

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICKY JUNIOR NELSON,

Defendant-Appellant.

UNPUBLISHED

January 15, 2002

No. 224297

Crawford Circuit Court

LC No. 99-001747-FC

Before: O’Connell, P.J., and Sawyer and Smolenski, JJ.

O’CONNELL, P.J. (*dissenting*).

I disagree with my colleagues that vacating defendant’s sentence and remanding for resentencing is necessary in the instant case. The evidence at trial revealed that defendant entered the six-year-old victim’s bedroom at night, made her take off her clothes, placed his penis in her mouth, and told her to “be quiet and don’t tell anyone.” In my view, remanding to allow for resentencing of this pedophile who preyed on a six-year-old girl would be futile and a waste of judicial resources where he already received an appropriate sentence. See, e.g., *People v Alexander*, 234 Mich App 665, 678; 599 NW2d 749 (1999) (declining to remand for full resentencing where to do so would waste court resources).

Defendant was convicted of one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (penetration with person under age of thirteen). The trial court sentenced defendant to a term of 9 to 17 years’ imprisonment.¹ During trial, the prosecutor presented the testimony of Deputy Sheriff Randall Herman, who stated that he interviewed defendant on July 13, 1999. After Herman advised defendant of his *Miranda*² rights, defendant gave the following statement regarding his interaction with the six-year-old victim the day before, July 12, 1999.

[Y]esterday with the whole ordeal, I was just . . . basically seeing what [the victim would] do. . . . You know when the first time I met her, I mean, she was humping my leg, I was just seeing if she would do anything bad. . . . We were basically standing up in her bed. . . . [A]t first I woke her up, got everything ready then

¹ The legislative sentencing guidelines recommended a minimum sentence in the range of 42 to 70 months’ imprisonment.

² *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

went in there and she was getting undressed and just, I mean, she still had clothes on, parts of her clothes on. . . . I was just basically seeing if she was going to scream or keep her mouth shut.

In response to Herman's question regarding what defendant did to the victim, defendant indicated that he "rub[bed] her leg" and "the top of [the victim's] chest." Defendant further told Herman that he "fe[lt] terrible" about his actions.

At defendant's November 29, 1999, sentencing hearing, the trial court made the following observations.

[CSC I] is one of the most serious crimes that the Court is called upon to deal with. The long-term ramifications of this type of activity for the victim are extreme. It is not specific to a particular case, but a pretty general and well-understood phenomenon that victims of these types of offenses have a great deal of difficulty going forward. There is some evidence in the record that this is the case with this young lady. There was absolutely no thing [sic], other than your gratification, involved in this matter. It's very, very bad.

* * *

The Court acknowledges that the sentence imposed exceeds the recommended guideline range. . . . The sentence is imposed for the reasons stated by the Court on the record; it is also imposed for the further reason that the Court intends to allow this victim a considerable period of time to grow and mature without any concerns about the Defendant being present in her life.

Because defendant committed this crime after January 1, 1999, the legislative sentencing guidelines apply. MCL 769.34(1), (2); *People v Reynolds*, 240 Mich App 250, 254; 611 NW2d 316 (2000). As our Supreme Court recently observed in *People v Hegwood*, ___ Mich ___ ; ___ NW2d ___ (Docket No. 118373, decided 12/4/01) slip op, 9:

Because the new guidelines are the product of legislative enactment, a judge's discretion to depart from the range stated in the legislative guidelines is limited to those circumstances in which such a departure is allowed by the Legislature.

MCL 769.34(3) provides in pertinent part:

A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure, and states on the record the reasons for departure.

Our Supreme Court further explained that the plain and unambiguous language of MCL 769.34(3) reflected the Legislature's intention that the "substantial and compelling" circumstances articulated by the court must justify the *particular* departure in a case, i.e., 'that departure.'" *Hegwood, supra*, slip op at 6-7, n 10 (emphasis in original).

In the present case, the trial court decided to depart from the legislative sentencing guidelines' range on the basis of several factors. Specifically, the trial court noted that defendant "used a position of authority to rape [the victim]," that defendant did not deny other alleged sexual misconduct with the victim, the victim was entitled to peace of mind knowing that defendant would be unable to commit the same despicable act again, and that the victim would have to undergo counseling.

