

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY ALLEN TOWN,

Defendant-Appellant.

UNPUBLISHED

July 9, 2002

No. 236337

St. Joseph Circuit Court

LC No. 99-009955-FC

Before: Fitzgerald, P.J., and Holbrook, Jr., and Doctoroff, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his sentence of twenty-one to fifty years in prison imposed on his plea-based conviction of criminal sexual conduct in the first degree (CSC I), the victim being under thirteen years of age, MCL 750.520b(1)(a). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant agreed to plead guilty of one count of CSC I in return for dismissal of two counts of CSC I and one count of criminal sexual conduct in the second degree, the victim being under thirteen years of age, MCL 750.520c(1)(a). To establish a factual basis for the plea offense, defendant admitted that he placed his penis in the mouth of the five-year-old female complainant for the purpose of sexual gratification.

The applicable statutory sentencing guidelines recommended a minimum term range of eighty-one to 135 months for the conviction of CSC I. The trial court stated that substantial and compelling reasons existed to exceed the guidelines, and that the guidelines did not adequately account for the scope and seriousness of defendant's offenses and defendant's own circumstances. The court emphasized that defendant was an admitted pedophile who sexually abused the female complainant some one hundred times over a period of approximately one year, and abused the six-year-old brother of the girl some fifty times during that same period. The court noted that the victims suffered extreme psychological trauma as a result of the abuse, and that they would require extensive therapy. The court also concluded that defendant was a danger to society. The court sentenced defendant to twenty-one to fifty years in prison, with credit for 260 days.

In most instances a trial court must impose a sentence within the calculated guidelines range. MCL 769.34(2). A trial court may depart from the guidelines if it finds that a substantial and compelling reason exists to do so. To constitute a substantial and compelling reason for

departing from the guidelines, the reason must be objective and verifiable, and must irresistibly hold the attention of the court. *People v Babcock*, 244 Mich App 64, 75; 624 NW2d 479 (2000), (hereinafter referred to as *Babcock I*). We review the trial court's determination of the existence of a substantial and compelling reason for departure for clear error. The determination that the reason is objective and verifiable is reviewed as a matter of law. The determination that the reason constituted a substantial and compelling reason to depart from the guidelines is reviewed for an abuse of discretion. *Id.*, 75-76.

The extent of a departure from the guidelines is reviewable pursuant to the principle of proportionality set out in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). *People v Babcock (After Remand)*, ___ Mich App ___, ___ NW2d ___ (Docket No. 235518, March 19, 2002) (hereinafter referred to as *Babcock II*). The key test of the proportionality of a sentence is whether it reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). The trial court may depart from the guidelines for nondiscriminatory reasons where legitimate factors either were not considered by the guidelines, or were considered but were given inadequate or disproportionate weight. MCL 769.34(3)(b); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001).

Defendant argues that the trial court abused its discretion by departing from the guidelines and imposing a minimum term that exceeded by nearly two times the high end of the recommended minimum term range. He asserts both that the seriousness of the offense was taken into account in the calculation of the guidelines, and that the trial court did not adequately articulate its reasons for departing from the guidelines. Finally, defendant contends that his sentence is so disproportionate that it constitutes cruel and unusual punishment.

We disagree and affirm defendant's sentence. The guidelines account for repeated felonious behavior in Offense Variable (OV) 12, MCL 777.42, contemporaneous felonious criminal acts, and OV 13, MCL 777.43, continuing pattern of criminal behavior. However, these variables can acknowledge at most the effect of three other offenses. Defendant admitted that he is a pedophile and that he sexually abused complainant and her brother some one hundred times and fifty times, respectively, within the span of approximately one year, that he sexually abused other very young children as well, and that he attempted to coerce the children into remaining silent by threatening them. The trial court did not err in finding that the magnitude of defendant's admitted behavior was given inadequate weight by the guidelines. *Armstrong, supra*. The trial court did not abuse its discretion by finding that substantial and compelling reasons existed for departing upward from the guidelines, *Babcock I, supra*, 76, and adequately articulated its reasons for exceeding the guidelines.

Defendant's sentence, while a significant departure from the guidelines, adequately reflects the seriousness of the matter, and thus is proportionate. *Houston, supra*; *Babcock II, supra*. A proportionate sentence is not cruel and unusual. *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Martin M. Doctoroff