2019 IL App (4th) 160729-UB

NO. 4-16-0729

FILED
January 10, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
SIXTO MARTINEZ,	)	No. 14CF1166
Defendant-Appellant.	)	
	)	Honorable
	)	Scott D. Drazewski,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Presiding Justice Holder White and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed defendant's convictions, finding it had no jurisdiction to rule on whether the Sex Offender Registration Act is unconstitutional and the circuit clerk did not improperly impose certain fines. The appellate court modified defendant's sentence to reflect the reduction in his child-pornography fines.

¶ 2 In February 2016, the trial court found defendant, Sixto Martinez, guilty of six counts of aggravated criminal sexual abuse and three counts of child pornography. The court sentenced defendant to four years in prison on one count of child pornography to be served consecutively to concurrent terms of three years in prison on the remaining counts. The court also imposed various fines and fees and noted defendant was required to register as a sex offender.

¶ 3 On appeal, defendant argued (1) the Sex Offender Registration Act (Registration Act) (730 ILCS 150/1 to 12 (West 2014)) is unconstitutional, (2) his child-pornography fines

should be reduced, and (3) the circuit clerk improperly imposed certain fines. We affirmed as modified. *People v. Martinez*, 2018 IL App (4th) 160729-U.

¶ 4 Defendant filed a petition for leave to appeal to the Illinois Supreme Court. On November 28, 2018, the supreme court denied defendant's petition; however, in the exercise of its supervisory authority, it directed this court to vacate its judgment and consider the effect of *People v. Bingham*, 2018 IL 122008, on the issue of whether a defendant may raise the constitutionality of the Registration Act on direct appeal. Accordingly, we vacate our original judgment and, after consideration of *Bingham*, we again affirm as modified.

¶ 5 I. BACKGROUND

¶ 6 In October 2014, a grand jury indicted defendant on six counts of aggravated criminal sexual abuse (counts I to VI) (720 ILCS 5/11-1.60(d) (West 2014)), alleging he knowingly committed acts of sexual penetration with S.M. involving defendant's penis and the anus and/or mouth of S.M., when S.M. was at least 13 years of age but under 17 years of age and defendant was at least five years older than S.M.

¶ 7 In February 2015, a grand jury indicted defendant on two additional counts of aggravated criminal sexual abuse (counts VII and VIII) (720 ILCS 5/11-1.60(d) (West 2014)). The grand jury also indicted defendant on eight counts of criminal sexual assault (counts IX to XVI) (720 ILCS 5/11-1.20(a)(1) (West 2014)), alleging he knowingly committed acts of sexual penetration with S.M., said acts involving defendant's penis and the mouth and/or anus of S.M., and the acts were committed with the use of force or threat of force.

¶ 8 A grand jury later indicted defendant on three counts of child pornography (counts XVII to XIX) (720 ILCS 5/11-20.1(a)(2), (a)(6) (West 2014)), alleging he, with the knowledge of the content thereof, possessed and/or disseminated a photograph or other similar

visual reproduction or depiction by computer of S.M., whom he reasonably should have known to be under the age of 18, in a setting involving the lewd exhibition of S.M.'s unclothed genitals. Defendant pleaded not guilty to the charges.

¶ 9 In February 2016, defendant's bench trial commenced. Dora M. testified she is the mother of S.M., who was born in May 1999. In 2014, Dora noticed changes in S.M.'s behavior at home, stating he would stay up late or leave for the weekend. She also noticed S.M. coming home with gifts, including clothes, a watch, and shoes. In September 2014, Dora found in her house a pair of underwear with the word "Papi." She later discovered a text message of "Papi" on S.M.'s phone.

¶ 10 S.M. testified he was 16 years old at the time of the trial. In September 2013, when he was 14 years old, S.M. joined "adultfriendfinder.com," which is "an adult site where you find partners, typically for sexual interactions." Because the website requires users to be 18 years old, S.M. lied about his age. S.M. uploaded photographs to his profile, including "a nude picture of [his] torso" and his genitalia, and he used the name "Samster696969" as his profile identification. "A week or so" after being on the website, he received a message from defendant. The two sent messages to each other and corresponded through other websites. S.M. initially told defendant he was 16 years old and later told him he was 14 years old. Defendant told him it was "okay as long as they don't find out."

