

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD JOHN RICHARDS,

Defendant-Appellant.

UNPUBLISHED

March 2, 2001

No. 220963

Grand Traverse Circuit Court

LC No. 99-007804-FC

Before: White, P.J., and Talbot and R. J. Danhof*, JJ.

PER CURIAM.

Defendant appeals by leave granted from a sentence entered by the circuit court upon defendant's plea-based conviction of second-degree criminal sexual conduct. MCL 750.520c; MSA 28.788(3). The trial court sentenced defendant to eight to fifteen years' imprisonment, although the recommended minimum sentence range under the new legislative sentencing guidelines was 1 to 2 years. We affirm.

At the plea proceeding, the prosecutor announced that defendant "is presently charged with the life offense of CSC first degree with an individual under the age of 13," then explained that defendant would be "entering a guilty plea to an amended count of CSC second," again predicated on the victim's being under thirteen. Concerning whether there was penetration, the prosecutor stated, "it's debatable whether there was. If there was, Judge, it was extremely slight. So for the purposes of the plea and sentencing, we'll go with CSC second contact."

Defendant first argues that because the trial court did not hold an evidentiary hearing to resolve his challenges to the PSIR, and because the court equivocated over whether penetration had occurred but then assumed that it did occur for purposes of sentencing, the trial court failed to respect defendant's right to be sentenced on the basis of accurate information. We disagree.

A criminal defendant has a Due Process right to be sentenced on the basis of accurate information. *Townsend v Burke*, 334 US 736, 740-741; 68 S Ct 1252; 92 L Ed 1690 (1948); *People v Malkowski*, 385 Mich 244, 249; 188 NW2d 559 (1971). A trial court's determination of the existence or nonexistence of facts affecting the sentencing decision is reviewed for clear error. *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995).

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

Defendant correctly cites *People v Hoyt*, 185 Mich App 531; 462 NW2d 793 (1990), for the proposition that the sentencing court should deal with challenges to presentence reports by either holding an evidentiary hearing, accepting the defendant's challenge, or ignoring the information. However, a remand for either an evidentiary hearing or for resentencing without consideration of the disputed factual assertions, is required only where the court has used disputed information without satisfactorily resolving the dispute on the record. *Hoyt* stands for the proposition that when a defendant challenges factual statements in a PSIR, the trial court "must make a finding on defendant's challenge on the record, and, when it finds challenged information to be inaccurate or irrelevant, it must strike that information from the presentence investigation report before sending it to the Department of Corrections." *Id.* at 531, citing MCR 6.425(A)-(D).

Defendant argues that the trial court improperly presumed both that he admitted to being a sexual predator of children, and that he admitted to penetrating the victim. However, the record shows that the trial court properly resolved all disputes concerning the information in the PSIR, and based its sentence on that information.

At sentencing, defense counsel stated that the defense had tried unsuccessfully to have some changes made in the PSIR. Counsel protested that defendant had never admitted to penetrating the victim, but had admitted only to rubbing his penis against the victim's abdomen to the point of ejaculation. Counsel further asserted that defendant suffered from developmental problems, and that the words concerning penetration in the police report "are not words that he would use." The trial court elicited from counsel that defendant was active in community activities, including volunteer fire fighting, and that his math and reading skills were only slightly lower than average.

In response to a police account in the presentence report that defendant admitted certain conduct, defendant stated that he did not penetrate the victim, but merely rubbed his penis "on her stomach," and denied touching the victim's vaginal opening with his penis in any way. The trial court stated that there was no reason for the police to report something that did not happen, and ruled, "I think he did say it," and that the language in the report stating that defendant admitted penetration would not be removed.

Counsel next objected to an indication that defendant had described himself as a "predator against children for his own sexual gratification," insisting that defendant would never have used the word "predator," for lack of understanding. The court elicited from defendant that he understood that a predator was "[a]n animal that comes out to kill," although defendant denied using that word in connection with the investigation. The court ruled, "I think he understood what was being said. . . . I think he knew what he was doing."

Counsel asked that a statement in the report to the effect that the victim had said that defendant "placed his private part on her private part" be stricken, but the trial court ruled, "it's what she said. We will leave it in."

Continuing all denials of legal penetration, counsel further objected to the indication that defendant admitted to the police to having an erection, to being unable to penetrate the seven-year-old victim's vagina, but to placing his penis between her vaginal lips and rocking back and

forth. The court ruled, “I am adding a sentence . . . that says, ‘Defendant denies making this statement and denies that this happened.’”

