Affirm and Opinion Filed June 3, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00558-CR

VICTOR MIGUEL CALDERON-CARDONA, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 296th Judicial District Court
Collin County, Texas
Trial Court Cause No. 296-82037-2018

MEMORANDUM OPINION

Before Justices Molberg, Reichek, and Evans
Opinion by Justice Molberg

Following an open plea, the trial court found Victor Miguel Calderon-Cardona guilty of one count of continuous sexual abuse of a child under fourteen and two counts of indecency with a child by sexual contact under Texas Penal Code sections 21.02 and 21.11(a)(1), respectively. The court sentenced him to life imprisonment without parole on the first count and twenty years' imprisonment on the second and third counts. He appeals, arguing the trial court failed to meaningfully consider all sentencing options before imposing the sentences. We affirm the court's judgments in this memorandum opinion. *See* TEX. R. APP. P. 47.4.

BACKGROUND

Appellant admitted sexually abusing C.C. and P.C., his stepdaughter and daughter. The judgments reflect that for the charge in Count I, his victim was ten years old, and for Counts II and III, his victim was nine.

Appellant's stepdaughter, C.C., was born in 2005. His daughter, P.C., was born two years later, about a year after he met C.C. and P.C.'s mother. Appellant and their mother later married, and the couple also became parents to a son. The three children were all raised together. They lived for a time in Alice, Texas, where the abuse began and was discovered by appellant's wife. She and appellant separated, and appellant moved to McKinney. The family was later reunited and lived together in McKinney, and the abuse began again, at least with respect to P.C.

Appellant was indicted in July 2018 on the three counts that led to the judgments at issue here. Count I charged that on or about January 1, 2014 through April 24, 2018, during a period that was thirty days or more in duration, when appellant was older than seventeen and C.C. and P.C. were both younger than fourteen, appellant committed two or more acts of sexual abuse against C.C. and P.C., including acts of aggravated sexual assault[1] and indecency with a child by

[1] The indictment alleged appellant caused P.C. and C.C.'s female sexual organs to contact his male sexual organ, caused P.C.'s mouth to touch his male sexual organ, caused P.C.'s sexual organ to touch his mouth, and caused penetration of P.C. and C.C.'s sexual organs by his finger.

contact.[2] Counts II and III charged that, on or about May 1, 2017, with intent to arouse or gratify a person's sexual desire, appellant intentionally and knowingly engaged in sexual contact with P.C. by touching her breast with his hand and mouth.

Appellant initially pleaded not guilty.

On April 29, 2019, appellant again pleaded not guilty, but as the parties waited on a jury list and prepared for voir dire, he changed his plea. The court then conducted an open plea hearing, where appellant waived his right to a jury trial, elected to have the trial court assess punishment, and pleaded guilty to the charges on all three counts.

The trial court advised him, and he indicated he understood, that if the court accepted his guilty plea on the charge alleged in Count I, his range of punishment was twenty-five years to ninety-nine years in prison, without the possibility of parole. On Counts II and III, the trial court advised him, and he indicated he understood, that if the court accepted his guilty plea, his range of punishment was imprisonment for two to twenty years and an optional fine not to exceed $10,000. The court accepted appellant's plea, found appellant guilty, and reserved punishment pending the sentencing proceedings, which began later that afternoon.

At the time of sentencing, C.C. was thirteen, P.C. was eleven, and appellant was thirty-two.

[2] The indictment alleged appellant touched P.C. and C.C.'s genitals with his hand and caused P.C.'s cheek, face, and hand to touch part of his genitals.

During the sentencing proceedings, the State's witnesses included P.C., C.C., a police officer with knowledge of appellant's police interview, and two forensic interviewers from the Collin County Children's Advocacy Center, who interviewed P.C. and C.C. following P.C.'s outcry to a school counselor in McKinney. Appellant was the only witness for the defense. He waived his right to remain silent and testified after acknowledging that he had the right not to do so.

The court admitted various exhibits into evidence, including a videotaped interview of appellant following his arrest, a transcript of that interview, and photographs of items taken from the family home during a search conducted after issuance of a warrant.

During his direct examination, appellant accepted full responsibility for what he did to P.C. and C.C., agreed he admitted to the police what he had done to P.C., and said that he knows he "made a huge error," "honestly feels bad about what happened," and "loves his daughters." He asked that the court consider P.C. and C.C.'s testimony that they do not want to see him die in prison.

