STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY M. ABATE,

Defendant-Appellant.

UNPUBLISHED
June 18, 2002

No. 226742
Wayne Circuit Court
LC No. 99-006283

Before: Kelly, P.J., and Murphy and Murray, JJ.

PER CURIAM.

Defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d(1)(b), and fourth-degree criminal sexual conduct, MCL 750.520e(1)(b).[1] He was sentenced to concurrent prison terms of one to fifteen years for the third-degree CSC conviction, and six months to two years for the fourth-degree CSC conviction. Defendant appeals as of right. We affirm.

Defendant, a Detroit police officer, was accused of sexually assaulting a female prisoner in the precinct lock-up. The complainant testified that she was coerced into having sex because defendant told her to cooperate or her stay in jail would be difficult. Defendant did not overtly threaten her, and he was not carrying a gun. Defendant denied telling the complainant that she had to cooperate, and claimed the complainant "forced herself" upon him and initiated sex with him in the jail cell.

The court, sitting as trier of fact, found the complainant's version credible and the defendant's version "very hard to believe." The court concluded that the defendant's position and the jail setting created a coercive atmosphere, and defendant coerced the complainant when he told her that things would be different for her if she did not cooperate.

I. WEIGHT OF THE EVIDENCE

Defendant argues that the verdict was against the great weight of the evidence because the complainant's testimony was thoroughly impeached by other witness testimony and was

[1] The judgment of sentence denotes MCL 750.520e(1)(a), a matter addressed in part IV of this opinion.

contrary to "physical facts" and "physical realities." We must examine whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998).

Nothing in the record supports defendant's argument that the complainant's testimony was contrary to "physical facts" or "physical realities." The written statements of two other prisoners do not mention anything about a sex act to which defendant admitted, and do not contradict the complainant's testimony that she did not consent. The fact that the cell where the sex act took place was visible from other cells proves nothing; the other prisoners did not say in their statements that they witnessed non-consensual sex, but they also did not say that they witnessed consensual sex as defendant testified. One witness' statement that the complainant "goes both ways" does not affect the credibility of the complainant's version.

The circuit court, after listening to the witnesses and viewing their demeanor, concluded that the complainant was credible and the defendant was not. We will not second-guess the court's determination of credibility. *Lemmon, supra* at 642-643. This case was a classic "he said - she said" case, and the circuit court's determination that the complainant was more credible is not contrary to the great weight of the evidence.

II. SENTENCING ISSUES – THIRD-DEGREE CSC

Defendant next presents a series of arguments attacking his sentence for third-degree criminal sexual conduct. Applying the statutory sentencing guidelines, MCL 769.34, the court scored twenty-five points for offense variable eleven for multiple penetrations. That score led to a recommended minimum sentence range of twenty-nine to fifty-seven months' imprisonment. At sentencing, the court departed downward and imposed a minimum sentence of twelve months.

In response to a post-sentencing motion, the court acknowledged that it had improperly scored offense variable eleven because there had been a single penetration, and the sentencing instructions state that no points should be assessed for the penetration that forms the basis for the conviction.[2] The court re-calculated the guidelines range to yield a recommended minimum sentence of twelve to twenty-four months. The court declined to change the sentence it had earlier imposed.

Defendant argues that the court was obligated to depart from the recommended range as recalculated because the court had departed from the recommended range the first time it sentenced defendant. While the courts necessarily focus on sentencing guidelines and its technical rules, the end result – the actual sentence – should not be lost in a series of mathematical calculations. When the circuit court first sentenced defendant, it cited various concerns about the guidelines and reached a conclusion that one year in prison was a more appropriate sentence for this defendant under the circumstances. It turns out the court was prescient – when the scoring error was identified, the recommended range fit perfectly over the

[2] "Do not score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense." MCL 777.41(2)(c).

court's original sentence. The key to the court's exercise of discretion was the court's conclusion that one year in prison was an appropriate sentence under the circumstances of the offense and the offender, rather than the need to deviate a particular percentage from the guidelines to achieve that tailored sentence. The fact that the court's concerns about excessive punishment were borne out through re-calculation of the guidelines does not mean defendant is entitled to another departure.

