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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 6/4/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0902
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ROYSTON JOE TOM,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-140615-001

The Honorable William L. Brotherton, Jr., Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
by Joseph T. Maziarz, Chief Counsel,
Criminal Appeals Section
and Andrew Reilly, Assistant Attorney General
Attorneys for Appellee

Natalee Segal Phoenix
Attorney for Appellant

S W A N N, Judge

¶1 Defendant Royston Joe Tom appeals the sentences he received for convictions of two counts of sexual assault. He contends that the trial court erred by holding his decision not

to testify against him when it declined to mitigate his sentence based on the potential for rehabilitation. Though we agree with Tom that the court's comments from the bench did not accurately reflect the law, we nonetheless affirm the sentences because there was no evidence in the record that Tom had any prospect for rehabilitation.

*FACTS AND PROCEDURAL HISTORY*¹

¶2 In 1999, Tom was indicted on 22 counts including kidnapping, aggravated assault, armed robbery, and sexual assault. The state filed a motion to dismiss the indictment because it could not locate the victims. In 2000, the trial court granted the state's motion to dismiss the indictment without prejudice.

¶3 In 2010, Phoenix Police Department located three of the victims from the 1999 indictment. The state issued a second indictment charging Tom with six counts of sexual assault, a class 2 felony (Counts 1-6).² After a ten-day trial, a jury

¹ "We view the facts in the light most favorable to sustaining the convictions." *State v. Musgrove*, 223 Ariz. 164, 166, ¶ 2, 221 P.3d 43, 45 (App. 2009).

² Tom was indicted for Count 1: "intentionally or knowingly, engag[ing] in sexual intercourse or oral sexual contact with [J.K.], without the consent of [J.K.], (to wit: oral/penile)"; Count 2: "intentionally or knowingly, engag[ing] in sexual intercourse or sexual contact with [J.K.], without the consent of [J.K.], (to wit: masturbatory contact)"; Count 3: "intentionally or knowingly, engag[ing] in sexual intercourse or oral sexual contact with [J.K.], without the consent of [J.K.],

convicted Tom of Counts 4 and 6. The jury found two aggravating factors: (1) "The offense involved the infliction or threatened infliction of serious physical injury"; and (2) "The offense caused physical, emotional or financial harm to the victim or if the victim dies as a result of the conduct of the Defendant, caused emotional or financial harm to the victim's immediate family."

¶4 At sentencing, defense counsel argued that the court should find rehabilitation to be a mitigating factor for the purposes of sentencing because Tom "is amenable to rehabilitation again although he is maintaining his innocence."

The trial court responded by stating:

So how does rehabilitation work in that, the typical rehabilitation is someone says: "I have done something wrong and I -- but I can change and I can be better." Right now the fact pattern I see would be: I have not done anything wrong. There is going to be nothing to rehabilitate. So I'm a little confused on that aspect as a mitigator of -- because your position is that basically he has done nothing wrong, so there is really nothing to rehabilitate

. . . .

The Court has also considered the mitigating circumstances

(to wit: penile/vaginal, first time)"; Count 4: "intentionally or knowingly, engag[ing] in sexual intercourse or oral sexual contact with [J.K], without the consent of [J.K.], (to wit: penile/vaginal, second time)"; Count 5: "intentionally or knowingly, engag[ing] in sexual intercourse or oral sexual contact with [W.C], without the consent of [W.C]"; and Count 6: "intentionally or knowingly, engag[ing] in sexual intercourse or oral sexual contact with [K.D.], without the consent of [K.D]."

And the issue of rehabilitation, that one doesn't make any sense to me because at least from the standpoint of the defendant, the defendant has taken the position that he has done nothing wrong, so I don't see anything to be rehabilitated.

The court found two mitigating factors for each count, recognized that the jury had found two aggravating factors for each count, and found that "the aggravating circumstances are sufficiently substantial to warrant an aggravated sentence." Consequently, the court sentenced Tom to an aggravated prison term of ten years for Count 4 and an aggravated prison term of ten years for Count 6 to be served consecutively to the sentence for Count 4.

¶15 Tom timely appeals his sentence. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A), 13-4031 and 13-4033.

STANDARD OF REVIEW

¶16 Because sentencing is the responsibility of the trial court, we will not alter the trial court's sentencing determination absent an abuse of discretion. *State v. Mincey*, 141 Ariz. 425, 445, 687 P.2d 1180, 1200 (1984). "An abuse of discretion is characterized by capriciousness or arbitrariness or by a failure to conduct an adequate investigation into the facts necessary for an intelligent exercise of the court's sentencing power." *State v. Ethington*, 121 Ariz. 572, 574, 592 P.2d 768, 770 (1979). Further, "[t]he existence of a single

aggravating factor exposes a defendant to an aggravated sentence" and "permits the sentencing judge to find and consider additional factors relevant to the imposition of a sentence up to the maximum prescribed in that statute." *State v. Martinez*, 210 Ariz. 578, 585, ¶ 26, 115 P.3d 618, 625 (2005).

DISCUSSION

¶7 Tom contends that the trial court violated his right to remain silent. U.S. Const. amend. V; *State v. Trujillo*, 227 Ariz. 314, 318, ¶ 15, 257 P.3d 1194, 1198 (App. 2011). Specifically, Tom argues that the trial court refused to find that rehabilitation was a mitigating factor because he did not testify at the sentencing hearing. Tom relies on *State v. Burgess*, which held that the court may not constitutionally draw a negative inference of lack of remorse from a defendant's silence at sentencing. 943 A.2d 727, 736-37 (N.H. 2008).

¶8 *Burgess* is inapposite. The issue there was lack of remorse; the issue here is the prospect for rehabilitation. More on point is the holding of *DiGiovanni v. United States*, 596 F.2d 74, 75 (2d Cir. 1979):

[W]hile it is true that a defendant's lack of desire for rehabilitation may properly be considered in imposing sentence, to permit the sentencing judge to infer such lack of desire from a defendant's refusal to provide testimony would leave little force to the rule that a defendant may not be punished for exercising his right to remain silent. Moreover, we question how much a refusal to

testify indicates an absence of rehabilitative desire, given that defendants often provide such testimony simply to get back at their former associates or to obtain a better deal from the Government. In any event, refusal to testify, particularly in narcotics cases, is more likely to be the result of well-founded fears of reprisal to the witness or his family.

(Emphasis added.)

¶9 The trial court's implication that a defendant who does not admit responsibility is automatically ineligible for a reduced sentence based on his potential for rehabilitation was therefore an incorrect statement of law. On the record before us, however, we find no error in the court's decision. Tom presented no evidence that he was amenable to rehabilitation -- the issue was only raised when counsel *suggested* that rehabilitation was a possibility. Counsel pointed to no evidence to support the suggestion, and we have found none. On these facts, we interpret the trial court's statement to refer to the complete absence of evidence of rehabilitative potential, not an adverse inference drawn from Tom's decision not to testify.

¶10 Moreover, the jury properly found two aggravating factors. The trial court therefore had lawful discretion to impose an aggravated sentence. And even if the court had found that Tom's purported ability to be rehabilitated was a

mitigating factor, it would not have been an abuse of discretion to impose an aggravated sentence.

¶11 We conclude that the trial court's sentencing of Tom was neither arbitrary nor capricious, and the court did not fail to conduct an adequate investigation into the facts necessary for it to exercise its sentencing power properly.

CONCLUSION

¶12 For the foregoing reasons, we affirm.

/s/

PETER B. SWANN, Judge

CONCURRING:

/s/

PATRICIA A. OROZCO, Presiding Judge

/s/

LAWRENCE F. WINTHROP, Chief Judge