

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT FITZGERALD SMITH,

Defendant-Appellant.

UNPUBLISHED

May 18, 2010

No. 290866

Wayne Circuit Court

LC No. 08-013149-FC

Before: METER, P.J., and MURRAY and BECKERING, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a). He was sentenced to a prison term of 25 to 50 years for each conviction, to be served concurrently. He appeals as of right, asserting that the 25-year mandatory minimum sentence prescribed by MCL 750.520b(2)(b) is unconstitutionally cruel or unusual punishment under the Michigan Constitution, as well as cruel and unusual under the United States Constitution. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

First-degree criminal sexual conduct is normally punishable by imprisonment for life or any term of years. MCL 750.520b(2)(a). However, as in this case, when the defendant is over the age of 17 and the victim is under the age of 13, the offense is punishable “by imprisonment for life or for any term of years, but not less than 25 years.” MCL 750.520b(2)(b). A legislatively mandated sentence is presumptively valid and proportionate, *People v Williams*, 189 Mich App 400, 404; 473 NW2d 727 (1991), and this Court must construe statutes “as being constitutional absent a clear showing of unconstitutionality.” *People v Launsbury*, 217 Mich App 358, 363; 551 NW2d 460 (1996).

The United States Constitution prohibits “cruel and unusual punishments,” US Const, Am VIII, while its Michigan counterpart prohibits “cruel or unusual punishment.” Const 1963, art 1, § 16. This includes in Michigan a prohibition of “grossly disproportionate sentences.” *People v Bullock*, 440 Mich 15, 32; 485 NW2d 866 (1992). Defendant contends that the 25-year mandatory minimum sentence is disproportionate, primarily because it exceeds the appropriate

sentence range under the sentencing guidelines¹ and eliminates the trial court's ability to fashion an individualized sentence by considering all relevant information, including information favorable to defendant.

The constitutional concept of "proportionality" is distinct from the nonconstitutional "principle of proportionality" mandated for discretionary sentences under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). *Bullock*, 440 Mich at 34 n 17. The principle of proportionality requires that a sentence be tailored to fit the nature of the offense and the background of the offender. *Milbourn*, 435 Mich at 650-651. The purpose of the sentencing guidelines is to determine a sentence that meets the principle of proportionality. *People v Smith*, 482 Mich 292, 305; 754 NW2d 284 (2008). However, the principle of proportionality "has no applicability to a legislatively mandated sentence because the trial court, in that case, lacks any discretion to abuse." *Bullock*, 440 Mich at 34 n 17. The constitutional concept "concerns whether the punishment concededly chosen or authorized by the Legislature is so grossly disproportionate as to be unconstitutionally 'cruel or unusual.'" *Id.* at 34-35 n 17. In determining whether a punishment is cruel or unusual, this Court looks at the gravity of the offense and the harshness of the penalty, compares the penalty to that imposed for other crimes in this state and to the penalty imposed for the same offense in other states, and considers the goal of rehabilitation. *Launsbury*, 217 Mich App at 363.

The gravity of the offense is extremely high. Defendant, an adult man, had sexual relations with a child under the age of 13, whom he had abused for several years. Although few offenses carry a mandatory minimum sentence, many, including the offense of which defendant was convicted, are subject to a penalty of life imprisonment.² Further, many other states mandate a minimum sentence of 25 years or more for adults who commit serious sexual crimes against minors.³ Accordingly, defendant's 25-year minimum sentence is not unconstitutionally cruel or unusual, and therefore violates neither the state nor federal constitutions. *People v Nunez*, 242 Mich App 610, 618 n 2; 619 NW2d 550 (2000).

¹ The legislative guidelines scored for defendant's convictions established a minimum sentence range of 81 to 168 months.

² Such offenses include possession of more than 1,000 grams of a controlled substance, MCL 333.7403(2)(a)(i), counterfeiting, MCL 750.260, assault with intent to commit murder, MCL 750.83, conspiracy to commit murder, MCL 750.157a(a), armed robbery, MCL 750.529, assault with intent to rob while armed, MCL 750.89, carjacking, MCL 750.529a(1), bank robbery, MCL 750.531, burglary using explosives, MCL 750.112, kidnapping, MCL 750.349(3), carrying away a child, MCL 750.350, and indecent exposure by a sexually delinquent person, MCL 750.335a(2)(c), and second-degree murder, MCL 750.317.

³ See, e.g., Ark Code Ann 5-14-103(c)(2); Cal Penal Code 288.7(a); Conn Gen Stat 53a-70c(b); Del Code Ann, tit 11, § 4205A(a)(2); Fla Stat 775.082(3)(a)(4a)(II); Nev Rev Stat 200.366(3)(b) and (c); RI Gen Laws 11-37-8.1 and 11-37-8.2; Tenn Code Ann 39-13-522(a) and (b)(2)(A); Utah Code Ann 76-5-402.1(2)(a) and 76-5-402.3(2)(a).

Affirmed.

/s/ Patrick M. Meter

/s/ Christopher M. Murray

/s/ Jane M. Beckering