Defendant also argues that he was entitled to a full sentencing hearing where he could request a downward departure and exercise full rights of allocution. We disagree. The court's correction of the sentencing grid did not rise to the level of a re-sentencing at which defendant and the victim would be entitled to allocution. See *People v Foy*, 124 Mich App 107; 333 NW2d 596 (1983). The court never amended the sentence to increase the punishment on the basis of a misconception of the law. See *People v Thomas*, 223 Mich App 9, 12; 566 NW2d 13 (1997).

Defendant further argues that he is entitled to resentencing because the improper scoring of the guidelines means the presentence report must contain inaccurate information, and he is entitled to be sentenced on the basis of accurate information. The misscoring of offense variable eleven does not mean defendant originally was sentenced on the basis of inaccurate information. The circuit court based the sentence on the testimony and other proofs, which showed a single penetration, and not on the basis of a mistaken belief the defendant had committed multiple penetrations.

Because of our disposition of this matter, we need not address defendant's argument, in regards to the right of allocution, that the sentencing guidelines statute, MCL 769.34(10), cannot prevent the judiciary from reviewing constitutionally infirm sentences.

III. SENTENCING DISCRETION – THIRD-DEGREE CSC

Defendant urges that jail time up to twelve months is a permissible sentence for third-degree CSC. He argues that the circuit court was under the mistaken belief that it was required to impose an indeterminate prison sentence for third-degree CSC. Therefore, defendant argues, the court did not recognize the scope of its discretion and thus did not properly exercise that discretion. The prosecutor responds that a prison sentence must be imposed for third-degree CSC under MCL 771.1 because it is a non-probationable offense.[3] Therefore, the prosecutor argues, MCL 769.34(5)[4] requires imposition of the mandatory minimum sentence and takes this

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[3] Although the third-degree CSC statute, MCL 750.520d, does not state that probation may not be imposed for the offense, MCL 771.1(1) includes third-degree CSC among offenses for which probation is not authorized.

[4] MCL 769.34(5) provides:

> If a crime has a mandatory determinant penalty or a mandatory penalty of life imprisonment, the court shall impose that penalty. This section does not apply to sentencing for that crime.

offense outside the scope of MCL 769.34(4),[5] which would otherwise allow the court to consider an "intermediate sanction" such as jail time.

Regardless of whether a non-probationable offense automatically requires a prison term under the jurisdiction of the state Department of Corrections, [remainder of paragraph deleted] the record does not support defendant's argument that the court was unaware of MCL 769.34(4)(d) and its provision allowing a jail term. There were no remarks at the original sentencing which indicate that the court felt it lacked discretion to sentence defendant to a jail term. *People v Knapp*, 244 Mich App 361, 389; 624 NW2d 227 (2001). Defendant points to this colloquy at his motion for resentencing as proof that the court did not know it could sentence him to a jail term:

> MR. LEVI (defense counsel): * * * So now a straight jail term is possible for CSC third by clear intent of the legislature. The only impediment preventing it is not there anymore, you can give straight jail term without probation. Was the Court aware of this at the time of sentencing, your Honor?
>
> THE COURT: I'm sorry?
>
> MR. LEVI: At the time of sentencing were you aware that you could have given a straight jail term?
>
> THE COURT: Just make your argument. We'll get a response from the prosecutor.
>
> MR. LEVI: If your honor was not, and another reason for resentencing is, my client would have been sentenced based on upon the Court's misconception of the law. * * *

Defendant argues that the court evaded the issue and that the record strongly suggests that the court did not know the scope of its discretion. We read the court's comment as a response to what may have sounded like impertinent cross-examination of the judge by defense counsel. We do not see this as an admission by the court that it did not recognize its own discretion.

The court had two options under MCL 769.34(4)(d): (1) it could sentence defendant to imprisonment within the recommended range of twelve to twenty-four months; or (2) it could

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[5] MCL 769.34(4)(d) provides:

> If the upper limit of the recommended minimum sentence exceeds 18 months and the lower limit of the recommended minimum sentence is 12 months or less, the court shall sentence the offender as follows absent a departure:
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> (*i*) To imprisonment with a minimum term within that range.
>
> (*ii*) To an intermediate sanction that may include a term of imprisonment of not more than 12 months.

sentence him to an intermediate sanction that "may" include a term of imprisonment for not more than twelve months. The court imposed the first option when it sentenced defendant to a minimum term within the guidelines range. The court indicated that it was giving defendant a benefit by sentencing him at the far low end of the guidelines, and there is no indication in the record that the court was prepared to or wished to reduce the sentence any lower. The sentence is valid.