¶ 11 "A few weeks" after their first communication, S.M. and defendant agreed to meet at a movie theater. After S.M. did not show up because he realized what he "was doing was wrong at that time," defendant "was very angered" and said S.M. had to "make it up to him." The two planned another meeting, and defendant picked him up and went to a hotel in Bloomington on October 12, 2013. Defendant went inside by himself to rent the room while

S.M. stayed in the car. After going to the room and conversing, defendant started touching S.M., who felt uncomfortable and attempted to leave. Defendant "firmly grasped" S.M.'s wrist and pulled him back. When S.M. "started begging" defendant that he did not want "to do this anymore," defendant demanded he be quiet and covered S.M.'s mouth with his hand. Defendant then "started slowly taking off [their] clothing." After engaging in kissing, defendant "pushed and shoved his genitalia forcefully into [S.M.'s] mouth." Once the oral sex was complete, defendant pushed S.M. onto the bed and started to perform anal sex. S.M. pleaded with him to stop, but defendant continued for "around five minutes."

¶ 12 Although defendant told S.M. he would take him home, they went to defendant's house in Lafayette, Indiana. Once they arrived, defendant pulled him out of the car and into the house, where defendant "forcefully" removed their clothes. Defendant "forced [S.M.] to perform oral sex" and then "turned [S.M.] around to perform anal sex." S.M. "was begging for him to stop," but defendant refused and told him to cooperate. During the anal sex, S.M. stated he felt a sharp object, which he assumed was knife, digging into his lower back. After defendant locked him in the bathroom, S.M. cleaned up blood from his back. The next morning, defendant told S.M. he would take him home. He also stated the sex acts would continue and he would provide gifts to S.M.

¶ 13 On November 10, 2013, defendant and S.M. scheduled a meeting, and defendant picked him up and went to a motel. After showering separately, S.M. performed oral sex on defendant and then defendant inserted his penis in S.M.'s anus. S.M. testified he went to the motel unwillingly because defendant threatened to come to his house and shoot the person who opened the door. S.M. stated he was scared of defendant because he threatened to kill S.M. and members of S.M.'s family.

¶ 14 In January 2014, defendant picked up S.M. and went to the mall in Bloomington. S.M. stated he received a gift of clothing at that time, but they did not have any sexual contact. S.M. testified defendant took him to Indiana approximately four times, and they engaged in sexual contact on each occasion. S.M. stated he hid notes at defendant's house "out of desperation" and in hopes defendant's children would "help" S.M.

¶ 15 On May 10, 2014, defendant picked up S.M. and they went to a hotel. After showering separately, they started kissing. S.M. then "had to perform oral sex." Then, defendant penetrated S.M.'s anus with his penis. After spending the night in the hotel, defendant took S.M. home.

¶ 16 S.M. testified they went to the same hotel on May 25, 2014. Again, S.M. performed oral sex on defendant and then defendant penetrated S.M.'s anus with his penis. S.M. stated defendant "would wake up throughout the night and then he would do the same thing."

¶ 17 S.M. stated he had contact with defendant in June, July, and August 2014. At the July meeting, defendant stayed at S.M.'s house. When S.M.'s parents saw a vehicle in the driveway, S.M. "freaked out" and told them it was a friend's car. Defendant refused to leave, and S.M. "decided that the only way to get rid of him was to bring him" through the house. When S.M. brought defendant inside, S.M. stated he "was sexually abused." After defendant left, S.M. noticed he had left a pair of thong underwear.

¶ 18 Throughout the time period in which defendant and S.M. were communicating, S.M. received his "incentives," including clothing, cash, and a watch. They also sent each other "photographs of each other's bodies." S.M. sent pictures of his genitalia after he told defendant he was 14 years old. Defendant also had S.M. take pictures of S.M.'s genitalia while at the hotel. S.M. testified his last contact with defendant occurred in August 2014, after his mother found

text messages on his phone.

