on this type of charge."

The defendant filed a timely notice of appeal on December 3, 2014.

¶ 16 ANALYSIS

¶ 17 The defendant first contends that he is entitled to a new sentencing hearing because the circuit court erred in considering Dr. Gottfried's victim impact statement. In particular, the defendant argues that Dr. Gottfried's statement, read by Reynolds, M.H.'s mother, was irrelevant, inadmissible hearsay that the court relied on as an aggravating factor, and was not authorized by statute. Thus, the defendant argues that the "Act is only relevant in this appeal to show that it does not apply to Dr. Gottfried's 'victim impact statement' ". In response, the State argues that this court lacks jurisdiction to determine this issue where the plain and explicit language in article I, section 8.1(d), of the Illinois Constitution (Ill. Const. 1970, art. I, § 8.1(d)) specifically removes victims' rights from the spectrum of issues in which a criminal defendant may appeal.

¶ 18 Initially, we note that the defendant did not object to the introduction of the victim impact statements at the sentencing hearing, and failed to raise this issue in his motion for reduction or reconsideration of sentence. The failure to object to the consideration of

allegedly improper evidence during a sentencing hearing and to raise it in a postsentencing motion results in a waiver of the issue on appeal unless the error is deemed plain error. *People v. Mahaffey*, 166 Ill. 2d 1, 27 (1995). The failure to object to allegedly improper victim impact evidence ordinarily results in waiver on appeal in noncapital cases. *People v. Gonzales*, 285 Ill. App. 3d 102, 104 (1996) (citing *People v. Wright*, 234 Ill. App. 3d 880, 899 (1992)). A reviewing court may apply the plain error exception to the waiver rule where the evidence is closely balanced or where the error is so substantial that it denied the defendant a fair sentencing hearing. *Mahaffey*, 166 Ill. 2d at 27.

¶ 19 We find neither circumstance present, and we deem the alleged error waived. Additionally, the error, if any, was not so substantial that we would find the type of prejudice necessary to find that the defendant was denied a fair sentencing hearing. The defendant has failed to show that the court's consideration of the victim impact statement was so prejudicial that it undermines confidence in the outcome. Rather, our review of the record shows that the circuit court considered many factors in rendering its sentence, including, among others, the seriousness of the offense; that the defendant's conduct caused or threatened serious harm to an autistic child; and the need to deter others to protect the public. Nevertheless, the court imposed an intermediate sentence of 15 years' imprisonment when the range of potential sentencing was from 6-30 years. Even if not waived, we do not find that plain error applies in this case.

¶ 20 Assuming that the defendant's claim is not waived on appeal, we find his argument meritless. Victim impact statements are admissible during the sentencing phase of a

criminal trial. *People v. Pavlovskis*, 229 Ill. App. 3d 776, 782 (1992). The evidence should be relevant and reliable in order to be admitted. *Id.* The foreseeable consequences of a defendant's actions upon a victim and his or her family are relevant to the sentencing determination. *Id.* A "crime victim" or "victim," as defined in section 3(a) of the Act (725 ILCS 120/3(a) (West 2012)), includes "(1) any natural person determined by the prosecutor or the court to have suffered direct physical or psychological harm as a result of a violent crime perpetrated or attempted against that person or direct physical or psychological harm ***; (2) in the case of a crime victim who is under 18 years of age *** both parents, legal guardians, foster parents, or a single adult representative; *** and (4) an immediate family member of a victim under clause (1) of this paragraph (a) chosen by the victim."

¶ 21 Although Dr. Gottfried's victim impact statement was erroneously admitted, given that she does not fall within the confines of section 3(a) of the Act, we conclude that the defendant's argument is foreclosed by section 9 of the Act, which states, "Nothing in this Act shall create a basis for vacating a conviction or a ground for appellate relief in any criminal case." 725 ILCS 120/9 (West 2012). In *People v. Richardson*, 196 Ill. 2d 225, 228-29 (2001), our supreme court allowed for the presentation of only one victim impact statement at sentencing, determining that the circuit court failed to comply with the Act where it accepted three victim impact statements rather than "a single representative" of the deceased. Even though our supreme court found error in the circuit court's consideration of three victim impact statements, the court stated that article I, section 8.1(d), of the Illinois Constitution precluded appellate relief. *Id.* 230. The court reasoned

that section 9 of the Act is based on article I, section 8.1(d), of the Illinois Constitution, which allows victim impact statements and also states that nothing in the section or any other statute enacted under it shall be a basis for appellate relief in any criminal case. *Id.* at 229-31. Even though the admission of the victim impact statement was error, given that Dr. Gottfried was not a "crime victim," *Richardson* precludes appellate relief.

¶ 22 The supreme court in *Richardson* further noted, however, that "it [is] important to note that the prohibition on appellate relief for violations of the Act or the [Illinois Constitution] does not alleviate the trial court's responsibility to exercise appropriate discretion at sentencing." *Id.* at 232; see *People v. Hope*, 184 Ill. 2d 39, 49, 53 (1998) (the Act "does not contemplate, and we will not condone, an expansion of victim impact statements to include evidence from victims other than the victims of the offense on trial"). Indeed, section 6 of the Act which provides that "[t]he court shall consider any statements made by the victim" is not mandatory in nature and does nothing to indicate what weight should be given to victim impact evidence, nor does it indicate what sentence should be imposed. See 725 ILCS 120/6(a) (West 1998); see also *People v. Felella*, 131 Ill. 2d 525, 539 (1989). " 'In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.' " *Richardson*, 196 Ill. 2d at 233 (quoting *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)).