Appellant also admitted to touching C.C. and P.C. in Alice, Texas before he and his wife separated, admitted that he apologized at that time, and admitted to touching P.C. again after the family reunited and they lived together in McKinney.[3]

[3] C.C. told the forensic interviewer their mom found out earlier and that appellant apologized then but went on to say she was not allowed to talk to P.C. about the abuse, had to keep it a secret, and did not know what was happening to her sister.

On cross-examination, when asked whether he had sex with P.C., appellant said, "I honestly never tried to penetrate her" but then admitted he ejaculated on her. He disputed P.C.'s testimony that he ejaculated on her "a lot" and said, "No, it didn't happen like that. It was just that time."

In contrast, P.C. testified appellant put his private part in her private part and that afterwards, she would see something "like slimy glue" that was "white or clear" on her "private part" and that she would have to wipe it off. When asked whether she had to do this a lot of times or a few times, she answered, "a lot."

P.C. also testified to several other acts of abuse charged in the indictment, including oral sex and digital penetration, the former of which she described as happening "a few times" and the latter as happening "a lot."

P.C. also testified that some of the abuse occurred when she was praying. She testified that when she was praying, appellant would sometimes tell her to sit on his lap and to put a pillow over her so he could touch her private part. She said he would touch her private part when she was praying, but at those times, unlike other times, "he wasn't in the hole."

When the prosecutor asked appellant whether he touched P.C. when she was praying, appellant said, "I don't remember that." He then went on to describe other incidents of touching P.C., including when the two of them were in bed together with P.C. and C.C.'s mother.

Appellant agreed he would like help "if he needs it," but testified he feels that he is "stronger now" and is "fortified, thanks to God."

After both sides rested and closed, the trial court sentenced appellant to life imprisonment without the possibility of parole on Count I and twenty years' imprisonment on Counts II and III, to run concurrently. Appellant objected to the sentence and filed a notice of appeal.

Here, he argues the trial court failed to meaningfully consider all sentencing options before sentencing him, and he cites two remarks by the trial court, both made after the close of the evidence. His first example is from the following exchange:

> [APPELLANT'S COUNSEL]: You have heard evidence today from the forensic investigators, as well as the victims in this case. It has been a really difficult situation for this entire family. . . .They made their attempts to deal with this problem . . . [they] were not successful. . . .
>
> My client went up to the stand, admitted that he did wrong. He admitted that to the police when he was interviewed. It is difficult for anybody to admit these kinds of allegations in such a public way. They have definitely a taboo in our society. You can come up here and say that you are a methamphetamine addict and have several relapses, but if you come up here and say that you are a child molester and you have been able to not be a child molester and then you said you are a child molester again, you don't have the same standard applied to you.
>
> THE COURT: You damn right they don't.
>
> [APPELLANT'S COUNSEL]: That said, Your Honor, the testimony of his two daughters indicated that they didn't want their father to die in jail, and I would ask that the Court take into consideration when issuing sentence on Mr. Calderon-Cardona.

Appellant also cites a remark after the sentence was announced, which involved the following exchange:

> [APPELLANT'S COUNSEL]: And, Your Honor, as far as the Defense and for record keeping purposes, I would like to object to the sentences being a violation of the U.S. Constitution, Amendment Number 8, being cruel and unusual punishment.[4]
>
> THE COURT: Okay. Overruled. I think what has happened that's cruel and unusual is what he did to his daughters. Sit down.

DISCUSSION

A trial judge is given wide discretion in sentencing, and as long as a sentence is within the proper range of punishment and there was at least some evidence upon which the court could have relied in assessing punishment, the sentence will generally not be disturbed on appeal. *See Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984).

Appellant argues the trial court denied him due process by failing to consider the full range of punishment. While he did not object on this basis below, he may raise this issue for the first time on appeal when, as here, no affirmative waiver has been made. *See Grado v. State*, 445 S.W.3d 736, 742–43 (Tex. Crim. App. 2014).

