

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KIM CHARLES COBURN,

Defendant-Appellant.

UNPUBLISHED

January 26, 1999

No. 198504

St. Clair Circuit Court

LC No. A-96-000416 FH

Before: Holbrook, Jr., P.J., and Markey and Whitbeck, JJ.

WHITBECK, J. (concurring in part and dissenting in part).

I concur with the majority in affirming defendant's convictions and agree with its conclusion that defendant's sentences for CSC II were not disproportionately severe. However, I respectfully dissent from the majority's conclusion that this case should be remanded for resentencing based on certain remarks by the trial court in connection with sentencing.

I agree with the majority that the trial court's remarks show that it considered defendant's refusal to admit guilt in imposing sentence. However, in light of *People v Lemons*, 454 Mich 234, 259-260; 562 NW2d 447 (1997), I conclude that this does *not* constitute error requiring a remand for resentencing.

Unquestionably, prevailing case law prior to *Lemons* precluded a trial court from considering a defendant's refusal to admit guilt as a factor in sentencing. See *People v Adams*, 430 Mich 679, 687, n. 6; 425 NW2d 437 (1988); *People v Yennior*, 399 Mich 892 (1977) (a court may not base a sentence "even in part on a defendant's refusal to admit guilt"). However, pre-*Lemons* case law allowed a trial court to consider a lack of remorse as a factor in sentencing. See *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995).

Lemons, supra, involved defendants who were convicted of criminal sexual conduct crimes in connection with allegations of particularly horrid acts of sexual and physical abuse against their children. As part of its rationale for concluding that the sentences imposed on one of the defendants for his crimes were proportionate, the Michigan Supreme Court stated:

The record further reveals that the defendants rejected plea bargains that would have spared their children the horror of reliving multiple acts of sexual abuse before strangers and the public, and that the defendants expressed no remorse whatsoever for the obvious pain and suffering they inflicted on their children. [*Id.* at 259.]

I conclude that, by considering negative effects of a defendant's rejection of a plea bargain, the Court in *Lemons* effectively considered his refusal to admit guilt as an aggravating factor in sentencing. Reviewing the discussion of the proportionality of the defendant's sentences in context, *id.* at 259-260, the pertinent language from *Lemons* may not be dismissed as dicta but rather was part of the Michigan Supreme Court's basic reasoning for upholding the proportionality of the defendant's sentences. In my view, by considering a defendant's refusal to admit guilt as an aggravating factor in evaluating the proportionality of a sentence, the Court overruled *sub silentio* prior case law precluding consideration of a defendant's refusal to admit guilt in sentencing. Thus, under binding Michigan Supreme Court precedent, the trial court did not err by considering defendant's refusal to admit guilt as an aggravating factor in sentencing.

I note that the pertinent language from *Lemons* did not merely reference a lack of remorse, as opposed to a refusal to admit guilt, as a factor in upholding the proportionality of the sentence at issue. Rather, the Michigan Supreme Court referenced *both* (1) the rejection of plea bargains *and* (2) a lack of remorse as aggravating factors. If the Court were merely considering a lack of remorse as a factor, it would have had no reason to include the reference to the refusal to accept plea bargains.

While I concur with the majority in affirming defendant's convictions, I respectfully dissent from its decision to remand this case for resentencing.

/s/ William C. Whitbeck