

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY MALCOLM TOJE,

Defendant-Appellant.

UNPUBLISHED

March 3, 2009

No. 278147

Wayne Circuit Court

LC No. 03-005726

Before: Whitbeck, P.J., and O’Connell and Owens, JJ.

PER CURIAM.

In this case after remand to the trial court, defendant Timothy Toje appeals as of right his sentence to 11 months to two years for fourth degree criminal sexual conduct (CSC IV),¹ with credit for 1315 days (3.6 years) served. We decide this appeal without oral argument pursuant to MCR 7.214(E), and we affirm.

I. Basic Facts And Procedural History

Following a bench trial, the trial court convicted Toje of one count of second degree criminal sexual conduct (CSC II),² and one count of third degree criminal sexual conduct (CSC III).³ The trial court sentenced Toje to concurrent terms of two to 15 years’ imprisonment on each count.

Toje then appealed to this Court, challenging his CSC III sentence.⁴ This Court affirmed, but questioned the validity of the CSC II conviction since the victim was 15 years old at the relevant time.⁵

¹ MCL 750.520e(1)(a).

² MCL 750.520c(1)(a).

³ MCL 750.520d(1)(a).

⁴ *People v Toje*, memorandum opinion of the Court of Appeals, issued May 19, 2005 (Docket No. 252370).

⁵ *Id.* at 1 n 1.

Toje then filed a delayed application for leave to appeal from the trial court's denial of his motion for relief from judgment. This Court issued an order vacating Toje's CSC II conviction and remanding for resentencing for CSC IV.⁶ This Court stated:

There is no evidence on the record that there was any sexual contact with the complainant when she was under 13 years of age. The complainant was age 15 at the time of the offense and the evidence supported a conviction for fourth-degree criminal sexual conduct. [Toje's] sentence on count II for third-degree criminal sexual conduct is not affected by this correction.

On remand, the trial court resentenced Toje to a term of 11 months to two years for CSC IV, with credit for 1315 days (3.6 years) served. Toje now appeals as of right.

II. PRV Scoring

A. Mootness

Toje argues that prior record variable (PRV) 7,⁷ was improperly scored given the reduction of his crime from CSC II to CSC IV. In *People v Rutherford*,⁸ this Court stated:

[B]ecause defendant has already served his minimum sentence, we decline to review this issue. Where a subsequent event renders it impossible for this Court to fashion a remedy, an issue becomes moot. See, e.g., *People v Greenberg*, 176 Mich App 296, 302; 439 NW2d 336 (1989); *Crawford Co v Secretary of State*, 160 Mich App 88, 93; 408 NW2d 112 (1987).^{9]}

Since Toje received credit for the entirety of his revised sentence, this issue is moot.

B. The Proper Scoring

Regardless, we note that the trial court properly scored PRV 7. PRV 7 requires the trial court to score for "subsequent or concurrent felony convictions."¹⁰ On resentencing, the trial court scored 10 points for PRV 7 based on its finding that Toje's conviction for CSC IV was a concurrent felony.¹¹

⁶ *People v Toje*, unpublished order of the Court of Appeals, entered May 21, 2007 (Docket No. 271517).

⁷ MCL 777.57.

⁸ *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

⁹ See also *People v Tombs*, 260 Mich App 201, 220; 679 NW2d 77 (2003), *aff'd* on other grounds 472 Mich 446 (2005).

¹⁰ MCL 777.57(1).

¹¹ See MCL 777.57(1)(b).

The Sentencing Guidelines,¹² including PRV 7, are part of the Code of Criminal Procedure.¹³ MCL 750.520e(2) provides that CSC IV is “a *misdemeanor* punishable by imprisonment for not more than 2 years.” (Emphasis added). However, MCL 761.1(g) defines a “felony” for purposes of the Code of Criminal Procedure as a crime “for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year” Therefore, for purposes of scoring the sentencing guidelines, CSC IV is a felony.

C. Cruel And Unusual

Regarding Toje’s argument that his sentence was cruel and unusual, we note that a proportionate sentence is not cruel and unusual¹⁴ and that a minimum sentence falling within the guidelines range is presumed to be proportionate.¹⁵ Toje has not overcome this presumption.

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O’Connell
/s/ Donald S. Owens

¹² MCL 777.11 *et seq.*

¹³ MCL 760.1 *et seq.*

¹⁴ *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002).

¹⁵ *People v Cotton*, 209 Mich App 82, 85; 530 NW2d 495 (1995).