STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 2, 2000
v	No. 215448 Allegan Circuit Court
ARON EUGENE CHUBB, Defendant-Appellant.	LC No. 98-010682-FH

Before: Fitzgerald, P.J., and Bandstra, C.J., and O'Connell, J.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). He was sentenced as an habitual offender, second, offense, MCL 769.10; MSA 28.1082, to a prison term of three to 22½years. Defendant appeals as of right. We affirm.

Defendant first argues that his statements to the police should have been suppressed because the police did not "scrupulously honor" his invocation of his rights to remain silent and to counsel and, instead, actively interrogated him after he asserted these rights. When reviewing a trial court's denial of a motion to suppress, this Court examines the entire record de novo and makes an independent determination. *People v Kowalski*, 230 Mich App 464, 472; 584 NW2d 613 (1998). However, deference is given to the trial court's factual findings and those findings will not be reversed unless they are clearly erroneous. *Id.* at 471. A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake has been made. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

Once a defendant asserts his or her right to remain silent, the police must cease their interrogation of the defendant. *Miranda v Arizona*, 384 US 436, 473-474; 86 S Ct 1602; 16 L Ed 2d 694 (1966). See also *Kowalski, supra* at 472. However, the police may resume questioning if the police "scrupulously honor" the defendant's right to remain silent once he or she asserts this right. *Michigan v Mosley*, 423 US 96, 104; 96 S Ct 321; 46 L Ed 2d 313 (1975). Police fail to "scrupulously honor" a defendant's right to remain silent when the police refuse to discontinue the interrogation or persist in repeated efforts to wear down the defendant's resistance and make him

change his mind. *Id.* at 423 US 105-106; *People v Slocum (On Remand)*, 219 Mich App 695, 704-706; 558 NW2d 4 (1996). Interrogation cannot resume without counsel present unless the defendant initiates further communication with the police. *Edwards v Arizona*, 451 US 477, 484; 101 S Ct 1880; 68 L Ed 2d 378 (1981).

According to Trooper Dekatch, he did not question defendant after defendant informed the trooper that he did not want to make a statement until he spoke with his attorney. When Dekatch observed Trooper Gutierrez engaging in casual conversation with defendant, Dekatch interrupted and informed Gutierrez that defendant had invoked his right to counsel. Dekatch did not interview defendant until after defendant initiated contact with Gutierrez and gave Gutierrez a statement, and did not secure a written statement from defendant until after defendant was again advised of his rights and waived those rights.

According to Trooper Gutierrez, he simply inquired if he could get defendant some coffee or water or whether defendant needed to use the restroom. In response to these inquiries, defendant stated that he was "sick about the whole thing" and wanted to talk. Gutierrez, who was then attired in street clothes, immediately identified himself as a police officer and told defendant that he could not talk about the case because defendant had asserted his rights to silence and counsel. However, defendant insisted on speaking with Gutierrez about the allegations of sexual assault made against him. Gutierrez questioned defendant only after defendant insisted on talking to him.

Given the testimony of Troopers Dekatch and Gutierrez, which the trial court found to be credible, we conclude that the police "scrupulously honored" defendant's invocation of his rights. The troopers properly discontinued the interrogation when defendant invoked his fifth amendment rights, and did not attempt to get defendant to "change his mind."

Further, we reject defendant's contention that the police were prohibited from taking an active part in interrogating defendant after he asserted his right to counsel. It is police-initiated custodial interrogation that is prohibited once an accused invokes his right to counsel. *Kowalski*, *supra* at 478. Here, it was defendant who initiated contact with the police because his remarks "evinced a willingness and a desire for a generalized discussion about the investigation." *Oregon v Bradshaw*, 462 US 1039, 1045-1046; 103 S Ct 2830; 77 L Ed 2d 405 (1983).

If a defendant initiates a conversation with police after asserting his right to have an attorney present, the police may not interrogate the defendant unless subsequent events indicate that the defendant waived his right to silence or to have an attorney present during the interrogation. A valid waiver is one that is "knowing and intelligent and found to be so under the totality of the circumstances, including the necessary facts that the accused, not the police, reopened the dialogue with the authorities." *Id.* at 406. The determination also depends on many factors, including the defendant's background, experience, and conduct.

Here, defendant's comments to Gutierrez clearly show that defendant knew and understood his rights and knew and understood the consequences of talking with the police. Defendant had completed two years of college and was a systems operator maintaining computers at his company. He also had

the foresight to call his lawyer before he arrived at the police post and to secure advice of counsel. Thus, based on our review of the record, we conclude that defendant validly waived his rights to an attorney and to remain silent and, therefore, the motion to suppress was properly denied.[1]

Defendant next contends that the prosecutor failed to prove the corpus delicti of the crime before introducing defendant's statements. We disagree. The corpus delicti rule applies only to a defendant's confession of a crime and not to mere admissions of fact. *People v Rockwell*, 188 Mich App 405, 407; 470 NW2d 673 (1991). Defendant's statement does not in and of itself show guilt of the charged offense but instead needs proof of other facts.[2] Thus, the statement is a statement of fact and not a confession. *Id*.

Last, defendant asserts that the maximum sentence imposed is disproportionate and constitutes cruel and unusual punishment.

Pursuant to MCL 750.520c; MSA 28.788(3), defendant was subject to a maximum sentence of fifteen years for the CSC conviction. As an habitual offender, defendant was subject to a maximum term of not more than one-and-a-half the maximum term prescribed for the CSC conviction. MCL 769.10; MSA 28.1082. Thus, the trial court had discretion to impose a maximum sentence not to exceed 22½ years.

A sentencing court does not abuse its discretion in sentencing an habitual offender within the statutory limits established by the Legislature when the offender's underlying felony, in the context of the offender's criminal history, evinces the offender's inability to conform his conduct to the laws of society. *Id.*; *People v Reynolds*, ___ Mich App ___; ___ NW2d ___ (Docket No. 211458, rel'd 3/17/00), slip op p 1.

Here, the circumstances of the offense and the offender include the admission of other acts of sex and abuse perpetrated on the victim and defendant's possession of child pornography. These circumstances and defendant's criminal history indicate that defendant cannot conform his conduct to the laws of society. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). The fact that the sentencing court considered defendant's eighteen-year-old "high court misdemeanor" conviction for the purpose of habitual offender enhancement purposes is of no consequence because convictions over ten years old may be used by the sentencing court in determining a proper sentence, *People v Zinn*, 217 Mich App 340, 349; 551 NW2d 704 (1996), and because misdemeanors punishable by imprisonment of one year or more are considered "felonies" for purposes of this enhancement. *People v Slocum*,, 156 Mich App 198, 200-201; 401 NW2d 271 (1986).

Accordingly, we conclude that the sentence imposed is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Because defendant's sentence is proportionate, the sentence does not amount to cruel and unusual punishment. *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell

[1] Our decision with regard to defendant's motion to suppress renders his claim of prosecutorial misconduct moot. *People v Greenberg*, 176 Mich App 296, 302; 439 NW2d 336 (1989). Indeed, defendant has conceded that he cannot demonstrate error requiring reversal if his statements to the police are held to be admissible.

[2] Although defendant admits guilt with regard to inappropriate sexual conduct with his daughter, his admissions were in regard to uncharged conduct that occurred in 1996 and 1997. With regard to the charged conduct that occurred in 1998, defendant denied that his daughter touched his penis for the purpose of sex and gratification.