

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH M. ROWLS,

Defendant-Appellant.

UNPUBLISHED

August 17, 1999

No. 208498

Oakland Circuit Court

LC No. 96-146339

Before: Bandstra, C.J., and Whitbeck and Talbot, JJ.

WHITBECK, J. (concurring)

I concur with the result reached by my colleagues with respect to defendant's failure to admit guilt but would add an additional ground. For purposes of my analysis, I assume that the trial court *did* consider defendant's failure to admit guilt and insistence upon a trial as a factor in sentencing defendant. However, I conclude that, due to the Michigan Supreme Court's analysis in *People v Lemons*, 454 Mich 234, 259-260; 562 NW2d 447 (1997), a trial court's consideration of this factor in sentencing does *not* constitute error.¹

Unquestionably, prevailing case law prior to *Lemons* precluded a trial court from considering a defendant's refusal to admit guilt and insistence upon a trial 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 in *Lemons* 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. [*Lemons, supra*, 454 Mich 259.]

While not controlling to my analysis, I note that this case is strikingly similar to *Lemons* in that it involves testimony describing repeated acts of sexual abuse of the child complainant by defendant and that the trial court alluded to defendant's refusal of plea bargain offers and insistence on a trial in its remarks at sentencing.²

I conclude that, by considering negative effects of a defendant's rejection of a plea bargain, the Michigan Supreme Court in *Lemons* effectively considered his refusal to admit guilt (at least for criminal law purposes) and insistence on a trial as an aggravating factor in sentencing. Reviewing the discussion of the proportionality of the defendant's sentence in context, *Lemons, supra*, 454 Mich 259-260, the pertinent language from *Lemons* may not be dismissed as dicta but rather was part of the Court's basic reasoning for upholding the proportionality of the defendant's sentences. I conclude that, by considering a defendant's refusal to admit guilt and insistence upon a trial as an aggravating factor in evaluating the proportionality of a sentence, the Court in *Lemons* necessarily concluded that this is a proper factor for consideration in sentencing and thereby overruled *sub silentio* prior case law precluding consideration of a defendant's refusal to admit guilt in sentencing. Thus, contrary to defendant's position, a trial court does not err by considering a defendant's refusal to admit guilt and insistence on a trial as an aggravating factor in sentencing. See also *People v Godbold*, 230 Mich App 508, 519; 585 NW2d 13 (1998), quoting *Corbitt v New Jersey*, 439 US 212, 218-219; 99 S Ct 492; 58 L Ed 2d 466 (1978) ("not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid. Specifically, there is no *per se* rule against encouraging guilty pleas.")

I note that the pertinent language from *Lemons* did not merely refer to a lack of remorse, as opposed to a refusal to admit guilt, as a factor in upholding the proportionality of the defendant's sentences. Rather, the Michigan Supreme Court referred to *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. I further note that I do not consider whether the pertinent rule of law embodied in *Lemons* or the earlier ban on considering a defendant's refusal to admit guilt as a factor in sentencing is the better rule of law. It is axiomatic that, as an intermediate appellate court, this Court is generally bound to follow the most recent holding of the Michigan Supreme Court on a point of law. I would therefore affirm on this additional ground as well.

/s/ William C. Whitbeck

¹ My analysis of this issue substantially reflects my analysis in my opinion concurring in part and dissenting in part in *People v Coburn*, unpublished opinion per curiam of the Court of Appeals (Docket No. 198504, issued 1/26/99). While the majority in *Coburn* rejected that analysis, the majority opinion in that case, being unpublished, "is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1).

² As horrible as the alleged sexual abuse described by the complainant in this case was – indeed as horrible as any child sexual abuse is –I do not mean to draw an equivalency between the facts of this case and the almost unbelievably heinous facts of *Lemons, supra*.