STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS ALLEN BARROR,

Defendant-Appellant.

UNPUBLISHED
February 13, 1998

No. 198521
Saginaw Circuit Court
LC No. 96-011789 FC

Before: Markey, P.J., and Doctoroff and Smolenski, JJ.

MEMORANDUM.

Pursuant to a plea bargain, by virtue of which an initial charge of first-degree criminal sexual conduct was dismissed, defendant pleaded nolo contendere to second-degree criminal sexual conduct. MCL 750.520c; MSA 28.788(3). On this appeal of right, he contends that the trial court failed to establish a proper factual basis for the plea, and that his counsel was ineffective in failing to object to the adequacy of the factual basis and in failing to negotiate a sentence bargain pursuant to *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

By stipulation of the parties, the factual basis was supplied by the trial court's perusal of the preliminary examination transcript. No authority is cited by defendant for the proposition for which he contends, that having found such transcript adequate to the task, the trial court must somehow recite pertinent portions for the record. The preliminary examination transcript is part of the lower court record and reflects that the victim, defendant's ten-year old daughter, testified that on the occasion in question, defendant inserted his fingers in her vagina. This establishes all the elements of the originally charged offense and is therefore adequate to the task of providing an adequate factual basis for any lesser offense to which defendant negotiates a plea. See *Guilty Plea Cases*, 395 Mich 96, 130-132; 235 NW2d 132 (1975). As the factual basis was proper, defense counsel could hardly be faulted for failing to interpose a meritless objection on this basis.

Nor is there any record indication that the prosecutor, having reduced the charges from the capital offense of first-degree criminal sexual conduct to second-degree criminal sexual conduct, would have been willing to bargain for a sentence limitation, or that the trial judge would have agreed to any

such limitation or, having agreed, would, after examination of the presentence report, have adhered to any such sentence agreement. Defendant was adjudicated a second offender. Defendant's minimum sentence is within the guidelines range for the unenhanced offense, even though the guidelines are theoretically irrelevant. *People v Edgett*, 220 Mich App 686, 691; 560 NW2d 360 (1996). It is simply inconceivable that the trial court would or properly could have agreed to limit the sentence below the sentence actually imposed. Therefore, even assuming that counsel might have sought to negotiate such a plea and failed to make the attempt, defendant has shown no prejudice from the dereliction. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Affirmed.

/s/ Jane E. Markey
/s/ Martin M. Doctoroff
/s/ Michael R. Smolenski