

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAMUEL MARION SMITH, JR.,

Defendant-Appellant.

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UNPUBLISHED

February 16, 1999

No. 204035

Monroe Circuit Court

LC No. 96-027460 FH

Before: Markman, P.J., and Jansen and J.B.Sullivan,\* J.J.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of third-degree criminal sexual conduct, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). Defendant was sentenced to three to fifteen years in prison. We affirm.

Defendant's sole issue on appeal is that trial counsel was ineffective at sentencing for acquiescing to a twenty-five point score for offense variable twelve where the score was without factual basis and increased defendant's guidelines range in circumstances which indicated that the judge intended the sentence to be near the low end of the guidelines.

To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the result of the proceeding was fundamentally unfair or unreliable. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996).

Appellate review of challenges to the scoring of the sentencing guidelines is very limited. *People v Mitchell*, 454 Mich 145, 175-178; 560 NW2d 600 (1997). If the sentence is proportionate, an error in the calculation of the guidelines variables provides no basis for relief. *People v Raby*, 456 Mich 487, 496; 572 NW2d 644 (1998). Application of the guidelines presents a cognizable claim only if the factual predicate is wholly unsupported, the factual predicate is materially false, and the sentence is disproportionate. *Mitchell*, *supra*, 454 Mich at 177. Here, the sentence was not disproportionate.

\* Former Court of Appeals judge, sitting in the Court of Appeals by assignment.

Defendant vaginally penetrated the thirteen-year-old complainant with his index finger. He was sentenced to three to fifteen years. The seriousness of the crime warranted the three year minimum sentence. Under *Mitchell, supra*, 454 Mich 145, if offense variable twelve was misscored, it was not a legal error. Defendant's ineffective assistance of counsel claim fails because the proceedings were not unfair or unreliable.

In any event, offense variable twelve was not scored improperly. The sentencing guidelines require that it should be scored twenty-five points if one sexual penetration occurred during the offense. However, in both first and third-degree criminal sexual conduct cases, the penetration that formed the basis of the conviction offense should not be scored, and the sentencing court is to score only penetrations which arise out of the same criminal transaction. Michigan Sentencing Guidelines (2d Ed, 1988), p 45. In this case, there is evidence that more than one penetration occurred during the August 29, 1995, incident which was the basis of defendant's conviction. Complainant testified that on that day, defendant inserted one finger into her vagina and then tried unsuccessfully to insert two fingers. She testified, "And then he couldn't, so he went back to one finger." Based on complainant's testimony, there is evidence that defendant penetrated her twice with one finger. Therefore, the scoring of offense variable twelve was proper because there was an additional penetration during the incident beyond that which formed the basis for the conviction.

Affirmed.

/s/ Stephen J. Markman

/s/ Kathleen Jansen

/s/ Joseph B. Sullivan