

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

BRIAN PANEK,

Defendant-Appellee.

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UNPUBLISHED

January 16, 2001

No. 224834

Kent Circuit Court

LC No. 99-000273-FH

Before: Wilder, P.J., and Hood and Cavanagh, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the sentence of probation imposed on defendant's plea-based convictions for first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(e); MSA 28.788(3)(1)(e) (sexual contact/weapon). We vacate defendant's sentence and remand for resentencing before a different judge.

In July 1996, defendant was charged with violation of a stalking ordinance. Specifically, defendant selected a name from the telephone book and made contact with a sixteen-year-old girl. Defendant attempted to have the girl meet him in a men's bathroom stall at a mall for the purpose of engaging in sexual acts. Defendant pleaded guilty to the stalking charge and was placed on sixty months' probation. Defendant was unsuccessfully discharged from probation on July 25, 1999.

On December 30, 1998, the incident that led to the sentence at issue occurred. Defendant resided in the same apartment complex as the victim. He observed her and engaged in self-gratification while thinking of the victim. Defendant fantasized about engaging in anal intercourse with the victim. On the date of the offense, defendant found that the door to the victim's apartment was closed, but not locked. He decided to act on his fantasies. However, defendant first went to his own residence and obtained a pair of blue latex gloves to ensure that he would not leave fingerprints following the sexual assault. Defendant entered the apartment, picked up a hammer, and unplugged the telephone. The victim was hearing impaired and almost blind without her glasses. She was in her bed asleep in a nightgown and was not wearing her glasses or hearing aids. Defendant unbuttoned his pants and let them fall to his knees. He grabbed the victim's breasts, kissed her, and attempted to penetrate the victim in her anus. The victim struggled with defendant and managed to plug the telephone back in and dial 911.

Defendant was angered by this act, pulled the telephone cord out, and physically attacked the victim. Defendant grabbed a ceramic bank in the apartment and smashed the bank on the victim's head in an attempt to render her unconscious. When that act did not prevent the victim from resisting his attack, defendant grabbed the victim with his hands around her neck and began to choke her. It was the victim's birthday, and she believed that defendant was going to kill her.

The police responded to the disconnected 911 telephone call. The victim answered the door, but it was opened only a foot. The victim was completely naked, and she had red marks around her neck area. The police observed a hand covered by blue latex glove over one of the hands of the victim that was attempting to pull the victim's hand away from the door. The victim managed to get away from defendant and squeeze out the small door opening. Defendant attempted to close the apartment door to preclude officers from entering, but the officers managed to push the door open and apprehend defendant.

Defendant admitted his participation in the assault of the victim in vulgar terms to police. He acknowledged that he had been watching the partially disabled victim for weeks and decided to play out his fantasies. Defendant pleaded guilty to three charges in exchange for the dismissal of five other charges that also arose out of this incident. The prosecutor requested a prison term based on the need to protect society in light of failed attempts to control or rehabilitate defendant following his prior offense.

The trial court sentenced defendant to serve four years' probation, with the first year on electronic tether. Defendant was directed to participate in any treatment program recommended by his counselors. The court followed the recommendation from defendant's current counselor that he receive intensive psychotherapy. However, the report, as read by the court in the record, concluded that "incarceration alone" would not correct defendant's behavior. The court focused on the fact that defendant's descriptions of sex were similar to what a twelve-year-old boy would say after reading Hustler magazine and the fact that prison "won't be good for you." The judge stated that, from his experience, defendant would not be eligible for sexual treatment programs for a long time and even after completion, the parole board would not release defendant. Therefore, if defendant was sentenced to prison, "I [the trial judge] think we can safely assume that he'll be gone for about ten years or more."

The prosecutor argues that the lenient sentence of probation constitutes an abuse of discretion. We agree. Our review of a sentence is for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). A sentence must be proportionate to the circumstances surrounding the offense and the offender. *Id.* When fashioning a sentence, the trial court should consider various factors, including punishment of the defendant, protection of society, reformation of the defendant, and deterrence of others. *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972). The nature and severity of the crime committed, and the defendant's reaction to his behavior are legitimate factors for consideration. *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985). The court based its decision to sentence defendant to probation in large part on its assumption that defendant would not receive prompt and effective treatment in prison. The court also concluded that defendant would not be paroled for a lengthy period of time even after completing treatment. A defendant's eligibility for parole is not a valid sentencing consideration. *People v Wybrecht*, 222 Mich App 160, 173; 564 NW2d 903 (1997).

Furthermore, the trial court gave great weight to the psychological reports that detailed defendant's need for intensive therapy in order to reform, but virtually ignored other legitimate sentencing considerations. Defendant committed the instant offenses against a woman who could not defend herself. He committed the offenses while on probation for stalking, demonstrating that court imposed restrictions did not deter him from criminal behavior. His conduct showed an adolescent perspective regarding sexual matters, but also a pattern of escalation of aggression against young and vulnerable women. Defendant freely admitted to the interviewing probation officer that he would have completed the attack on the victim had she not been able to notify the police. Given the circumstances of the offense and defendant's reaction to his own behavior, the trial court abused its discretion by imposing an excessively lenient sentence of probation based on speculation concerning the lack of efficacious prison treatment programs and the ineligibility for parole following treatment. *Milbourn, supra*; *Wybrecht, supra*.

The prosecutor also seeks resentencing before a different judge. We agree. We apply the following test to determine whether resentencing should occur before a different judge<sup>1</sup>:

(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. [*People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986), quoting *United States v Sears, Roebuck & Company, Inc*, 785 F2d 777, 780 (CA 9, 1986).]

When a trial court gives unwarranted weight to findings or fails to strike the balance emphasized in case law, an abuse of discretion occurs that warrants remand to a different judge. See *People v Thenghkam*, 240 Mich App 29, 42, 74; 610 NW2d 571 (2000). Because it would be difficult for the trial court to separate itself from the expressed views regarding the effective prison treatment and parole considerations, we remand for resentencing before a different judge.

Vacated and remanded for resentencing before a different judge.

/s/ Kurtis T. Wilder  
/s/ Harold Hood  
/s/ Mark J. Cavanagh

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<sup>1</sup> We note that this request does not involve the standards of MCR 2.003.