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2013 IL App (3d) 110901-U

Order filed February 5, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

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|----------------------------------|---|-------------------------------|
| PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the Circuit Court |
| |) | of the 14th Judicial Circuit, |
| Plaintiff-Appellee, |) | Rock Island County, Illinois, |
| |) | |
| v. |) | Appeal No. 3-11-0901 |
| |) | Circuit No. 98-CF-216 |
| |) | |
| NICHOLUS OGDEN, |) | Honorable |
| |) | Jeffrey W. O'Connor, |
| Defendant-Appellant. |) | Judge, Presiding. |

PRESIDING JUSTICE WRIGHT delivered the judgment of the court.
Justices Lytton and McDade concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion by sentencing defendant to 60 years' imprisonment for first-degree murder.

¶ 2 After a bench trial, defendant, Nicholus Ogden, was convicted of first-degree murder (720 ILCS 5/9-1(a)(2) (West 1996)) and was subsequently sentenced to 60 years' imprisonment. Defendant appeals, arguing that this court should reduce his sentence because his sentence was excessive. We affirm the trial court's decision.

¶ 3

FACTS

¶ 4 On March 2, 1998, the State charged defendant by information with first-degree murder for the death of nine-month old Nicole Lesley-Krakliow on November 23, 1997. During a bench trial held in 2009, the following information was presented to the court.

¶ 5 On November 22, 1997, defendant was living in an apartment with his girlfriend, Laura Lesley, her son, and her infant daughter, Nicole. Defendant was not Nicole's biological father, and, at the time, Laura was pregnant with defendant's child.

¶ 6 Around 10 p.m. on November 22, 1997, defendant left the apartment to play video games and drink beers with friends and returned around 1:30 a.m. Shortly after returning, defendant agreed to take care of Nicole, who had regurgitated on herself, to allow Laura to obtain some sleep. Before Laura went to bed at 2 a.m., the only injury she noticed on the child was an old bruise on the side of the baby's head.

¶ 7 At approximately 3:30 a.m., Laura was startled from her sleep by defendant's voice screaming that Nicole was not breathing. When emergency responders arrived at the home shortly after receiving the 9-1-1 phone call around 3:45 a.m., they noticed the unresponsive child had bruising on her head and bite marks on her cheek and arm.

¶ 8 Expert medical testimony presented to the court established Nicole died from a blunt force, head injury and the injuries were consistent with both battered baby syndrome and shaken baby syndrome. According to the expert testimony, the child's injuries most likely occurred between midnight and the 9-1-1 call around 3:45 a.m. and were not consistent with a fall from the couch onto the carpet. Due to the severity of the head injury, Nicole would have been comatose within minutes.

¶ 9 Later, while at the hospital, defendant told Village of Milan police officer Mark Rumley that after returning to the apartment around 1:30 a.m., defendant took care of the baby himself and Laura went to the bedroom to get some sleep. Eventually, defendant fell asleep on the couch with the baby positioned on his stomach. However, he suddenly awakened after hearing a “thud” and unexpectedly found the baby on the floor and unresponsive.

¶ 10 When subsequently questioned by another Village of Milan police officer, Kevin Humphrey, defendant first denied all knowledge of the source of the bite marks on the child. Defendant then admitted during the same conversation with Humphrey that defendant may have bitten Nicole while giving her CPR, and finally explained to the same officer the bite marks on the child may have happened while Nicole was sleeping with her face on defendant's face.

¶ 11 Following the evidence and arguments, the trial court found defendant guilty of first degree murder. On June 28, 1999, the trial court denied defendant's post-trial motion and sentenced defendant to the then-mandatory sentence of natural life based on the victim's age.

¶ 12 On July 11, 2000, this Court vacated defendant's sentence and remanded the cause for a new sentencing hearing because the mandatory life statute had been held unconstitutional in *People v. Wooters*, 188 Ill. 2d 500 (1999). On August 13, 2003,¹ the trial court ordered another pre-sentence investigation report to be prepared for the court's consideration since a significant amount of time had passed since the first pre-sentence investigation in May of 1999.