IV. SENTENCING ISSUE – FOURTH-DEGREE CSC

Defendant argues that the circuit court exceeded the guidelines when sentencing him for fourth-degree criminal sexual conduct without stating a substantial and compelling reason for departure. The court determined that the recommended minimum guidelines range was zero to seventeen months. The court imposed a prison sentence of six months to two years.

Because the highest end of the range was eighteen months or less, defendant argues that MCL 769.34(a) required the court to impose an intermediate sanction (such as a jail term not exceeding twelve months) or to state on the record a substantial and compelling reason for not doing so. Because the court originally departed downward when it imposed the sentence for third-degree CSC, defendant also argues that the court was obligated to depart downward on the fourth-degree CSC sentence and impose a jail term.

The prosecutor argues that, because this sentence is concurrent with the third-degree CSC sentence, no additional relief would help defendant. He is serving a prison term for third-degree CSC, so he will be compelled to serve the fourth-degree CSC sentence in prison as well, even if he were sentenced to serve the shorter term in jail.

The legislative sentencing guidelines require the court to impose an "intermediate sanction" when the recommended guidelines range is eighteen months or less, unless the court states a substantial and compelling reason on the record for imposing a prison sentence. MCL 769.34(4)(a).[6] An "intermediate sanction" does not include a prison sentence. *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002), citing MCL 777.1(d) and MCL 769.31(c). Therefore, a court is required to state a substantial and compelling reason in some situations even where the court has sentenced a defendant within the range set forth in the guidelines. *Stauffer, supra* at 636. The court here did not state a substantial and compelling reason for sentencing defendant to imprisonment instead of other acceptable forms of punishment. We would ordinarily remand to allow the court to state a substantial and compelling reason, or to grant re-

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[6] The statute provides:

> If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in chapter XVII is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.

sentencing where the court could evaluate various sentencing options available to it. See *People v Babcock*, 244 Mich 64, 80; 624 NW2d 479 (2000). Here, however, the circuit court would be powerless to send defendant to the county jail as defendant urges because this sentence is concurrent to the sentence already being served with the state Department of Corrections, which sentence we have affirmed. The issue is moot because we cannot fashion a remedy, and we will not order the circuit court to engage in a fruitless act. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

V. INEFFECTIVE ASSISTANCE OF COUNSEL

In his fifth issue, defendant combines several matters to argue that he is entitled to a *Ginther*[7] hearing to demonstrate that he was denied the effective assistance of counsel or, at a minimum, correction of his presentence report and judgment of sentence. Specifically, defendant argues: (1) the presentence report contained inaccurate references to the use of "force" during the commission of the offenses; (2) the judgment of sentence and presentence report contained an inaccurate statutory citation; (3) he was denied the effective assistance of counsel because timely objection to the errors would have cured the errors; and (4) even if this Court does not order a *Ginther* hearing, it should order the errors corrected. The prosecutor argues that if the presentence report contains errors, the proper remedy is to remand for correction of those mistakes, not a hearing into whether defense counsel was ineffective for allowing those errors to occur in the first place.

We agree there are inaccuracies in the presentence report and judgment of sentence that should be corrected. It is clear that the court convicted and sentenced defendant for sexual assault based on coercion, not force. Thus, inclusion of the word "force" in sentencing documents is inaccurate. We direct the court to amend the judgment of sentence and the PSIR to reflect "coercion" or "force or coercion" instead of "force" alone. Likewise, we direct the court to amend the judgment of sentence and PSIR to reflect that the conviction for fourth-degree CSC was obtained pursuant to MCL 750.520e(1)(b). We note that the warrant, the bindover, and the judgment all cited MCL 750.520e(1)(a), but the Information cited MCL 750.520e(1)(b) and the conviction was based on the coercion section of the statute, not the complainant's age.

We decline to order correction of documents created by other state agencies, such as the Parole Guidelines Data Sheet, because those are not sentencing documents and were not generated by, endorsed by, or used by the circuit court. This is not a parole appeal.

Correction of the above errors is a ministerial act and does not include a right of allocution or require resentencing.

VI. DISQUALIFICATION OF JUDGE

Defendant seeks to have a different judge assigned to proceedings on remand. We find no evidence that the trial judge will have difficulty effectuating the terms of this opinion. Cf. *People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986).

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[7] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Affirmed and remanded for correction of the presentence report and judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ Christopher M. Murray