Due process requires a neutral and detached hearing body or officer. *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973). The effective functioning of our criminal justice system depends on a defendant's substantive right to be sentenced by a

[4] Appellant argues in his brief that we should reverse because the trial court "gave no serious consideration to the argument" that the sentence is cruel and unusual under the Eighth Amendment, *see* U.S. CONST. amend VIII, but he does not raise this as an issue in this appeal. We reject this as a basis for reversal here. "Generally, punishment assessed within the statutory limits is not considered excessive, cruel, or usual." *Toledo-Argueta v. State*, No. 05-18-00387-CR, 2019 WL 3072176, *3 (Tex. App.—Dallas, July 15, 2019, no pet.) (citing *State v. Simpson*, 488 S.W.2d 318, 323 (Tex. Crim. App. 2016)).

neutral and detached judge who properly considers the entire range of punishment. *See Grado*, 445 S.W.3d at 741. If a trial court arbitrarily refuses to consider the entire range of punishment, it denies the defendant due process. *Id*. at 739.

Absent a clear showing of bias, however, we presume the trial court was neutral and detached and that it did not act arbitrarily. *See Brumit v. State*, 206 S.W.3d 639, 645 (Tex. Crim. App. 2006). Bias is not shown when (1) the trial court hears extensive evidence before assessing punishment, (2) the record contains explicit evidence that the trial court considered the full range of punishment, and (3) the trial court made no comments indicating consideration of less than the full range of punishment. *Id*.[5]

All three of those circumstances are present here. The trial judge's remarks do not provide the clear showing necessary to overcome the presumption that the court was neutral and detached in punishment and that it considered the full range of punishment. *See Brumit*, 206 S.W.3d at 644–46 (holding in case involving similar charges that court's assessment of life sentence was not predetermined but was supported by extensive evidence of repeated sexual abuse of two children and its effects on the children); *c.f. Cabrera v. State*, 513 S.W.3d 35, 39–41 (Tex. App.—Houston 14th Dist., pet. ref'd) (distinguishing *Brumit* and reversing and remanding

[5] *See Liteky v. United States*, 510 U.S. 540, 555 (1994) ("judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge" but "will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.") No such favoritism or antagonism is evident here.

for a new punishment hearing when trial court told defendant before jury selection or presentation of any evidence, "I hope you're not under any illusion you are going to get [the minimum sentence] after trial, are you?").

Like *Brumit*, and in contrast to *Cabrera*, the trial court's remarks here were made after all of the evidence had been presented. Also, the trial court explicitly stated the full range of punishment several times before sentencing, and the record contains no indication that the trial court refused to consider the full range here.

Although appellant cites to *Brumit* in his briefing, he fails to apply it, and *Brumit* does not support his arguments here. He cites no other case that would require us to reverse the judgments and remand the case for additional sentencing proceedings. Instead, appellant argues that the trial court should have explicitly explained why, given his age, the court did not impose a fifty- or sixty-year sentence instead of a life sentence,[6] and he cites only a single, non-binding case, *U.S. v. Hayes*, 589 F.2d 811 (5th Cir. 1979), as implicit support. His argument seems to be that in *Hayes*, because the trial court explicitly referred to what it considered before imposing the sentence, the trial court should have done so here and erred by not explaining why a shorter sentence was not imposed. We are not persuaded.

[6] The record indicates that before switching his plea from not guilty to guilty, appellant rejected the State's offer of a sixty-year sentence without parole on Count I and twenty-year sentences on Counts II and III. Although we understand why appellant might now regret that decision, the record simply does not support his request for a reversal and remand for new sentencing proceedings.

Based on this record, we presume the trial court acted properly and considered all the evidence presented before sentencing appellant, and we overrule appellant's sole issue. *See Brumit*, 206 S.W.2d at 644–46; *Bloys v. State*, No. 05-18-01551-CR, 2019 WL 5558583, *2 (Tex. App.—Dallas Oct. 29, 2019, no pet.); *Cunningham v. State*, 05-18-00214-CR, 2018 WL 5784489, *2–3 (Tex. App.—Dallas Nov. 5, 2018, pet. ref'd); *Hernandez v. State*, No. 05-13-00076-CR, 2014 WL 1047263, *1–4 (Tex. App.—Dallas Mar. 17, 2014, no pet.) (all reaching same conclusion).

CONCLUSION

We affirm the trial court's judgments.

/Ken Molberg/
KEN MOLBERG
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

VICTOR MIGUEL CALDERON-CARDONA, Appellant	On Appeal from the 296th Judicial District Court, Collin County, Texas Trial Court Cause No. 296-82037-2018.
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Based on the Court's opinion of this date, the judgments of the trial court are **AFFIRMED**.

Judgment entered this 3rd day of June, 2020.