05/23/86 STATE TENNESSEE v. DONALD E. MCINTOSH

1986 | Cited 0 times | Court of Criminal Appeals of Tennessee | May 23, 1986

AFFIRMED

ROBERT E. BURCH SPECIAL JUDGE

O P I N I O N

The defendant, Donald E. McIntosh, was convicted of aggravated rape and aggravated sexual battery. He was sentenced to concurrent thirty-five (35) and fifteen (15) years respectively. In this appeal, he contests the sufficiency of the evidence to sustain a conviction and the sentence imposed, complains about the admission of certain evidence and about certain alleged procedural errors. The judgment is affirmed.

The defendant, according to his own admission, had been engaging in sexual contact with his two step-daughters, ages eleven and nine, for some time prior to his arrest. The eleven-year old testified that this had been occurring for two to three years, while defendant admitted that it had occurred about seven times in eight months with the eleven-year old and "three or four times" with the nine-year old. Defendant stated that he would take out his penis and rub it around the girls' vagina until he ejaculated. The defendant denied penetrating either girl, while the eleven-year old testified that she had no doubt that the defendant's penis had been inside her body. Defendant was convicted of aggravated rape of the eleven-year old. The nine-year old testified only that the defendant had tried to put his private part into her. Defendant was convicted of aggravated sexual battery of the nine-year old.

The medical testimony showed that the physical condition of the eleven-year old was consistent with penetration, although it could not be established with reasonable medical certainty. Penetration was not medically indicated in the case of the nine-year old.

Defendant admitted sexual contact with both girls but denied penetration of either of them. Defendant introduced medical proof which showed that he had medical problems and was on medication which would make it unlikely that he would be able to obtain an erection.

In his appeal, defendant presents a number of questions for review. We shall consider them in the order presented.

POLYGRAPH QUESTIONS

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Defendant contends that the trial court erred in allowing the District Attorney General to question the defendant about his answers given during a polygraph exam. Neither the fact of the exam nor the results thereof was mentioned to the jury.

In his brief, defendant has failed to cite any authority in support of this issue. He has, therefore, waived any review of this issue. See State v. Johnson 541 S.W.2d 417 (Tenn. 1976). Rule 27(a)(7) T.R.A.P

SUFFICIENCY OF THE EVIDENCE

In his next two issues, defendant asserts that the evidence did not support the verdict and that the verdict is contrary to the law and the weight of the evidence.

Again, defendant has waived these issues by his failure to cite authorities to support his argument. State v. Johnson, Supra., Rule 27 (a)(7) T.R.A.P.

In spite of this waiver, we have examined the evidence and are of the opinion that the evidence does support the verdict of the jury.

Defendant himself admitted in open court acts constituting aggravated sexual battery. He only denied penetration.

The medical evidence neither proved nor disproved penetration of the eleven-year old girl. Her physical condition was consistent with penetration.

The eleven-year old girl testified that there was no doubt in her mind that defendant had penetrated her.

Even given sexual pain and dysfunction, penetration is still possible. The slightest intrusion into the bodily opening of another is all that is required for a finding of rape. T.C.A. § 39-2-602(11).

There was sufficient evidence for the jury to find that defendant penetrated the eleven-year old girl and supports a finding of guilt beyond a reasonable doubt. Rule 13(3), T.R.A.P.; Jackson v. Virginia 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed2d 560 (1979).

The issues are denied.

OVERRULING MOTION FOR JUDGMENT OF ACQUITTAL

Defendant advances the proposition that the trial Judge committed error in overruling his motion for judgment of acquittal made at the Conclusion of the state's proof.

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An examination of the record discloses that defendant did make a motion for judgment of acquittal at the close of the state's proof. Such examination also discloses that he failed to renew his motion at the Conclusion of all the proof.

A defendant who fails to renew at the close of all the evidence his motion for judgment of acquittal made at the close of the state's proof, waives the motion. State v. Thompson 549 S.W.2d 943 (Tenn. 1977). See Raybin, Tennessee Criminal Practice and Procedure, § 26.88.

The issue is denied.

PRESENTENCE REPORT

Defendant states that it was error for the trial court to read the presentence report which contained certain improper material.

