

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES MILLER,

Defendant-Appellant.

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UNPUBLISHED

June 26, 2001

No. 221852

Wayne Circuit Court

LC No. 99-000329

Before: Smolenski, P.J., and McDonald and Jansen, JJ.

PER CURIAM.

Defendant was convicted on two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a). The trial court sentenced defendant to life imprisonment and 40 to 80 years' imprisonment for the first-degree criminal sexual conduct convictions, to be served concurrently with 10 to 15 years' imprisonment for each of the second-degree criminal sexual conduct convictions, with credit for 195 days served. We vacate defendant's sentences and remand for resentencing under properly calculated sentencing guidelines.

Defendant first argues that the trial court erroneously scored the judicial sentencing guidelines when it recorded fifty points for defendant's prior high severity felony convictions. In order to preserve a guidelines scoring error for appellate review, the defendant must object at sentencing. *People v Cain*, 238 Mich App 95, 129; 605 NW2d 28 (1999); MCR 6.429(C). Because defendant's trial attorney failed to object to the trial court's scoring of the guidelines, the issue is not properly preserved for appeal. However, for the reasons set forth below, we address the merits of defendant's claim.

Although the judicial sentencing guidelines were superseded by legislatively enacted guidelines, MCL 769.31 *et seq.*, the judicial guidelines apply to offenses committed before January 1, 1999. MCL 769.34(1). Because defendant committed the present offenses on December 17, 1994, the judicial guidelines apply.<sup>1</sup> Those guidelines, as calculated by the

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<sup>1</sup> We reject defendant's argument that he is entitled to resentencing in light of the ameliorative penalty provisions of the legislative sentencing guidelines, rather than the judicial sentencing guidelines. In *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000), this  
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probation department, recommended a minimum sentence range of 8 to 15 years. However, the trial court altered the scoring of the guidelines during sentencing, in order to reflect defendant's prior felony convictions. The trial court's action resulted in a new minimum sentence range of 20 to 40 years or life imprisonment. "'Appellate review of guidelines calculations is limited, and a sentencing court has discretion in determining the number of points to be scored provided there is evidence on the record that adequately supports a particular score.'" *Cain, supra* at 129-130, quoting *People v Dilling*, 222 Mich App 44, 54; 564 NW2d 56 (1997).

Within the judicial sentencing guidelines, PRV 1, entitled "prior high severity felony convictions," allows a trial court to score fifty points when a defendant's record indicates prior convictions of two or more enumerated felonies. Michigan Sentencing Guidelines (2d 3d), p 41. However, the judicial sentencing guidelines also provide:

Do not score any prior felony convictions, misdemeanors, or juvenile delinquency adjudications that precede conviction-free periods of 10 years or more. A conviction-free period exists if more than 10 years have elapsed between the discharge date from any conviction or adjudication and the commission of the next offense that results in a conviction." [Michigan Sentencing Guidelines (2d ed), p 3 (emphasis in original).]

Defendant committed the instant offenses on December 17, 1994. The presentence investigation report stated that defendant was discharged from his most recent prior conviction on May 31, 1984.<sup>2</sup> Because more than ten years elapsed between the two dates, the trial court should not have scored defendant's prior convictions. Defendant's prior record level should have been scored as a "B" and his offense severity level should have been scored as a "IV," placing him in the minimum sentence range of 10 to 25 years' imprisonment. Michigan Sentencing Guidelines (2d ed), p 47.

Although the trial court's guidelines scoring error was not properly preserved for our review, defendant raises the issue through an ineffective assistance of counsel claim. Defendant contends that he was deprived of the effective assistance of counsel at sentencing because his trial attorney failed to object to the trial court's scoring error. A criminal defendant is entitled to the effective assistance of counsel at sentencing. *People v Harris*, 185 Mich App 100, 105; 460 NW2d 239 (1990).

Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. In order for this Court to reverse on the basis of

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Court held that the judicial guidelines apply to offenses committed before January 1, 1999, and that the legislative guidelines apply to offenses committed on or after that date. *Reynolds* also held that the clear and unambiguous statutory language found in MCL 769.34 required a finding that the Legislature intended the statutory sentencing guidelines to have prospective, not retroactive, effect. *Id.* Accordingly, defendant's argument on this point is without merit.

<sup>2</sup> The prosecutor's contention that defendant's discharge date was not presented to the trial court is without merit.

ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness and so prejudiced defendant that he was denied the right to a fair trial. To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. [*People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999) (citations omitted).]

Further, the decision to address the court at sentencing is typically viewed as a tactical decision. *Harris, supra* at 105. However, we can discern no possible strategy in defense counsel's failure to object to the trial court's erroneous scoring of the sentencing guidelines. The trial court added fifty additional points to the guidelines scoring, resulting in a significantly higher minimum sentence range. The error was obvious, as the date on which defendant was discharged from his most recent prior conviction figured prominently in the presentence investigation report. We therefore conclude that trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Further, we conclude that defendant was prejudiced by trial counsel's performance because there is a reasonable probability that the result of the proceedings would have been different had the trial court considered the appropriate guidelines range.

Justice requires that we vacate defendant's sentences and remand this case to the trial court for resentencing in light of properly scored guidelines.<sup>3</sup> We note that the trial court may consider defendant's prior conduct in fashioning an appropriate sentence for the instant offense, even though it may not consider defendant's prior felony convictions when scoring the judicial sentencing guidelines. *People v Chesebro*, 206 Mich App 468, 474; 522 NW2d 677 (1994).

We vacate defendant's sentences and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Gary R. McDonald

/s/ Kathleen Jansen

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<sup>3</sup> In light of our decision to remand for resentencing, we need not address defendant's argument that the sentences imposed by the trial court were disproportionate to the offense and the offender.