IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. MARTINEZ

STATE OF NEBRASKA, APPELLANT,
V.
JACOB A. MARTINEZ, APPELLEE.

Filed December 31, 2012. No. A-12-535.

Appeal from the District Court for Washington County: JOHN E. SAMSON, Judge. Affirmed.

Shurie R. Graeve, Washington County Attorney, for appellant.

Deborah D. Cunningham for appellee.

IRWIN, SIEVERS, and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

The State of Nebraska has filed this appeal, asserting that the sentence imposed upon Jacob A. Martinez' plea to a charge of sexual assault was excessively lenient. In light of the record in this case and the trial court's consideration of all relevant factors before imposing its sentence, and in light of the standard of review in all cases challenging a trial court's sentence as being an abuse of discretion, we find this appeal to be meritless and we affirm.

II. BACKGROUND

The victim in this case was a 16-year-old girl, and Martinez was 20 years old at the time of the incident. On the night in question, the victim joined Martinez, Martinez' cousin, and Martinez' girlfriend and drove around with them while they all drank alcohol. Martinez had apparently recently been informed that he was being sent to Iraq by the Army. The victim apparently consumed at least three beers while they were driving around. The group then went to Martinez' home and consumed more alcohol, until she eventually became ill.

The victim reported remembering that somebody gave her chewing gum she believed had something else in it and that she remembered somebody being on top of her and feeling pain. Her memory of the events was apparently not very clear.

The next morning, the victim awoke to find herself naked and lying in bed next to Martinez' cousin. Martinez apparently came to the room to ask what was going on, and Martinez' cousin apparently was concerned that he had engaged in inappropriate contact with the victim. Martinez and his cousin then drove the victim to a park near her home and dropped her off there.

The victim reported that she was afraid she had been sexually assaulted. A sexual assault kit was performed, and it revealed the presence of semen. DNA samples were obtained from Martinez and his cousin.

Initially, the people involved in the handling of the matter believed that Martinez' cousin was the one who had engaged in sexual intercourse with the victim, and Martinez was deployed to Iraq. The DNA test of Martinez' cousin, however, excluded him as being the perpetrator. The DNA test of Martinez suggested that he was the source of the semen found. When Martinez returned from his tour of duty in Iraq, he was arrested and charged with sexual assault. He entered a no contest plea.

Martinez appears to have been fully cooperative and to have undergone various evaluations and interviews. It appears that the consistent conclusion of all experts was that he was readily accepting responsibility, was remorseful, and was not a danger to reoffend. His record consisted primarily of traffic offenses. He had been a very productive member of society, serving as a military police officer overseas in the Army. He also received letters of support for the presentence report from the Army (despite its need to discharge him as a result of this charge) and from friends, family, and acquaintances. The victim did not submit any impact statement.

As a result of all the circumstances concerning the offense and Martinez' background and evaluations, the court concluded that probation was an appropriate sentence. However, the court did not impose a typical or "easy" probation order. The court ordered Martinez to serve 6 months in jail immediately and then be subject to electronic monitoring for the following 6 months. The court ordered a variety of typical restrictions against the use of substances, et cetera, and imposed a total probation term of 5 years. In addition, because of the offense to which Martinez entered the plea, he is subject to the registration requirements of the Sex Offender Registration Act.

III. ASSIGNMENT OF ERROR

The sole assignment of error in this appeal brought by the State is that "[t]he sentence imposed . . . was excessively lenient."

IV. ANALYSIS

The State's argument on appeal is primarily that the very nature of the offense being a sexual assault makes probation inappropriate. The State acknowledges in its brief that Martinez had no criminal record, was young at the time of the offense, had been a productive member of society, and was at low risk to reoffend. Nonetheless, the State urges that a sentence of probation

suggests that perpetrators get a "get out of jail" card for their first rape, and the State emphasizes that Martinez' past and lack of likelihood to reoffend does not in any way minimize the trauma undergone by the victim. Brief for appellant at 8.

Cases in Nebraska where the only issue on appeal is whether a sentence imposed within statutory limits is an abuse of discretion consistently demonstrate that the appellate courts very rarely find an abuse of discretion. Indeed, the Nebraska Supreme Court has on several occasions reversed the Nebraska Court of Appeals for suggesting that a sentence might have been excessive. See, *State v. Phillips*, 242 Neb. 894, 496 N.W.2d 874 (1993); *State v. Riley*, 242 Neb. 887, 497 N.W.2d 23 (1993); *State v. Reynolds*, 242 Neb. 874, 496 N.W.2d 872 (1993). When reviewing a sentence within the statutory limits, whether for leniency or excessiveness, an appellate court reviews for an abuse of discretion. *State v. Parminter*, 283 Neb. 754, 811 N.W.2d 694 (2012). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *Id.*

Martinez has noted in his brief on appeal the rare circumstances where the Supreme Court has found a sentence to be excessively lenient and how in each case there was either a substantial prior criminal record or something particularly egregious about the instant offense. See, *State v. Parminter*, *supra*; *State v. Moore*, 274 Neb. 790, 743 N.W.2d 375 (2008); *State v. Rice*, 269 Neb. 717, 695 N.W.2d 418 (2005); *State v. Fields*, 268 Neb. 850, 688 N.W.2d 878 (2004).

In this case, the trial court appropriately considered everything it was supposed to consider. The court specifically noted, on the record, Martinez' lack of prior criminal problems, his military experience, the probation assessment indicating that he was a moderate to low risk to reoffend, and the fact that this was a single incident with no evidence of any prior history of sexual offenses or assaultive behavior. The court specifically noted the expert opinions provided to supplement the probation office tests. The court specifically noted that Martinez had successfully completed a substance abuse program. The court specifically noted that it was a difficult sentence to impose when weighing the magnitude of the offense with Martinez' background, but concluded that he was amenable to rehabilitative efforts and imposed a probationary sentence within statutory limits. The court added some "teeth" to the probation sentence in recognition of the severity of the underlying offense.

V. CONCLUSION

We cannot find the sentence in this case to be an abuse of discretion, and the State's assertions to the contrary are meritless. We affirm.

AFFIRMED.