Once again, defendant has failed to cite any authority in support of this issue and, thus, has waived appellate review thereon. State v. Johnson, Supra. Rule 27(2)(7) T.R.A.P.

In addition, we note that it has not been demonstrated that the trial Judge was prejudiced by the report. In fact, the able and learned trial Judge considered the material objected to and excluded it seemingly without difficulty.

In passing, we note that it would be impossible for the trial Judge to intelligently rule upon defendant's objections to the presentence report without reading the offending passages.

The issue is without merit.

NOT FINDING DEFENDANT AN ESPECIALLY MITIGATED OFFENDER

Defendant submits that the trial Judge erred in not finding the defendant an especially mitigated offender. He again does not cite any authority in support of his position and, therefore, waives it. State v. Johnson, Supra. Rule 27(a)(7) T.R.A.P.

Admittedly, defendant meets the first two requirements of T.C.A. § 40-35-108 for an especially mitigated offender. He has neither a felony conviction nor a misdemeanor sentence of six months or more.

It is the third and final requirement which defendant fails to meet. The court must find extreme mitigating factors in the commission of the offense and a minimum of enhancement factors.

In the sentencing hearing, the trial Judge found no mitigating factors under T.C.A § 40-35-110,

except perhaps that the defendant was suffering from a mental or physical condition that significantly reduced his culpability for the offense. To that we would add that defendant did not contemplate cause nor threaten serious bodily injury to the victims.

These mitigating factors certainly cannot be said to be extreme. It follows, then, that the trial Judge was correct in not finding defendant to have been an especially mitigated offender.

DOUBLE ENHANCEMENT

Defendant submits that the trial court erred in considering the tender age of the victims as an enhancement factor since the offenses of which defendant was convicted contained as a necessary element thereof the fact that the sexual assault was perpetrated upon a child under the age of thirteen (13) years.

T.C.A. § 40-35-111 provides that an enhancement factor cannot be considered as such if it is a necessary element of the offense charged in the indictment.

The record establishes that the trial Judge considered the age of the victims at the sentencing hearing. The factor which made the sexual assaults aggravated was the age of the victims. Therefore, considering the age of the victims as an enhancing factor was error.

It does not follow, however, that the sentence should be altered. Other enhancement factors were considered by the trial Judge which support the sentence imposed by the court. Taking the record as a whole it cannot be said that the trial Judge abused his discretion in imposing the sentence in this case. See State v. Mays 667 S.W.2d 512 (Tenn. Cr. App. 1983).

The issue is without merit.

CRUEL AND UNUSUAL PUNISHMENT

Defendant submits that to imprison him in his poor health condition constitutes cruel and unusual punishment in violation of the Federal and State Constitutions.

In support of his issue, defendant cites Mullins v. State 571 S.W.2d 852 (Tenn. Cr. App. 1978). Mullins is not on point. The state here is not wantonly inflicting pain and the sentence is not grossly out of proportion to the severity of the crime.

Next defendant cites Coker v. Georgia 433 U.S. 584, 97 S. Ct. 2861, 53 L.E.d2d 982 (1977), stating that this sentence of imprisonment in defendant's health condition is "not unlike infliction of the death penalty". We would observe that it is not like it either. The state is not intentionally killing the defendant. He is simply being imprisoned for a crime. It is true that the defendant may have a

shortened life expectancy if imprisoned but he is being treated the same as any convicted defendant. He has asked for special consideration in sentencing because of ill health. To allow a convicted defendant to escape imprisonment which is mandated by the circumstances of the crime would frustrate the purpose of the Sentencing Reform Act. One of the purposes of the act is to prevent crime and promote respect for law by providing an effective deterrent to others likely to commit similar offenses. T.C.A. § 40-35-102 (3)(A). Physical infirmity cannot be allowed to be a basis for escaping imprisonment for crime else a class of people could commit crimes with impunity.

The issue is without merit.

IMPROPER ARGUMENT

Defendant alleges that the state's closing argument at the sentencing hearing was improper because deterrence was argued and was not supported by the evidence.

Initially, we note that there is evidence in the record to support the deterrence argument. The fact that this point may have been refuted on cross-examination is a proper matter for argument.

