

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOSEPH ELLERBE,	§
	§
Defendant Below,	§
Appellant,	§ No. 215, 1999
	§
v.	§ Court Below: Superior Court
	§ of the State of Delaware in and
STATE OF DELAWARE,	§ for New Castle County
	§ Cr.A. Nos. IN98-04-1306, 1307
Plaintiff Below,	§ and IN98-05-0983
Appellee.	§

Submitted: April 18, 2000

Decided: May 11, 2000

Before VEASEY, Chief Justice, WALSH, and HARTNETT, Justices.

O R D E R

This 11th day of May 2000, upon consideration of the briefs of the parties, it appears that:

(1) The appellant, Joseph Ellerbe (“Ellerbe”), was indicted on charges of attempted first degree unlawful sexual intercourse, second degree kidnapping, possession of a deadly weapon during the commission of a felony and possession of a deadly weapon by a person prohibited. At trial, the State presented evidence that Ellerbe had accosted a woman on a Wilmington street, forced her to the ground at knife point and pulled at her clothes. Ellerbe was frightened away by the shouts of a resident and was apprehended by police in the neighborhood.

(2) The jury was unable to reach a verdict on the charge of attempted first degree sexual intercourse but found Ellerbe guilty of the second degree kidnapping and both weapons charges. Ellerbe was sentenced to a total of 25 years at Level V with decreasing levels of supervision after 14 years and six months. The Superior Court also directed that Ellerbe be classified as a Tier 2 sexual offender pursuant to 11 *Del. C.* §§ 4120, 4121 and 4336.

(3) In this appeal, Ellerbe does not dispute his guilt but claims that the sentence imposed on him was excessive and reflective of a “closed mind.” He further contends that the charges of which he was convicted, as a matter of law, could not authorize the court to require registration as a sex offender.

(4) The combined maximum penalty authorized for the charges of which Ellerbe was convicted totaled 33 years at Level V and the presumptive sentence under SENTAC guidelines was 12 years, six months. Because Ellerbe has been previously convicted of rape in New York, he clearly qualified for aggravated enhancement of penalties. This Court has consistently declined to review sentences imposed within statutory limits, *see Mayes v. State*, Del. Supr., 604 A.2d 839, 842 (1992); *Siple v. State*, Del. Supr., 701 A.2d 79, 83 (1997), or entertain claims of departure from SENTAC guidelines. *See Gaines v. State*, Del. Supr., 571 A.2d 765, 766-67 (1990).

(5) Although, theoretically at least, the imposition of a sentence by a judge with a “closed mind” (*i.e.*, sentencing based on preconceived bias without consideration of the nature of the offense or the character of the defendant) could constitute an abuse of discretion, the record here does not support such a claim. We have carefully examined the record in this case and find no basis for concluding that the sentence imposed by the trial judge reflected a closed mind. The jury was unable to reach a verdict as to the charge of attempted unlawful sexual intercourse. The kidnapping and weapons convictions, however, reflect the jury’s assessment of a violent, unprovoked street attack on a helpless woman. Given the defendant’s previous history of such conduct, the resulting sentence was well within the range of reasonableness. Thus, we conclude that the trial judge did not abuse his discretion in the sentence imposed.

(6) The second claim in this appeal is more problematic in view of the jury’s verdict. The second degree kidnapping charge, as indicted, alleged that Ellerbe “did intentionally and/or unlawfully restrain [the victim] with the intent to commit a felony and/or to abuse the victim sexually and/or to terrorize the victim.” The jury was specifically instructed that it must agree as to the purpose for which the victim was restrained. In its verdict of guilt on the kidnapping charge, the jury specifically determined that the purpose of the restraint was for “commission of felony and intent to terrorize.” Thus, by implication, the

defendant was not found guilty of kidnapping for the purpose of sexual abuse. At sentencing, the State requested that Ellerbe be designated as Tier 2 sexual offender based on his conviction on the second degree kidnapping charge. The State now concedes that such a designation was error.

(7) Under 11 *Del. C.* § 4120(a), “[a]ny person who is hereafter convicted in this State of any sexual offense specified in §§ 764 through 779, 783 and 783A of this title” is subject to court-ordered registration as a sexual offender. Section 4121(a)(4)(d) defines a “sex offender” as, *inter alia*, a person convicted of a violation of 11 *Del. C.* § 783(4) (kidnapping second degree for the purpose of sexual abuse). Although Ellerbe was, in effect, convicted of kidnapping second degree to facilitate the commission of a felony and to terrorize the victim under 11 *Del. C.* § 783 subsections (3) and (5), respectively, the State concedes that there was no basis in the jury’s verdict for a finding that Ellerbe’s crime was directed to a sexual purpose.

(8) We agree with the State’s analysis. Although the trial judge was entitled to form a different impression based on his view of the evidence, registration as a sexual offender requires a conviction of a designated offense. Because there is no record support for the sexual registration portion of the sentence imposed in this case, that portion of the sentence must be stricken.

Accordingly, this matter is remanded to the Superior Court for correction of that portion of Ellerbe's sentence that directed his registration as a sexual offender.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED in part and REVERSED and REMANDED in part.

BY THE COURT:

s/Joseph T. Walsh
Justice