

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROGER LEE TUURLING,

Defendant-Appellant.

UNPUBLISHED

February 23, 1999

No. 201580

Ottawa Circuit Court

LC No. 91-015930 FC

Before: McDonald, P.J., and Hood and Doctoroff, JJ.

PER CURIAM.

In 1992, defendant pleaded guilty to second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3), and he was sentenced to seven to ten years' imprisonment, to run consecutive to a prior sentence of eighteen to ninety-six months that defendant was serving at the time of the offense. Defendant subsequently moved for resentencing, and he was resentenced to six to ten years' imprisonment. On appeal, this Court held that the sentence imposed was proportionate both to the offender and his offense, but remanded for resentencing due to questions surrounding the scoring of Offense Variable 25 of the sentencing guidelines. *People v Tuurling*, unpublished opinion per curiam of the Court of Appeals, decided August 1, 1995 (Docket No. 169997). On remand, defendant was again sentenced to six to ten years' imprisonment. Defendant appeals by right, and we affirm.

Defendant first contends that the sentencing court abused its discretion by failing to give him credit against his sentence in this case for 157 days he served in jail between the time of his arrest in 1991 and sentencing in 1992. We disagree. Consecutive sentencing is mandated in this case by MCL 768.7a(2); MSA 28.1030(1)(2). Accordingly, any credit to which defendant was entitled for that time was to be applied against his preexisting sentence, not his consecutive sentence in this case. E.g., *People v Alexander (After Remand)*, 207 Mich App 227, 229; 523 NW2d 653 (1994). Moreover, any failure by the Michigan Department of Corrections to count defendant's time in the county jail as time served for defendant's prior sentence should be challenged in proceedings other than the instant case. *People v Watts*, 186 Mich App 686, 687 n 1; 464 NW2d 715 (1991), lv den 439 Mich 866 (1992).

Defendant cites *People v Adkins*, 433 Mich 732, 751 n 10; 449 NW2d 400 (1989), for the proposition that even when credit is not available under MCL 769.11b; MSA 28.1083(2), a sentencing court still has discretion to give credit against the sentence it imposes based upon time served for an unrelated offense. The *Adkins* case involved the issue of sentence credit for time served in other jurisdictions, for offenses committed while free on bond for the offense for which sentencing credit is sought. The ultimate concern in that situation was that lack of sentencing credit would allow the concurrent sentencing rule to be frustrated. *Id.* at 749-750. In that context, the Court observed that while MCL 769.11b does not apply, sentencing courts may use their sentencing discretion under the indeterminate sentencing law to reduce a defendant's minimum sentence, should the court conclude that such credit is "warranted" and "appropriate." We doubt that such action would be appropriate in the instant context, however, where consecutive sentencing is required and giving credit for time served on the prior sentence would frustrate the mandate of MCL 768.7a(2); MSA 28.1030(1)(2). Moreover, it is readily apparent that the sentencing court also was not persuaded by defense counsel's argument that discretionary credit would be appropriate in this case.

We also reject defendant's contention that his six to ten-year sentence is disproportionate and therefore constitutes cruel and unusual punishment. Because the sentence is within the sentencing guidelines range, it is presumptively proportionate, and defendant has failed to overcome the presumption of proportionality by identifying the kind of unusual circumstances that would render a sentence within the guidelines range disproportionate. E.g., *People v Piotrowski*, 211 Mich App 527, 532-533; 536 NW2d 293 (1995). Moreover, this Court has already ruled, in defendant's prior appeal, that a six to ten-year sentence is proportionate both to the offender and the offense in this case.

Affirmed.

/s/ Gary R. McDonald

/s/ Harold Hood

/s/ Martin M. Doctoroff