The authorities cited by defendant are not on point They refer to argument to a jury who, at that time, was considering sentencing and guilt. The fact that the court reduced the sentence does not make the authorities applicable. Prior to the Sentencing Reform Act we were dealing with sentencing by juries. Now sentencing is done by the trial Judge under a set of statutory guidelines.

Most importantly, the trial Judge is specifically allowed by statute to consider deterrence in fixing the sentence. T.C.A. § 40-35-103(1)(B) and see T.C.A. § 40-35-102(3)(A). Argument on the point, therefore, is certainly allowable.

The issue is without merit.

FAILURE TO CONSIDER DRUG SIDE EFFECTS AS MITIGATION

Defendant argues that the court erred in not considering the side effects of drugs he was taking in mitigation of his sentence.

Defendant has again failed to cite authorities in support of this position. Appellate review of the issue is, therefore, waived. Rule 27(a)(7) T.R.A.P., Johnson v. State, Supra.

In spite of the waiver, we have reviewed the entire sentencing hearing and are of the opinion that the trial Judge did not abuse his discretion in fixing the sentence in this case. T.C.A. § 40-21-104; See State v. Mays 667 S.W.2d 512 (Tenn. Cr. App. 1983).

The issue is without merit.

REFUSAL TO CHARGE RANGE OF PUNISHMENT

Defendant argues that it was error for the trial Judge to refuse to inform the jury of the possible punishment for the offenses charged in spite of the fact that this request was not made prior to jury selection as required by T.C.A. § 40-35-201(b). He argues that there is no rational basis for this requirement of the statute.

We disagree. The state must be given notice of this request prior to jury selection so that prospective jurors may be questioned about the effect that knowing the possible punishment might have upon their verdict. As all lawyers well know, some jurors cannot find it within themselves to convict a defendant if the conviction would mean a lengthy prison sentence. If this information is to be given to the jury, the state must at least be allowed to question prospective jurors about it. If no motion is filed at the time of jury selection, such questioning may be irrelevant.

The issue is without merit.

NEWLY DISCOVERED EVIDENCE

Defendant states that the fact that a side effect of the drug Inderol is impotency in ninety-five percent (95%) of its male users was discovered after trial. He argues that this fact would entitle him to a new trial.

The issue of penetration was fully litigated at trial. Even if the defendant could not obtain an erection, some penetration would be possible. Only the slightest penetration is sufficient for a conviction of rape. T.C.A § 39-2-201(11). In our opinion, such evidence would not have affected the outcome of the trial. This evidence would have only served to contradict evidence that there was penetration.

Newly discovered evidence which only serves to contradict evidence adduced at trial is not a valid basis for a motion for new trial. State v. Hill 598 S.W.2d 815 (Tenn. Cr. App. 1980.)

The issue is without merit.

FAILURE TO ENFORCE PLEA BARGAIN

Finally, defendant argues that the trial court erred in refusing to require the state to comply with the terms of the plea bargain offer which the state had initially made and later, withdrawn. In support of his argument, he cites Santobello v. New York 404 U.S. 257, 30 L.Ed2d 427, 92 S. Ct. 495 (1971).

Santobello is not on point. It deals with the abrogation of an agreement after the entry of a guilty plea made in reliance upon the agreement. Such is not the situation in the case before us. This offer was withdrawn prior to any guilty plea. In such a situation, a different standard is applied. See Raybin, Tennessee Criminal Practice & Procedure § 22.77.

In a situation in which a plea bargain offer is withdrawn prior to the entry of a plea of guilty made in reliance upon it, there must be shown to have been a loss of a trial tactic or a fundamental right as a result of the miscarriage of negotiations in order to make a plea bargain enforceable. Mentheny v, State 589 S.W.2d 943 (Tenn Crim. App 1979); See also Mabry v. Johnson U.S. , 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984).

Defendant cites no loss of trial tactic or fundamental right in his criminal trial as a result of the withdrawal of the offer. He does address some difficulty caused in his divorce case because of the withdrawn offer. The prejudice contemplated by Metheny is to the affected criminal action. We decline to extend the principles of Metheny to cover prejudice to a collateral civil matter.

The issue is without merit.

All issues having been examined and found to be meritless, the judgment of the trial court is affirmed.