

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN DARWIN SIVRAIS,

Defendant-Appellant.

UNPUBLISHED

May 20, 2008

No. 277386

Iosco Circuit Court

LC No. 07-003225-FC

Before: Donofrio, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right from his sentences of 80 to 120 months in prison imposed on his plea-based convictions of assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1). We affirm.

Defendant was originally charged with two counts of criminal sexual conduct in the first degree (CSC I), the victim being under 13 years of age, MCL 750.520b(1)(a), one count of criminal sexual conduct in the third degree, the victim being at least 13 years of age but under 16 years of age, MCL 750.520d(1)(a), and three counts of assault with intent to commit criminal sexual conduct involving penetration. Defendant pleaded guilty to two counts of assault with intent to commit criminal sexual conduct involving penetration in return for dismissal of the other charges and the prosecutor's agreement to not seek sentence enhancement pursuant to MCL 769.12.

The judicial sentencing guidelines applied in this case because the offenses occurred prior to January 1, 1999.¹ The judicial sentencing guidelines recommended a minimum term range of 60 to 80 months. The trial court sentenced defendant to concurrent terms of 80 to 120 months in prison, with credit for 232 days.

A sentence imposed under the judicial sentencing guidelines is reviewed for an abuse of discretion. A trial court abuses its discretion if it imposes a sentence that violates the principle of

¹ See MCL 769.34(1).

proportionality. That principle requires that a sentence be proportionate to the circumstances of the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

A sentence within the judicial sentencing guidelines is presumptively proportionate. In order to overcome this presumption, a defendant must show that unusual circumstances render the sentence disproportionate. *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000).

We affirm defendant's sentences. The appellate bar to sentence review in MCL 769.34(10) applies only to sentences imposed under the statutory sentencing guidelines, and thus defendant's arguments regarding that section have no relevance in this case.² Defendant is entitled to appellate review of his sentence under the standard announced in *Milbourn*, *supra*.

Defendant's minimum sentences are within the applicable judicial sentencing guidelines, and thus are presumptively proportionate. Defendant has not shown that unusual circumstances render the sentences disproportionate. Defendant states only, and without substantiation, that the statutory sentencing guidelines would recommend a minimum term of 10 to 23 months for his conviction offenses. Even assuming *arguendo* that defendant's calculations are correct, the statutory sentencing guidelines have no relevance to this matter because defendant's offenses occurred prior to January 1, 1999. See *People v Reynolds*, 240 Mich App 250, 254; 611 NW2d 316 (2000).

Defendant admitted to repeatedly molesting the victims over the course of several years. He pleaded guilty to two charges of assault with intent to commit criminal sexual conduct involving penetration in exchange for dismissal of other charges, including two counts of CSC I, both of which carried a maximum sentence of life in prison. The trial court was entitled to consider the plea bargain and the nature of the dismissed charges when imposing sentence. *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994).

Defendant has not demonstrated that unusual circumstances render his minimum terms disproportionate. Defendant is not entitled to resentencing in this matter.

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ William B. Murphy

² We note that defendant's argument that MCL 769.34(10) is unconstitutional has been rejected by our Supreme Court. See *People v Garza*, 469 Mich 431; 670 NW2d 662 (2003).