STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDY TROY VLIET, SR.,

Defendant-Appellant.

UNPUBLISHED
January 12, 2001

No. 226759
Saginaw Circuit Court
LC No. 96-012893-FH

Before: Markey, P.J., and Whitbeck and J. L. Martlew*, JJ.

PER CURIAM.

Defendant Randy Vliet claims an appeal from the sentence of forty to sixty months in prison imposed on his plea-based convictions of attempted first-degree child abuse[1] and resisting and obstructing a police officer.[2] We affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

Vliet was charged in 1996 in connection with an incident that occurred in 1992 in which he videotaped young children, including his six-year-old son, engaging in a physical altercation. The videotape depicted a confrontation that lasted for at least ten minutes and was punctuated by pleas from Vliet's young son that they be allowed to stop fighting. Vliet and another adult male, Vito Wise, could be heard on the videotape encouraging the children to fight and, in fact, Vliet could be heard ordering his son to fight. After viewing the videotape, the trial court rejected a proposed plea agreement, which included a sentencing agreement, and set the matter for trial. Wise pleaded guilty to attempted first-degree child abuse and agreed to testify at Vliet's trial. Because Vliet failed to appear for trial, he was on absconder status for approximately two years. After being apprehended, Vliet made an unsuccessful motion to disqualify the trial court on the ground that the court had determined from viewing the videotape that he was guilty.

[1] MCL 750.136b(2); MSA 28.331(2)(2); MCL 750.92; MSA 28.287(2).

[2] MCL 750.479; MSA 28.747.

* Circuit judge, sitting on the Court of Appeals by assignment.

Subsequently, Vliet pleaded nolo contendere to the charges noted above in return for dismissal of other charges, including absconding. The trial court sentenced Vliet to concurrent terms of forty to sixty months for his attempted first-degree child abuse conviction and sixteen to twenty-four months for the resisting and obstructing conviction, with credit for 301 days already served.

II. The Child Abuse Sentence

A. Standard Of Review

Vliet argues that he is entitled to resentencing because the minimum term of forty months for the conviction of attempted child abuse in the first degree is disproportionate to his circumstances and to those surrounding the offense.[3] We review the sentence imposed for an abuse of discretion.[4]

B. Consulting The Guidelines

Vliet first attempts to demonstrate that the trial court abused its discretion by showing that, had he been charged with assault with intent to murder, his minimum sentence under the judicial sentencing guidelines would be only zero to twelve months in prison, far lower than the sentence the trial court imposed in this case. Even assuming that that zero-to-twelve-month estimate is accurate, this Court has previously rejected the claim that a sentencing court should consult the guidelines for a similar crime when imposing sentence for a crime that is not included in the guidelines.[5] Vliet also points that his minimum sentence for attempted first-degree child abuse under the new legislative sentencing guidelines would be only seven to twenty-three months. However, again assuming that his estimate is correct, the legislative sentencing guidelines apply prospectively[6] and, therefore, do not apply to his crime, which was committed before the new guidelines went into effect.

Furthermore, as we have noted above, the evidence showed that Vliet required his six-year-old son to engage in a physical confrontation with another child. He would not allow his son to withdraw from the fight even after the child began to cry and indicated that he was injured. Rather than end the incident, Vliet berated his son for his behavior. This was callous and cruel conduct. On the basis of these facts – and we must state that they are shocking in and of themselves – we conclude that the trial court properly exercised its discretion by imposing a sentence in this case that reflects the seriousness of the offense and the way Vliet violated what should have been a trusting and loving relationship with his son.[7]

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[3] *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

[4] *People v Compagnari*, 233 Mich App 233, 235-236; 590 NW2d 302 (1998).

[5] *People v Laube*, 155 Mich App 415, 417; 399 NW2d 545 (1986).

[6] MCL 769.34(1); MSA 28.1097(3.4)(1).

[7] *Milbourn*, *supra*; *Compagnari*, *supra*.

III. Information Affecting Sentencing

A. Standard Of Review

Vliet also argues that he is entitled to resentencing because the trial court failed to resolve his challenges to the way the trial court was considering irrelevant information and erroneously attributing everything said on the videotape to him. Because a defendant has a due process right to be sentenced on the basis of complete and accurate information,[8] this constitutional issue would ordinarily entail review de novo.[9] However, to decide this issue, we must examine the trial court's factual findings, which requires review for clear error.[10]

B. Analysis

In an unusual twist to a frequently-raised challenge, Vliet's argument on appeal do not implicate information in the presentence report, but rather comments the trial court made as it was imposing sentence. These comments concerned what the trial court had heard Vliet saying on the videotape. When defense counsel objected to the trial court's conclusion that Vliet, not Wise, had specifically encouraged the fight and had somehow taught or encouraged his son to use racial epithets, the court trial responded by indicating that its findings were relevant and accurate. The trial court did resolve Vliet's challenge and did so based on its personal assessment of the videotape. We have no reason to doubt the trial court's overarching conclusion concerning Vliet's involvement in the fight between the boys and how his behavior likely influenced his son. Moreover, Vliet has not shown how these two purportedly inaccurate conclusions influenced the sentence the trial court imposed when it had otherwise sufficient reasons to impose a relatively long sentence. Thus, even if the trial court made incorrect factual findings concerning whether Vliet or Wise said something on the tape and whether he taught his son to use racial epithets, the error was harmless.[11]

In light of our decision in these cases, Vliet's argument that he is entitled to be resentenced before a different judge is moot.

Affirmed.

/s/ Jane E. Markey
/s/ William C. Whitbeck
/s/ Jeffrey L. Martlew

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[8] *People v Eason*, 435 Mich 228, 233, 458 NW2d 17 (1990); *People v Braithwaite*, 67 Mich App 121, 122-123; 240 NW2d 293 (1976).

[9] See *People v McRunels*, 237 Mich App 168, 171; 603 NW2d 95 (1999).

[10] MCR 2.613(C).

[11] *People v Daniels*, 192 Mich App 658, 675; 482 NW2d 176 (1991).