STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 15, 2010
v	No. 291626 Tuscola Circuit Court
MAXIMO SANDOVAL, JR., Defendant-Appellant.	LC No. 06-009907-FC

Before: ZAHRA, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

A jury convicted defendant of three counts of criminal sexual conduct (CSC) involving personal injury, MCL 750.520c(1)(f).[1] The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 20 to 60 years for each conviction. On appeal, this Court affirmed defendant's convictions, but remanded for resentencing.[2] On remand, the trial court sentenced defendant to concurrent prison terms of 18 to 60 years for each conviction. Defendant appeals as of right following his resentencing. We affirm.

The following facts are taken from this Court's original opinion in this matter:

In the summer of 2005, defendant, then a 25 year-old male, knocked on the victim's window at 2 a.m. The victim, then a 13 year-old girl who is developmentally delayed, knew the defendant because his parents lived in her neighborhood and because she worked with defendant at a local farm. When the victim heard the knocking, she went to the door and opened it. When she saw defendant, she went outside. Defendant and the victim went to his parents' house and the two entered the back of defendant's mother's van, where they kissed. Defendant then

[1] He was acquitted of two additional counts of first-degree CSC involving personal injury, MCL 750.520b(1)(f).

[2] This Court concluded that the trial court sentenced defendant outside the minimum sentence range of 58 to 228 months without stating substantial and compelling reasons on the record justifying the departure. *People v Sandoval, Jr.*, unpublished opinion per curiam of the Court of Appeals, issued December 4, 2008 (Docket No. 277509), slip op pp 4 – 5.

touched the victim's breasts and her vagina and the victim told him to stop. Defendant refused and called the victim derogatory names. The victim tried to leave the van, but defendant pulled her back into the van. Defendant, having pulled his pants down, then grabbed the victim's head and forced her to perform fellatio on him twice. The victim told defendant to stop, but he refused and continued to push her head down. Sometime during these events, the victim tried to push defendant off her and defendant tried to choke her. The victim got out of the van and ran home. Once the victim returned home, the victim's mother called the police and the victim submitted to a sexual assault examination and rape kit. The examiner found saliva on the victim's chest, which was collected and sent for DNA testing. Defendant's DNA matched the DNA collected from the victim's chest.

Defendant was arrested on August 22, 2005. Defendant was then incarcerated on parole detainer and remained incarcerated during the pendency of this matter. Trial was set for February 14, 2006. However, on February 13, 2006 the charges were dismissed without prejudice because the DNA analysis had not yet been completed. The prosecutor refiled the charges on May 12, 2006 and defendant was arraigned and "rearrested" on June 5, 2006. After a pretrial in October 2006, the matter was brought to trial on January 9, 2007. At trial, defendant presented an alibi defense, alleging that he was sleeping at his sister's house at the time of the event. The victim testified according to the facts above. The victim also indicated that she has been angry, embarrassed, and afraid as a result of the incident and that she sought counseling after the incident.

At a February 23, 2009, hearing on remand for resentencing, defendant asked for sentence credit for the 496 days served from the date of his initial arrest to the date of his initial sentence in this case. However, defense counsel acknowledged, "there are cases that say you do not have to do that – or that you don't do that." The trial court refused to grant the sentence credit requested by defendant.

Defendant first argues that the trial court erred in denying him credit for time served because he was held in jail on the present offense, and not on the parole violation, and is therefore entitled to credit for the time served. However, our Supreme Court recently rejected this argument in *People v Idziak*, 484 Mich 549, 566-569; 773 NW2d 616 (2009). In *Idziak*, the Supreme Court ruled that a paroled prisoner who is arrested for a new felony, detained in jail prior to trial for the new felony, and subsequently convicted of and sentenced on the new felony, could not receive credit for time served in jail before the date that his maximum sentence for the parole offense was completed. The Court held that MCL 769.11b does not apply in these circumstances because the defendant is incarcerated pursuant to the parole statutes, rather than incarcerated for the reasons stated in MCL 769.11b, being denied or unable to furnish bond. *Id.* The Court summarized its holding as follows:

> We hold that, under MCL 791.238(2), the parolee resumes serving his earlier sentence on the date he is arrested for the new criminal offense. As long as time remains on the parolee's earlier sentence, he remains incarcerated, regardless of his eligibility for bond or his ability to furnish it. Since the parolee is not being held in jail "because of being denied or unable to furnish bond," the jail credit statute does not apply. [*Idziak*, 484 Mich at 552.]

It is clear that defendant was in jail on a parole detainer. Therefore, because of his status as a parole detainee, he is not entitled to sentence credit for the time he spent in jail on the current offense. Defendant's additional arguments that his constitutional double jeopardy, due process, and equal protection guarantees were violated when he received no credit were also addressed and rejected in *Idziak.*

In a Standard 4 brief, defendant asserts that this Court should address defendant's argument that offense variable (OV) 11 was improperly scored. This issue is not properly before this Court, as this Court already addressed the issue of whether OV 11 was properly scored and determined that it was. This Court held:

> Lastly, the trial court scored 50 points for OV 11, which permits a sentencing court, in certain circumstances, to score 50 points if two or more sexual penetrations occurred. MCL 777.41(a). The victim's testimony that defendant forced her to perform fellatio twice almost immediately after he touched both her breasts and vagina supported the trial court's 50-point score for OV 11. Penetrations, like those in this case, that occur in "the same place, under the same set of circumstances, and during the same course of conduct" are properly scored as penetrations arising out of the sentencing offense. *People v Mutchie,* 251 Mich App 273, 276-277; 650 NW2d 733 (2002); MCL 777.41(s) Thus, defendant's argument that there is no connection between his conviction offenses and the alleged act of fellatio lacks merit.

This Court remanded for resentencing within the guidelines range, or for a statement of substantial and compelling reasons for the departure, and the appeal was affirmed in all other respects. "When a case is remanded by an appellate court, proceedings on remand are limited to the scope of the remand order." *People v Canter,* 197 Mich App 550, 567; 496 NW2d 336 (1992) (citation omitted).[3] Indeed, on remand for resentencing defendant did not raise any arguments regarding the scoring of the variables, and on appeal "readily concedes that when a case is remanded by an appellate court, proceedings in the trial court are limited by the scope of the remand order." Nonetheless, defendant urges this Court to reconsider this issue "in the interests of justice." Defendant maintains that *Mutchie,* 254 Mich App 273, the case on which this Court relied in affirming the trial court's scoring of OV 11 in this case, conflicts with our Supreme Court's later opinion in *People v Johnson,* 474 Mich 96; 712 NW2d 703 (2006). This argument is without merit. *Mutchie* remains good law, and the Court in *Johnson* quoted and factually distinguished *Mutchie.* The Court noted, consistent with this Court's holding in *Mutchie,* that the Legislature intended for those penetrations "arising out of the sentencing offense" to be scored.[4]

---

[3] Moreover, because neither the law nor the facts have changed since our first decision, this Court's prior decision is law of the case. *People v Herrera (On Remand),* 204 Mich App 333, 340; 514 NW2d 543 (1994).

[4] *Johnson* was factually distinguished from *Mutchie* in that the two CSC offenses for which the defendant was sentenced in *Johnson* occurred on different days in the same month. The (continued…)

Defendant also argues that the sentence imposed for second-degree CSC is not proportionate to the circumstances of the case. Second-degree CSC is an offense subject to the legislative guidelines. The principle of proportionality is generally inapplicable to sentences determined under the legislative guidelines. *People v Babcock*, 244 Mich App 64, 78; 624 NW2d 479 (2000). Rather, proportionality is an inherent function of the guidelines, *People v Babcock*, 469 Mich 247, 263-264; 666 NW2d 231 (2003), and thus a challenge based on proportionality cannot be considered. *People v Pratt*, 254 Mich App 425, 429-430; 656 NW2d 866 (2002). The trial court's minimum sentence of 18 years was within the minimum sentence range of 58 to 228 months. A sentence that is within the guidelines must be affirmed on appeal unless it was based on inaccurate information or an error in the scoring of the guidelines is shown. MCL 769.34(10). Defendant has not demonstrated an error in the scoring of the guidelines or the use of inaccurate information by the trial court in determining his sentence and therefore this Court must affirm.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald

(…continued)

Supreme Court noted, "Because MCL 777.41(2)(a) only allows those penetrations 'arising out of the sentencing offense' to be scored under OV 11, and because the two penetrations that formed the bases of the two sentencing offenses in this case occurred on different dates and there is no evidence that they arose out of each other." *Idziak*, 474 Mich at 96.