

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROGER JAMES PACER,

Defendant-Appellant.

UNPUBLISHED

June 14, 2002

No. 227361

Osceola Circuit Court

LC No. 99-002919-FC

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

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82, and third-offense habitual offender, MCL 769.11. He was thereafter sentenced to a term of four to eight years of imprisonment. He appeals as of right and we affirm.

On appeal, defendant's issues relate only to his sentence. He contends that his sentence is disproportionate and that he was given a harsher sentence because he exercised his constitutional right to a jury trial.

Because the offense in this case occurred on September 27, 1998, the judicial sentencing guidelines and not the legislative sentencing guidelines are applicable. See MCL 769.34(1). The judicial sentencing guidelines do not apply to the sentencing of habitual offenders. *People v Hansford (After Remand)*, 454 Mich 320, 323; 562 NW2d 460 (1997). The maximum sentence for a felonious assault conviction is four years and the third habitual offender statute permits the court to double the maximum sentence to eight years. Thus, the sentence is clearly within the statutory limits.

Defendant contends, however, that his sentence is disproportionate because the trial court relied on information in the presentence information report concerning the criminal sexual conduct offenses of which defendant was acquitted.¹ However, the trial court could properly consider other criminal activities established at the trial even though defendant was acquitted of those charges. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). There was ample testimony from the victim at trial establishing the criminal sexual conduct charges,

¹ Defendant was acquitted of two counts of first-degree criminal sexual conduct and two counts of attempted first-degree criminal sexual conduct.

although defendant was acquitted of those charges. Consequently, it was not error for the trial court to consider those charges.

Next, the record does not support defendant's contention that the trial court gave him a harsher sentence because he exercised his right to a jury trial. In fact, the trial court stated that defendant had every right to a trial and accepted the jury's verdict. Defendant makes much of the fact that he withdrew his guilty plea and requested a jury trial when the trial court (a different judge) indicated that it would not follow the plea bargain for one year in the county jail, but would instead sentence him to three to four years for a felonious assault conviction and forty to sixty months for a gross indecency conviction. The trial court at sentencing very clearly stated that the plea agreement had no significance or effect on it. There is simply no indication that the trial court impermissibly gave defendant a harsher sentence because he exercised his right to a jury trial.

Here, in considering defendant's background (two prior felony convictions and five prior misdemeanor convictions) and the seriousness of the offense (defendant held a knife to the victim's throat), we conclude that the trial court did not abuse its discretion in sentencing defendant. *Hansford, supra*, pp 324, 326.

Affirmed.

/s/ Kathleen Jansen
/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder