

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY THOMAS SMITH,

Defendant-Appellant.

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UNPUBLISHED

April 27, 2010

No. 288932

Wayne Circuit Court

LC No. 03-012800-FC

Before: K. F. Kelly, P.J., and Hoekstra and Whitbeck, JJ.

PER CURIAM.

In 2004, defendant was convicted by a jury of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), for digitally penetrating the victim's vagina and anus. The sexual assaults began when the victim was nine years old and continued over a 15-month period. At defendant's original sentencing, the trial court found substantial and compelling reasons to depart from the sentencing guidelines range of 9 to 15 years and sentenced defendant to three concurrent terms of 30 to 50 years' imprisonment each. On appeal, our Supreme Court held that although the trial court justified its decision to depart from the sentencing guidelines range, it failed to offer any justification to support the extent of the departure imposed. *People v Smith*, 482 Mich 292, 299-302, 305-306; 754 NW2d 284 (2008). Accordingly, the Court vacated defendant's sentences and remanded the case "for resentencing and for an explanation of the extent of any departure made on remand." *Id.* at 319. On remand, the trial court resentenced defendant to three concurrent prison terms of 25 to 50 years each. Defendant appeals as of right. We affirm.

I. Resentencing on Remand

At resentencing, the trial court articulated two rationales for the extent of the departure and proportionality. As partial justification for the sentences imposed, the trial court first noted that if defendant had committed the offenses after August 2006, he would have been subject to a 25-year mandatory minimum sentence. See MCL 750.520b(2)(b), as amended by 2006 PA 169, effective August 28, 2006. The trial court explained that it did not intend to use the amended statute "in an ex post facto fashion," but rather as a measure of the Legislature's viewpoint of an appropriate sentence. The court explained:

In this particular case I have been asked to show or demonstrate why my deviation in this child molesting case, which everyone described as being heinous, is proportionate.

Now the Supreme Court, at least five of them anyway had said well, I should look maybe to other jurisdictions to get other viewpoints.

Well, what's wrong with looking at the viewpoint of the Legislature? The Legislature has said, you know, we think if you do this, you ought to get 25 years on the minimum.

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I do think that in terms of looking at proportionality, in terms of what does the Legislature think is an appropriate severity [sic] for an offense such as this, while I will agree that it is a fixed sentence at this particular point now with a 25 year minimum, I do think that it reflects the fact that the People of the State of Michigan through the Legislature have now stated that the appropriate sentence for someone who commits this type of sexual assault on a young child, they should go to prison for a 25 year minimum. That was what the will of the People has been expressed through the Legislature.

I think if I'm going to look to an Opinion and look for some guidance as to what might be proportionate, I find that that is the most illustrative for purposes of this particular resentencing.

The trial court also explained that defendant's exploitation of the victim was not adequately reflected in the scoring of OV 10, explaining:

This nine year old child came from a dysfunctional family. There was no father present. The mother had been in prison for drugs, who would disappear for months at a time and had all but left this nine year old child to be with the defendant and his wife, who were acting in a child care, running essentially a child care center kind of environment. So they were holding themselves out as being people who cared for and were interested in the welfare of children.

This nine year old had no siblings to protect her. There was no adult to protect her. For a period of 15 months as the evidence showed, she became the defendant's sex toy.

And in this particular case also this was the exploitation of this child and her vulnerability, not just the vulnerability of her physically, not being able to answer or fight back, but the fact that she was told, according to her own testimony, that if she told anybody, that she and her baby brother and sister would be put out on the street, and they would be homeless.

You know any child longs for security first and foremost. And to threaten a child with being thrown out on the street and that they're the precipitating factor is an outrageous exploitation of that child, an outrageous exploitation of that child's vulnerability.

Defendant did not challenge the trial court's determination that there were substantial and compelling reasons to depart from the sentencing guidelines range. Instead, he argued that the court's reliance on the minimum penalty in MCL 750.520b(2)(b) to justify the extent of the departure was an improper retroactive application of the law, an ex post facto violation, and a violation of due process. He further argued that the sentence was disproportionate.

At the conclusion of the hearing, the trial court sentenced defendant to three concurrent terms of 25 to 50 years' imprisonment.<sup>1</sup>

## II. Standards of Review

This Court reviews the extent of a sentencing departure for an abuse of discretion. *Smith*, *supra* at 300. Defendant's arguments concerning the legality of the trial court's consideration of the minimum penalty adopted by the Legislature in 2006 are questions of law which this Court reviews de novo. *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995).

## III. Analysis

Defendant first argues that the 2006 amendment of MCL 750.520b(2) may only be applied prospectively to offenses committed after its effective date. We agree. However, in this case, the trial court did not impose a 25-year minimum sentence on defendant pursuant to MCL 750.520b(2). The trial court specifically acknowledged that the statutory mandatory minimum penalty did not apply to defendant, and instead decided to impose 25-year minimum sentences as an exercise of its independent discretion to impose a sentence within the guidelines range or to depart from the guidelines range for substantial and compelling reasons. The trial court considered the recently adopted mandatory minimum penalty only as a tool or benchmark for determining a proportionate sentence. Thus, the court did not retroactively apply the statutory amendment to offenses that occurred before its effective date. Cf. *People v Doxey*, 263 Mich App 115; 687 NW2d 360 (2004).

Citing *People v Michielutti*, 474 Mich 889; 704 NW2d 705 (2005), *Doxey*, *supra* at 115, *People v Thomas*, 260 Mich App 450, 457-459; 678 NW2d 631 (2004), and *People v Izarraras-Placante*, 246 Mich App 490, 496-499; 633 NW2d 18 (2001), defendant asserts that courts of

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<sup>1</sup> The resentencing transcript reveals the trial court actually stated, "So I will amend the sentence in this particular case, and it is the sentence of the Court that the defendant be committed to the Michigan Department of Corrections for a period of not less than 25 years, a period *not greater than 60 years*." (Emphasis added.) However, the October 30, 2008, judgment of sentence, as well as the amended judgment of sentence dated January 7, 2009, both reflect sentences of 25 to 50 years. Because neither party on appeal raises this discrepancy, we assume that the trial court either misspoke or the transcript is in error.

this state have held that ameliorative changes in sentencing statutes for controlled substance offenses cannot be used to favor defendants who committed their offenses before the effective date of the changes. Defendant argues that because such ameliorative changes cannot be used to favor defendants who committed their offenses before the effective date of the legislation, “it would be fundamentally unfair, and thus a violation of due process, to allow changes to the law to be used retroactively to *the detriment* of a criminal defendant.” In the cases cited by defendant, the appellate court did not apply a general rule that ameliorative changes in the law cannot be used retroactively to benefit a defendant in sentencing. Rather, in each case the appellate court was required to determine the respective trial court’s sentencing authority as derived from its interpretation of the statutes in question in order to ascertain and give effect to the intent of the Legislature. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). The present case does not involve a question of statutory interpretation, but rather an exercise of the trial court’s unquestioned sentencing authority to depart from the guidelines and impose a sentence for any term of years. Moreover, as indicated previously, the trial court recognized that the recently enacted mandatory minimum penalty did not apply to defendant’s case. Due process does not require that this Court balance the unfavorable results received by defendants in controlled substances cases with a favorable result in the present appeal.

Defendant further argues that had the trial court correctly sentenced him in 2004, the court would not have been able to use the 2006 amendment of MCL 750.520b(2) as a benchmark. He contends that due process requires that he not be punished for having successfully appealed his sentences. He argues that prospective application of the amendment and a prohibition on using it to justify the extent of a departure is the only interpretation that avoids violating the proscription on ex post facto laws in the state and federal constitutions. US Const, art I, § 9 cl 3; US Const, art I, § 10, cl 1; Const 1963, art 1, § 10.<sup>2</sup> We disagree.

Neither due process nor the prohibition on ex post facto laws require a court to exercise its discretion at resentencing using only information that was available at the original sentencing. To the contrary, in *Wasman v United States*, 468 US 559, 572; 104 S Ct 3217; 82 L Ed 2d 424 (1984), the Court stated, “We hold that after retrial and conviction following a defendant’s successful appeal, a sentencing authority may justify an increased sentence by affirmatively identifying relevant conduct or events that occurred subsequent to the original sentencing proceedings.” Here, the trial court had already determined that defendant’s conduct warranted a significant sentence, and considered a subsequent legislative enactment only to assist it in fashioning a proportionate sentence. Although defendant contends that it is unfair to consider the amended penalty in MCL 750.520b(2) as a benchmark for determining a proportionate sentence because that penalty was not in existence at the time of his original sentencing, our Supreme Court rejected a similar argument in *People v Fisher*, 442 Mich 560; 503 NW2d 50 (1993).

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<sup>2</sup> “[A]lthough the Ex Post Facto Clause does not apply directly to the judiciary, it applies by analogy through the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution.” *People v Potts*, 436 Mich 295, 300; 461 NW2d 647 (1990).

In *Fisher*, the defendant was convicted of second-degree murder for an offense committed in 1985. He was sentenced to prison for 40 to 60 years, which was a significant departure from the recommended range of 7 to 16 years under the first edition of the judicial sentencing guidelines. This Court remanded for resentencing and a more complete explanation of the trial court's reasons for departure. *Id.* at 564. On remand, the trial court again sentenced the defendant to 40 to 60 years, and this Court vacated that sentence and remanded for a second resentencing by a different judge. *Id.* at 564-565. At the second resentencing, the trial court indicated that it was considering the second edition of the judicial sentencing guidelines, which became effective on October 1, 1988. *Id.* at 565. The recommended range under the revised version was 10 to 25 years. *Id.* The trial court resentenced the defendant to a prison term of 25 to 50 years. *Id.* This Court held that the trial court erred by considering the second edition of the sentencing guidelines. *Id.* The Supreme Court, however, rejected the defendant's contention that retroactive application of the revised sentencing guidelines violated the defendant's right to due process, the prohibition on ex post facto laws, or the defendant's right to appeal. *Id.* at 580. The Court referred to its previous decision in *People v Potts*, 436 Mich 295; 461 NW2d 647 (1990), in which it held that retroactive use of the second edition of the judicial guidelines did not violate the proscription against ex post facto laws because the guidelines did not convey any substantive rights and did not limit the trial court's sentencing discretion. The *Fisher* Court then extended the reasoning in *Potts*, explaining:

Given our conclusion in *Potts*, that the revised guidelines convey no substantive rights, it logically follows that application of the revised nonbinding sentencing guidelines to a defendant who has appealed his sentence neither chills his right to appeal nor infringes upon his right to due process. The revised guidelines did not increase defendant's punishment in this case; the only change was in what was deemed appropriate punishment pursuant to the guidelines. Moreover, the revisions did not limit the discretion afforded the sentencing judge. [*Fisher, supra* at 582 (citation omitted).]

Similarly, in the present case, the Legislature's adoption of a minimum penalty pursuant to 2006 PA 169 did not limit the trial court's discretion or increase defendant's punishment. The trial court's consideration of the amended penalty only as a benchmark for determining a proportionate penalty is comparable to the trial court's consideration of the nonbinding revised judicial guidelines in *Fisher*. The fact that the revised edition of the guidelines was not in existence at the time of defendant Fisher's original sentencing did not mean that consideration of those guidelines at his resentencing was improper. Similarly, the fact that the minimum penalty in MCL 750.520b(2), as amended, was not enacted until after defendant was originally sentenced does not establish that the trial court's consideration of the change at resentencing was improper.

Next, defendant argues that the trial court failed to articulate why the sentences it imposed were proportionate to the offenses and this offender, as required by the Supreme Court's decision. He contends that the trial court's reference to the 25-year minimum penalty in MCL 750.520b(2), as amended, is inadequate to comply with the Supreme Court's directive because "[a] mandatory minimum is the antithesis of proportionate sentencing." We disagree.

Unlike what occurred at defendant's original sentencing, the trial court on remand provided an "explanation for the *extent* of the departure that was independent of the reasons given to impose a departure sentence." *Smith, supra* at 305-306. Although the court did not

compare the sentences with the guidelines ranges for other Class A offenses, that method is only a “potential means” to offer a justification for the extent of a departure and is not required. *Id.* at 306, 309. The trial court here explained why it chose the particular degree of departure and provided substantial and compelling reasons to justify the departure from the appropriate guidelines range. The trial court’s articulation of its reasons is sufficient to allow adequate appellate review. The trial court was “not required to use any formulaic or ‘magic’ words” to justify its departure. *People v Babcock*, 469 Mich 247, 259 n 13; 666 NW2d 231 (2003). “The requirement that the trial court justify the extent of the departure is not overly burdensome. The court need only reasonably comply with the statutory articulation requirement in order to facilitate appellate review,” *Smith, supra* at 315, and to “further the legislative goal of sentencing uniformity,” *id.* at 319. The trial court satisfied its obligation to articulate the reasons for the sentences it imposed.

Defendant also argues that his sentences are disproportionate and notes that the Supreme Court’s analysis of his original 30-year sentences and their relationship to the grid for Class A offenses, is equally applicable to the 25-year sentences because both the 30-year (360-month) and 25-year (300-month) sentences fall within the guidelines range only for E-VI, F-V, and F-VI cells. He also cites several unpublished decisions of this Court referencing lesser sentences for convictions of first-degree criminal sexual conduct, as well as *People v Reincke (On Remand)*, 261 Mich App 264, 265; 680 NW2d 923 (2004), in which the trial court departed from the sentencing guidelines range of 81 to 135 months and sentenced the defendant to 30 to 60 years of imprisonment for a conviction of first-degree criminal sexual conduct. The reasons for the departure in *Reincke* were the injuries to the three-year old child, which involved the tearing of the tissue separating the vagina from the rectum, the child’s vulnerability, and the need to protect society from the defendant. *Id.* at 268.

However, as this Court observed in *Reincke*, we are not to substitute our judgment for that of the trial court. We must accord deference to the trial court’s determinations and acknowledge the trial court’s extensive knowledge of the facts and the offender. *Id.* at 267-268. An abuse of discretion exists only where the trial court selects an outcome that falls outside the principled range of outcomes. *Id.* at 268. In this case, the trial court fashioned minimum sentences that are consistent with the lowest minimum sentence deemed appropriate for an adult offender who commits first-degree criminal sexual conduct against an individual less than 13 years old. In light of the Legislature’s recognition that such a sentence is appropriate in these circumstances, regardless of the offender’s prior record, we conclude that the sentences chosen by the trial court are within the range of principled outcomes, and therefore, not an abuse of discretion.

Affirmed.

/s/ Kirsten Frank Kelly  
/s/ Joel P. Hoekstra  
/s/ William C. Whitbeck