¶ 19 On cross-examination, S.M. stated he sent text messages to defendant and said he loved him "quite a bit." S.M. admitted lying to get on the "friend finder" website, knew the site had to do with sex, and put on his profile that he was looking for a one-night stand. When asked why he did not leave defendant's house when defendant was asleep, S.M. stated he was scared of how he would get home.

¶ 20 Bloomington police detective Michael Burns testified he investigated a claim of the sexual abuse of S.M. in September 2014. He learned defendant was born in August 1966 and, in October 2014, he was 48 years old. Police arrested defendant on October 2, 2014, and a search of his cell phone revealed two nude photographs of S.M.

¶ 21 Defendant testified on his own behalf and stated he was 49 years old. He denied owning a thong. Defendant brought S.M. to Indiana four to five times, and they engaged in sexual relations. They also engaged in sexual relations at S.M.'s house and at hotels. Defendant stated S.M. provided four different ages during their relationship, with the oldest being 23 years old. When asked his age before the first hotel encounter, S.M. said he was 18 years old. Defendant stated he never threatened S.M. or his family and never cut him with a knife.

¶ 22 Defendant stated S.M. often asked for money and gifts and once tried to use defendant's credit card without permission. S.M. also asked him for $1000, claiming someone from a hotel had recorded them having sex. Defendant told S.M. he was going to report the matter to the police, but S.M. told him not to do anything.

¶ 23 On cross-examination, defendant stated S.M. told him he was 14 years old after their October 12, 2013, encounter. S.M. sent "maybe 12" photographs of his genitals to defendant during the course of their relationship.

¶ 24 Following closing arguments, the trial court found defendant not guilty on two counts of aggravated criminal sexual abuse (counts I and II) and not guilty of criminal sexual assault (counts IX to XVI). The court found S.M. and defendant had a consensual relationship and noted S.M. had "not been truthful in a variety of circumstances relating to what took place" between them. The court also found defendant did not use or threaten force against S.M.

¶ 25 The trial court, however, found that after their first sexual encounter, defendant knew or should have known S.M. was a minor. Thus, the court acquitted defendant of the two charges relating to the October 13, 2013, encounter but found him guilty of aggravated criminal sexual abuse (counts III to VIII). The court also found defendant guilty of child pornography (counts XVII to XIX) for possessing two photographs on his cell phone and for disseminating a photo of S.M. in an online conversation.

¶ 26 In March 2016, defendant filed a posttrial motion, arguing the evidence failed to prove beyond a reasonable doubt that defendant knew S.M.'s age since S.M. repeatedly lied to him. The trial court denied the motion. In April 2016, the court sentenced defendant to four years in prison on count XVII, to be served consecutively to concurrent terms of three years in prison on counts III to VIII, XVIII, and XIX. The court noted defendant would be required to register as a sex offender. The court imposed "all other mandatory minimum fines as requested by the State, including the minimum thousand dollar fines on counts [XVII] through [XIX]." The court's supplemental sentencing order lists a $500 fine for each of the child-pornography convictions. This appeal followed.

¶ 27 II. ANALYSIS

¶ 28 A. The Registration Act

¶ 29 Defendant argues the "difficult, lifelong restraints and registration requirements"

of the Registration Act and related statutes constitute grossly disproportionate penalties and violate his constitutional rights to procedural and substantive due process. In *Bingham*, 2018 IL 122008, ¶ 1, the defendant was convicted of theft and sentenced to prison. The trial court did not impose as part of its judgment a requirement that defendant register as a sex offender. *Bingham*, 2018 IL 122008, ¶ 9. The conviction did, however, trigger the collateral consequence of having the defendant register as a sex offender. *Bingham*, 2018 IL 122008, ¶ 10. On direct appeal, the defendant argued the registration requirement violated due process and *ex post facto* principles, but the First District disagreed. *Bingham*, 2018 IL 122008, ¶¶ 11-12.

¶ 30 On appeal to the supreme court, the defendant argued the registration requirement is unconstitutional as applied to him on substantive due process grounds and violative of *ex post facto* principles. *Bingham*, 2018 IL 122008, ¶ 14. The State raised a jurisdictional argument, contending "a reviewing court has no power on direct appeal of a criminal conviction to order that a defendant be relieved of his obligation to register as a sex offender when that obligation was neither imposed by the trial court nor did it in any way relate to the reasons for his conviction and sentence in that court." *Bingham*, 2018 IL 122008, ¶ 15.