¶ 23 Here, the admission of Dr. Gottfried's statement did not amount to a due process violation. Due process bars the introduction of evidence that is so unduly prejudicial that it renders the sentencing hearing fundamentally unfair. *Payne*, 501 U.S. at 825. It is well

established that where a sentencing hearing is conducted before the circuit court rather than a jury, the court is presumed to consider only competent and relevant evidence in determining sentence. *Richardson*, 196 Ill. 2d at 233. We note, first, that the State did not mention Dr. Gottfried's victim impact statement in closing arguments, but relied heavily on the fact that M.H. was the defendant's "autistic family member." Moreover, the State also argued that a lengthy sentence was necessary to deter others and to protect the public, especially given that the defendant had not admitted "what the victim said happened," claiming "[t]hat [it] didn't really happen. I didn't pin her down. It was consensual."

¶ 24 The circuit court considered the evidence in aggravation and mitigation. In referencing the factors in aggravation, the court focused on the element of deterrence, specifically denoting that the sentence was necessary because the defendant's actions caused serious harm to an autistic child. The mitigation factors the court specifically considered included the defendant's clean criminal record and his ability to take responsibility for his actions. After the court pronounced the 15-year prison sentence, the court then noted "[a]nd the court also considered the victim impact statements of the minor and of Dr. Gottfried, and considered the trauma that the minor had been put through and will be continued to be put through for, perhaps, the rest of her life." Based on a review of the record, it appears that the court merely mentioned Dr. Gottfried's victim impact statement, less than one page of written material, only after the sentencing had been pronounced and immediately before the court explained the defendant's rights

to appeal. Thus, we cannot find that the court's statement above, alone, was so egregious that it rendered the sentencing hearing fundamentally unfair.

¶ 25 The defendant argues next that the circuit court erred when it considered the age of the victim, an element of the offense, at sentencing, which resulted in a prison sentence over double the minimum. Specifically, the defendant contends that the court noted that "[i]t certainly did that to the minor who was 12 years and 2 months [old]." The defendant asserts that the circuit court found "Mr. Gargas's actions caused or threatened serious harm because M.H. was a minor," and that the court further emphasized M.H.'s age by stating that "the offense was committed against an autistic child."

¶ 26 The circuit court is best suited to determine the most appropriate sentence. *People v. Hicks*, 101 Ill. 2d 366, 375 (1984). A circuit court's sentencing decision is entitled to great deference and will not be disturbed absent a showing of an abuse of discretion. *Id.* It is well settled that a factor implicit in the offense should not be used in aggravation in sentencing. *People v. White,* 114 Ill. 2d 61, 67 (1986). However, as long as the court does not consider incompetent evidence, improper aggravating factors, or ignore pertinent mitigating factors, it has wide latitude in sentencing a defendant to any term within the statutory range prescribed in the offense. *People v. Thurmond*, 317 Ill. App. 3d 1133, 1143 (2000) (citing *People v. Hernandez,* 204 Ill. App. 3d 732, 740 (1990)). Even reliance on an improper factor in sentencing does not always necessitate remand for sentencing. *White,* 114 Ill. 2d at 66. "Where the reviewing court is unable to determine the weight given to an improperly considered factor, the cause must be remanded for resentencing." *People v. Johnson*, 347 Ill. App. 3d 570, 576 (2004) (citing *People v.*

Bourke, 96 Ill. 2d 327, 332 (1983)). Rather, "where it can be determined from the record that the weight placed on the improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence, remandment is not required." *Id.* (citing *Bourke*, 96 Ill. 2d at 332).

¶ 27 Here, the circuit court stated during the sentencing hearing that "[t]he factors in aggravation, as the court sees it, is No. 1, the defendant's conduct caused or threatened serious harm. It certainly did that to the minor who was 12 years and 2 months." Along with this statement, the court emphasized that "the court also considered the fact that the offense was committed against an autistic child." However, the court also noted that another aggravating factor was that "the sentence is necessary to deter others from committing the same crime." This court considered all of the circumstances surrounding the circuit court's consideration of factors in aggravation and mitigation, which included arguments by the State and defense counsel. We find that, when read in conjunction with the remaining statements that followed at the sentencing hearing, the circuit court was merely commenting upon the seriousness of the offense by pointing out that the defendant's victim, M.H., was autistic and that the incident had caused or threatened serious harm. We further find that, even if we were to accept the defendant's argument on this point, remand would be unnecessary because the defendant's sentence was well within the statutory range of 6-30 years' imprisonment and other aggravating factors still existed. We decline, therefore, to remand the instant case for resentencing where the possible consideration of an improper aggravating factor did not lead to a greater sentence.

¶ 28 CONCLUSION

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

¶ 30 Affirmed.