Revisiting the question whether defendant admitted to being a “predator,” counsel asked to delete a statement attributed to defendant in which he allegedly said that he was a “predator against kids.” The court ruled again that defendant both made the statement, and understood what a predator was.

Defendant did not request that the probation officer or police officer who attributed the statements to defendant be present for cross examination regarding the accuracy of their accounts or conclusions. We therefore conclude that the court held an adequate hearing regarding the accuracy of the information in the presentence report and adequately stated its findings on the record. The court considered and resolved the controversy concerning how defendant had characterized himself, and this Court defers to the trier of fact’s ability to observe witnesses, determine credibility, and weigh testimony. Concerning penetration, defendant argues that the trial court’s upward departure indicates that the court presumed that penetration had occurred, even though the court did not articulate such a finding of fact. However, although the court accepted the representation that defendant had admitted to rubbing his penis against the victim’s vaginal lips, the court expressly declined to consider the penetration issue for sentencing purposes, stating on the record that the legal elements for penetration may not have been met. The court did not adjust the sentencing scores to reflect penetration; instead, it acknowledged the guidelines range applicable where there is no penetration and announced its determination to depart upward.

For these reasons, defendant’s argument that the trial court sentenced him without an adequate resolution of disputed facts and on the basis of inaccurate information is without merit.

Defendant further argues that the reasons the trial court provided for exceeding the recommended minimum sentence were not sufficiently substantial or compelling to justify a minimum sentence that is four times greater than that recommended under the guidelines, and that the trial court’s fourfold increase in the matter constitutes an abuse of discretion under the facts of this case. Under this Court’s recent decision in *People v Babcock*, __Mich App__; __NW2d__ (Docket No. 223624, issued 12/26/00), defendant’s arguments must fail.

The instant offense was committed after January 1, 1999, and the legislative sentencing provisions, MCL 769.34; MSA 28.1097(3.4), control. Under the statute, a sentencing court must sentence within the statutory guidelines unless there is a “substantial and compelling” reason to depart. MCL 769.32(3); MSA 28.1097(3.4)(3); *Babcock*, slip op. at 4. The legislative guidelines incorporate the concept of “substantial and compelling” enunciated by the Supreme Court in *People v Fields*, 448 Mich 58; 528 NW2d 176 (1995). *Babcock*, slip op. at 5. A trial court’s determination of the existence or nonexistence of facts affecting the sentencing decision is reviewed for clear error; whether specific facts are “objective and verifiable” is reviewed as a matter of law; and whether objective and verifiable factors constitute “substantial and compelling reasons,” to depart is reviewed for an abuse of discretion. *Fields*, at 77-78; *Babcock*, slip op. at 6.

MCL 769.34(3); MSA 28.1097(3.4) provides that a sentencing court may depart from the appropriate sentence range established under the legislative guidelines if the court has “a substantial and compelling reason for that departure and states on the record the reasons for departure.” The statute further provides:

(b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

Here, we conclude that the court had substantial and compelling reasons for departure that were objective and verifiable, and that were not adequately accounted for in determining the sentence range under the guidelines. First, although defendant received points for a prior high severity juvenile adjudication, the ten points did not reflect that the prior adjudication was for a sexual assault on an eleven-year-old boy. Second, because the court concluded that penetration had not been established, defendant was given no points for the nature of the sexual contact. MCL 750.520c; MSA 28.788(3) makes criminal any sexual contact with a child under thirteen years of age, which includes any intentional touching of the victim’s intimate parts or the clothing covering the immediate area of the victim’s intimate parts, if the touching can reasonably be construed as being for the purpose of sexual arousal or gratification. MCL 750.520a(k); MSA 28.788(1)(k). In the instant case, the guidelines do not take into consideration the aggravated nature of this particular CSC 2d offense, where defendant and the seven-year-old victim were both undressed and defendant simulated intercourse to the point of ejaculation. We thus conclude that the trial court correctly determined that the circumstances presented objective and verifiable facts not adequately considered by the guidelines, and did not abuse its discretion in concluding that these facts constituted substantial and compelling reasons for departing from the guidelines.¹ Our determination that the trial court did not err in finding substantial and compelling reasons for departure ends our review under the statute. *Babcock*, slip op. at 6-7.²

Affirmed.

/s/ Helene N. White
/s/ Michael J. Talbot

¹ Additionally, we reject the argument that the sentencing court’s expressions of displeasure with the legislative guidelines, especially in CSC cases, indicates bias. The court here based its departure on the specifics of the offense and offender, and not on a general belief that the guidelines were inadequate.

² Judge White does not reach the question whether this aspect *Babcock* was correctly decided because she is not persuaded that the instant sentence is disproportionate or an abuse of discretion.