¶ 31 The supreme court agreed with the State, noting "[t]he requirement that defendant register as a sex offender is not encompassed within the judgment or any order of the trial court. Thus, defendant's argument did not ask a reviewing court to reverse, affirm, or modify the judgment or order from which the appeal is taken." *Bingham*, 2018 IL 122008, ¶ 17.

> "Accordingly, we conclude that a reviewing court has no power on direct appeal of a criminal conviction to order that defendant be relieved of the obligation to register as a sex offender when there is neither an obligation to register imposed by the trial court nor an

order or conviction that the defendant is appealing that is directly related to the obligation or the failure to register." *Bingham*, 2018 IL 122008, ¶ 18.

¶ 32 The supreme court also noted "the improper tack" the defendant chose in raising an as-applied challenge to the registration requirements "for the first time in the reviewing court in a collateral proceeding without the benefit of a factual record to support the claim ***." *Bingham*, 2018 IL 122008, ¶ 22. "All as-applied challenges are, by definition, dependent on application of the law to the specific facts and circumstances alleged by the challenger; therefore, it is crucial that the record be sufficiently developed with respect to those facts and circumstances for purposes of appellate review." *Bingham*, 2018 IL 122008, ¶ 22. The court held that "[b]ecause this is not the proper forum for defendant to raise his claims and because an as-applied challenge may not be raised where it is litigated for the first time on review," the portion of the appellate court's judgment that had addressed the defendant's constitutional claims on the merits must be vacated. *Bingham*, 2018 IL 122008, ¶ 25.

¶ 33 In the case *sub judice*, defendant acknowledges he failed to raise his as-applied constitutional challenge in the trial court, and, according to *Bingham*, he cannot do so now on direct appeal. Thus, as we have no jurisdiction to consider defendant's constitutional claim, we cannot address the merits. We, however, affirm defendant's convictions here.

¶ 34 B. Child-Pornography Fines

¶ 35 Defendant argues his child-pornography fines should be reduced to $1500 to reflect one fine for each of his three convictions for child pornography. The State concedes error, and we agree.

¶ 36 Section 5-9-1.14 of the Unified Code of Corrections (730 ILCS 5/5-9-1.14 (West

2014)) provides, "In addition to any other penalty imposed, a fine of $500 shall be imposed upon a person convicted of child pornography under Section 11-20.1 of the Criminal Code of 1961 or the Criminal Code of 2012." Here, the trial court found defendant guilty on three counts of child pornography, but he received $4500 in fines pursuant to section 5-9.1.14. The State concedes that, while defendant was convicted of nine sex-offense counts, he was only subject to the $500 child-pornography fines on those particular three counts. Thus, we reduce defendant's child-pornography fines to $1500. See Ill. S. Ct. Rule 615(b)(4) (eff. Jan. 1, 1967) (permitting the reviewing court to "reduce the punishment imposed by the trial court"); *People v. Schillaci*, 171 Ill. App. 3d 510, 527, 526 N.E.2d 871, 882 (1988) (reducing the fine imposed by the trial court pursuant to Illinois Supreme Court Rule 615(b)(4)).

¶ 37 C. Other Fines

¶ 38 Defendant argues this court should vacate various fines improperly imposed by the circuit clerk. Specifically, defendant lists $3720 as a lump sum surcharge, $900 for the Violent Crime Victim Assistance fund, $450 for the court system, $135 for the child advocacy center, $90 for drug court, $270 for juvenile records expungement, $90 for arrestee's medical costs, and $10 for probation and court services. In its brief, the State contends the circuit clerk did not improperly impose these fines, as the record reflects the trial court signed a supplemental sentencing order reflecting the imposition of the challenged assessments based on defendant's nine felony convictions. In his reply brief, defendant concedes the fines were properly imposed by the court in its written order and withdraws the issue. Accordingly, we need not address it.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we vacate our original judgment, affirm defendant's convictions, and reduce his child-pornography fines to $1500. As part of our judgment, we

award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 41 Affirmed as modified.