

COLORADO COURT OF APPEALS

Court of Appeals Nos. 02CA2294 & 02CA2304
Saguache County District Court Nos. 02CR13 & 02CR14
Honorable Robert W. Ogburn, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Jimmy Gollihugh,

Defendant-Appellant.

SENTENCES REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE TAUBMAN
Marquez and Webb, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
April 22, 2004

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In this consolidated appeal, defendant, Jimmy Gollihugh, appeals the consecutive sentences imposed in two cases in which he pleaded guilty to two counts of second degree burglary of a dwelling. We reverse and remand.

Defendant was charged in multiple cases with multiple counts of second degree burglary of a dwelling and theft arising from defendant's breaking into numerous homes. Pursuant to a plea agreement, defendant pleaded guilty to one count each of second degree burglary of a dwelling in cases 02CR13 and 02CR14 in exchange for the dismissal of the other charges against him. The court sentenced him to consecutive terms of twelve years in the Department of Corrections on each count.

Defendant contends that the trial court abused its discretion and improperly aggravated his sentence by imposing consecutive sentences based on improper findings. Specifically, defendant argues that the trial court (1) did not consider the statutory sentencing factors and (2) improperly considered the bad character of his father and sister in sentencing him. Because we agree with the latter contention, we reverse.

I.

Initially, we reject defendant's argument that he received an aggravated sentence. Each sentence was in the presumptive range. See § 18-1.3-401(1)(a)(V)(A), C.R.S. 2003 (presumptive sentencing range for a class three felony is four to twelve years plus a five-year mandatory parole period). The fact that the

sentences imposed a total of twenty-four years does not mean that "in effect" the court sentenced defendant to twenty-four years. See People v. Quintano, 81 P.3d 1093 (Colo. App. 2003) (cert. granted Jan 12, 2004). Thus, because no aggravated sentence was imposed, the court was not required to make findings of aggravation.

We also reject the People's contention that defendant waived any objection to the court's statement about his family because he did not object during the sentencing hearing. In support, the People rely on People v. Powell, 748 P.2d 1355 (Colo. App. 1987), which concerns a defendant's obligation to object to contrary evidence presented at a restitution hearing. However, we are not aware of any authority that a defendant must object at a sentencing hearing to each factor relied on by the trial court which he or she later intends to challenge on appeal.

II.

Sentencing is by its nature a discretionary function. The trial court is afforded wide latitude in imposing a sentence. People v. Fuller, 791 P.2d 702 (Colo. 1990).

In exercising its sentencing discretion, the trial court must consider the nature of the offense, the character and rehabilitative potential of the offender, the development of respect for the law, the deterrence of crime, and the protection of the public. The court may not place undue emphasis on any one of these factors to the exclusion of the others. People v.

Eurioste, 12 P.3d 847 (Colo. App. 2000). However, the court need not engage in a point-by-point discussion of every factor relevant to its sentencing decision. A reasonable explanation for the sentence will suffice. People v. Walker, 724 P.2d 666 (Colo. 1986).

Notwithstanding the broad discretion given to trial courts in imposing sentences, a trial court violates a defendant's right to due process by relying on information not contained in the record. See Noland v. People, 175 Colo. 6, 485 P.2d 112 (1971). Recently, a division of this court held that a defendant's right to due process is denied if the sentencing court relies upon information and evidence not contained in the presentence report or otherwise disclosed to the defendant before the sentencing hearing. See People v. Pourat, ___ P.3d ___ (Colo. App. No. 02CA1621, Feb. 26, 2004).

At oral argument, the People asserted that the sentence must be upheld under People v. Broga, 750 P.2d 59 (Colo. 1988), in which the supreme court held that a sentence in the aggravated range could be upheld if the trial court relied on an inappropriate factor, as long as other appropriate factors supported the sentence. However, Broga did not address the circumstances here of a trial court relying on information not contained in the record, nor did the Broga court cite or discuss Noland.

Here, after rejecting defendant's expressions of remorse, the trial court stated as follows:

You've been in and out of trouble with the law since you were a kid. You're twenty-four. You went on a crime spree, and we end up with a plea to two charges. You got a good break on this. I'm going to enter a restitution order. Realistically, I don't know how you're going to pay and look at your track record, and you've come from a remarkable family. Your father is in trouble. Your sister is in trouble. . . .

Personally, the actions and your conduct in the way you've ripped through the lives of people, thoughtlessly, selfishly, with no consideration for them whatsoever -- I can only say that regrettably, you are a dark cloud on the community with very little prospect of a silver lining. I think you are like a rotten tooth that needs to be pulled, and we are going to pull your rotten tooth for twelve years, and you can rot in jail for all I care. If you can meet your goals -- the right words again -- great. Perhaps a new tooth will grow that won't be rotten, but right now you truly are like a rotten tooth; and you are going to be removed from this community for twelve years on each count consecutive.

While the trial court considered several relevant factors in imposing sentence to the maximum of the presumptive range on each count, such as defendant's lack of remorse, his prior criminal history, and the effect of his "crime spree" on the victims, the trial court impermissibly considered that defendant's father and sister were "in trouble."

No information on the behavior of defendant's father and sister was contained in the presentence report, and thus, defendant had no opportunity to respond to the court's comments

in this regard. Moreover, sentencing must be based upon factors concerning the defendant, not on the behavior of members of a defendant's family unconnected to either the charged offenses or the defendant's potential for rehabilitation. See United States v. Patriarca, 912 F. Supp. 596 (D. Mass. 1995). This is particularly important in rural communities, where trial judges are more likely to be familiar with the family circumstances of parties appearing before them.

We also disapprove of the trial court's observation that defendant "could rot in jail for all I care." Such a comment is irrelevant to the appropriate sentencing factors, see People v. Eurioste, supra, and may suggest bias against defendant.

Further, we cannot say that the trial court's reference to defendant's father and sister being "in trouble" was harmless error, particularly because the probation department recommended an eight-year sentence and the district attorney recommended concurrent twelve-year sentences.

Accordingly, defendant's sentences must be reversed.

III.

Defendant also contends the trial court abused its discretion in imposing consecutive sentences without making adequate findings of fact. Because we have reversed defendant's sentences, we need not address this contention.

On remand, the trial court may again consider whether to impose consecutive or concurrent sentences. See People v.

Thomas, 916 P.2d 582 (Colo. App. 1995) (as a general rule, if a defendant is convicted of multiple offenses, the trial court in its discretion may impose consecutive or concurrent sentences). If the trial court determines again to impose consecutive sentences, it should state on the record its reasons for so doing.

The sentences are reversed, and the case is remanded for resentencing consistent with this opinion.

JUDGE MARQUEZ and JUDGE WEBB concur.