¹The three-year delay between the issuance of this Court's mandate and defendant's new sentencing hearing appears, based on the record, to have been due to defendant's post-conviction claims, which included an allegation that the trial judge labored under a conflict of interest. After a hearing on the matter conducted by a different trial judge, the court denied the post-conviction petition on July 22, 2003. The matter was returned to the original trial judge, who immediately recused himself, and Judge O'Connor was assigned to hear the matter.

¶ 13 On October 2, 2003, numerous witnesses testified on defendant's behalf during the sentencing hearing and indicated defendant had grown spiritually during his incarceration. The State argued that defendant was eligible for an extended-term sentence of 60 to 100 years due to the victim's age, which defense counsel disputed because defendant had not been put on notice that this offense was subject to extended-term sentencing. The trial court took the extended sentencing issue under advisement.

¶ 14 On November 14, 2003, the trial court sentenced defendant to 60 years' imprisonment followed by three years of mandatory supervised release. The court determined the extended-term sentencing issue was moot based on the sentence imposed. Before announcing this sentence, the court found that there were no applicable statutory factors in mitigation and found the following statutory factors in aggravation applied: defendant's conduct caused or threatened serious harm, defendant's lengthy prior history of delinquency and criminal activity, defendant's "disastrous" mental and emotional health history, and the need for deterrence.

¶ 15 On March 28, 2005, this Court issued a minute order allowing defendant's motion requesting a summary order remanding the matter compliance with Supreme Court Rule 605(a). On June 30, 2005, the trial court complied with the directive by advising defendant of his appeal rights. Thereafter, appointed defense counsel filed a motion to reconsider defendant's sentence on July 25, 2005, but the motion was never heard due to defendant's request to substitute counsel. After a number of substitutions of appointed counsel, and a six year delay, the trial court ordered newly appointed counsel to file an amended motion to reconsider on September 16, 2011. Counsel filed an amended motion to reconsider on November 14, 2011.

¶ 16 The court held a hearing on defendant's amended motion to reconsider his sentence on December 6, 2011. After evidence and following arguments from both parties, the trial court

denied defendant's motion to reconsider. Defendant filed a timely notice of appeal.

¶ 17

ANALYSIS

¶ 18 Defendant requests this court to reduce his 60-year sentence for first-degree murder because the sentence is excessive. The State argues that the trial court appropriately considered the statutory mitigating and aggravating factors when sentencing defendant, and therefore, the sentence imposed by the trial court should not be disturbed on appeal.

¶ 19 Defendant claims the trial court improperly failed to consider, in mitigation, both his youthfulness and his potential for rehabilitation as evidenced by the progress he made in prison since June 28, 1999. In addition, defendant argues the trial court should have considered that defendant suffered "severe emotional disturbances" causing him to be "overwhelmed by a difficult situation" on the day of Nicole's death.

¶ 20 It is well-settled that the trial court has broad discretionary powers in imposing a sentence, and the trial court's sentencing decision is entitled to great deference. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). The case law provides that information about a defendant's mental or psychological impairment is not inherently mitigating, and, importantly, the trial court may consider evidence of that nature as either mitigating or aggravating, depending on whether the evidence evokes compassion or demonstrates possible future dangerousness. See *People v. Coleman*, 183 Ill. 2d 366, 404 (1998). A defendant's youth or rehabilitative potential does not outweigh other factors. *People v. Johnson*, 223 Ill. App. 3d 169, 172 (1991); *People v. Lima*, 328 Ill. App. 3d 84, 100 (2002).

¶ 21 The trial judge is in a superior position to evaluate and weigh various factors including defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age, and a reviewing court should not substitute its judgment for that of the trial court merely

because it would have weighed the sentencing factors differently. *Alexander*, 239 Ill. 2d at 213.

Therefore, when a trial court imposes a sentence within the statutory range, the appellate court will not disturb the sentence absent an abuse of discretion. *People v. Coleman*, 166 Ill. 2d 247, 258 (1995).

¶ 22 First-degree murder carries a sentencing range of not less than 20 years and not more than 60 years. 730 ILCS 5/5-8-1(a)(1)(a) (West 1998). Here, defendant's sentence was within the statutory range of punishment. After carefully reviewing the record in this case, we conclude that the sentence imposed by the court does not represent an abuse of discretion.

¶ 23 CONCLUSION

¶ 24 For the foregoing reasons, the judgment of the circuit court of Rock Island County is affirmed.

¶ 25 Affirmed.