With regard to the first factor, defendant's patent abuse of a position of authority with the victim, I disagree with the majority's contention that MCL 769.34(3)(b) precluded the trial court from using this factor as a substantial and compelling reason to justify departure from the recommended guidelines' range. I recognize that pursuant to MCL 769.34(3)(b), a trial court may not use as a basis for departure a factor already accounted for "in determining the appropriate sentence range unless the court finds . . . that the characteristic has been given inadequate or disproportionate weight." However, by including this factor on the sentencing guidelines departure form (SGDF), the trial court reflected its determination that this factor was not given adequate weight in fashioning the sentencing guidelines' range. Specifically, the SGDF states "[w]hen determining the sentence for the offender, [the trial court] found (1) that point values for the following offense and prior record factors were inappropriate, and that the following factors not specifically included in the guidelines led me to choose a sentence outside the guidelines range."

Moreover, I agree with the majority that the second factor considered by the trial court – that defendant did not deny the allegations of other sexual misconduct – was objective and verifiable and constituted a substantial and compelling reason for departing from the guidelines' range. *People v Babcock*, 244 Mich App 64, 75; 624 NW2d 479 (2000).

However, I disagree with the majority's contention that the victim's peace of mind and the potential that she may have to undergo counseling to deal with the ramifications of defendant's actions are not objective and verifiable factors that provided the court with substantial and compelling reasons to deviate from the legislative guidelines' range. To be objective and verifiable, "the facts considered by the judge . . . must be actions or occurrences which are external to the minds of the judge, defendant and others involved in making the decision and *must be capable of being confirmed*." *People v Fields*, 448 Mich 58, 66; 528 NW2d 176 (1995) (emphasis supplied), quoting *People v Krause*, 185 Mich App 353, 358; 460 NW2d 900 (1990).

In contrast with the majority, I believe the fact that the six-year-old victim may have to undergo counseling is a fact "external to the mind[] of the judge," and is likewise capable of being confirmed. *Fields, supra* at 66. As the majority notes, in her victim impact statement to the court, the victim's grandmother indicated that the child may well need counseling in the future. In my view, the trial court did not abuse its discretion in finding this to be a substantial and compelling reason to deviate from the recommended guidelines' range. *Babcock, supra* at 78.

In my opinion, defendant's sentence also satisfied the principle of proportionality, which requires that a sentence be proportionate to the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). In *Babcock, supra* at 78, this Court concluded that once a reviewing court determines that the trial court did not abuse its

discretion in finding substantial and compelling reasons to depart from the guidelines' range, further review of the sentence under the principle of proportionality is precluded. Judge Hood filed a concurring opinion, in which he disagreed with the majority that *Milbourn* was relegated to the "judicial scrap heap" by virtue of the enactment of the legislative sentencing guidelines. *Babcock*, *supra* at 92 (Hood, J., concurring). Specifically, Judge Hood noted that "the Legislature has not abandoned the principle of proportionality, but, rather, incorporated the principle into the sentencing guidelines, and it is to be taken into consideration when departing from the sentencing guidelines." *Id.* at 86. Similarly, in *Hegwood*, *supra*, slip op at 6-7, n 10, our Supreme Court appeared to question the *Babcock* Court's conclusion that the principle of proportionality played no part in appellate review pursuant to the legislative sentencing guidelines.

The Court of Appeals indicated in *Babcock* that the principle of proportionality is not part of the legislative guidelines, and that there will be no appellate review of sentence length in cases in which there is a substantial and compelling reason to depart from the recommended minimum stated in the guidelines range. 244 Mich App 77-78. . . . [W]e do not believe that the Legislature intended, in every case in which a minimal upward or downward departure is justified by 'substantial and compelling' circumstances, to allow unreviewable discretion to depart as far below or as far above the guideline range as the sentencing court chooses. Rather, the 'substantial and compelling' circumstances articulated by the court must justify the *particular* departure in a case, i.e., 'that departure.' [Emphasis in original.]

Because the trial court did not abuse its discretion in finding substantial and compelling reasons to justify from the recommended guidelines range, and the departure satisfied the principle of proportionality, I would affirm defendant's sentence.

/s/ Peter D. O'Connell