

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWIGHT WAYNE CAMPBELL,

Defendant-Appellant.

UNPUBLISHED

September 11, 1998

No. 197494

Muskegon Circuit Court

LC No. 94-037219 FC

Before: Holbrook, Jr., P.J., and Wahls and Cavanagh, JJ.

MEMORANDUM.

Defendant appeals by right his plea-based sentence for first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), entered on resentencing after remand from this Court. We affirm.

Defendant's conviction arose out of repeated sexual assaults on his girlfriend's then three-year-old son. The victim contracted anal herpes and gonorrhea, sustaining permanent physical and psychological damage. Defendant was originally sentenced to 516 to 840 months' imprisonment. In an unpublished opinion, this Court found that the sentence improperly considered the effect of disciplinary credits, failed to properly resolve challenges to the presentence report, and was disproportionate. *People v Campbell* (Docket No. 181991, issued May 24, 1996). The Court remanded the matter for resentencing before a different judge.

On resentencing, the sentencing guidelines were scored at 96 to 240 months. The court found that the guidelines were insufficient where they did not reflect the vicious nature of the crime, the age of the victim, and the permanent nature of his injuries. The court sentenced defendant to 320 to 540 months' imprisonment.

Defendant argues that his sentence is disproportionate. We disagree. A sentence is proportionate where it reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). A sentencing judge may depart from the guidelines range based on factors already taken into account in the guidelines. *People v Hatch*, 156 Mich App 265, 268-269; 401 NW2d 344 (1986). We conclude that the trial court did not abuse its discretion in exceeding the

guidelines range based on factors which were inadequately reflected in the guidelines. *Houston, supra*. We also reject defendant's assertion that his sentence violates due process. *People v Eason*, 435 Mich 228; 458 NW2d 17 (1990).

Defendant also argues that trial counsel was ineffective in failing to challenge inaccurate information in the presentence report.¹ To establish an ineffective assistance of counsel claim, the defendant has the burden of showing that counsel's performance fell below an objective standard of reasonableness, and that there is a probability that but for the unprofessional errors the outcome of the proceeding would have been different. *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997). After the *Ginther* hearing, the trial court noted that it could "unequivocally say that its sentencing decision was not affected by the presence of the contested language in the presentence investigation report whether it was accurate or inaccurate." Where the trial court did not rely on the challenged information in passing sentence, there is no showing that defendant was prejudiced by counsel's actions.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Myron H. Wahls

/s/ Mark J. Cavanagh

¹ On April 25, 1997, this Court ordered that the case be remanded so that defendant could file with the trial court a motion for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). The *Ginther* hearing was held on May 20, 1997. In an opinion and order dated May 30, 1997, the trial court ruled that it found "no denial of effective assistance of counsel in this matter based upon the record."