STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 17, 2016
v	No. 326593 Crawford Circuit Court
WAYNE ROBERT FARREN, Defendant-Appellant.	LC No. 12-093344-FC

Before: GLEICHER, P.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM.

Defendant, Wayne Robert Farren, appeals by right the trial court's judgment of sentence imposed after this Court affirmed his convictions, but remanded for resentencing. See *People v Farren*, unpublished opinion per curiam of the Court of Appeals, issued March 18, 2014 (Docket No. 312951). A jury found Farren guilty of accosting a child for immoral purposes, MCL 750.145a, assault and battery, MCL 750.81, possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(*v*), and attempted second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) and MCL 750.92. On remand, the trial court again departed from the sentencing guidelines. It sentenced him to serve 46 months to 15 years in prison for accosting a child, to serve 93 days for assault and battery, to serve 2 to 15 years in prison for possession of cocaine, and to serve 10 to 20 years in prison for attempted CSC II. For the reasons more fully explained below, we again remand this case.

Farren's convictions arise out of an incident at a party. Evidence showed that Farren expressed an interest in making sexual contact with a child present at the party and later attempted to force the child to make sexual contact. A relative of the child discovered Farren with the child and they fought. Farren left the party on foot and an officer stopped him after noticing that he was bleeding. After investigating the fight, officers arrested Farren, searched him, and discovered cocaine.

The trial court originally sentenced Farren to serve prison terms of 5 to 15 years for accosting a child, 93 days for assault and battery, 2 to 15 years for possession of cocaine, and 10 to 20 years for attempted CSC II. The recommended minimum sentence range for each sexual-offense conviction was 10 to 46 months. On appeal, this Court determined that the trial court improperly applied the mandatory minimum for sexual offenses stated under MCL 750.520f to Farren's sentence. See *Farren*, unpub op at 6. The Court also stated that the trial court "did not

explain why the extent of its departure was appropriate, and [that it could] not determine whether the trial court would have sentenced defendant as it did if it had not erroneously relied on MCL 750.520f(1)." *Id.* at 7. Accordingly, we remanded for resentencing.

Farren first argues that the trial court improperly calculated the late penalty fee that it imposed in the judgment of sentence. In the brief that he submitted on his own behalf, Farren also appears to argue that the trial court improperly imposed a 20% fee on the total costs, which already included a late fee, in violation of MCL 600.4803(1). Because he did not raise these issues before the trial court, our review is for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The trial court ordered Farren to pay a $350 attorney fee, $257 in state minimum costs, and a $130 crime victim rights fee. It also ordered him to pay a 20% late fee of $212.40. The judgment states that Farren's balance is $949.40. Further, the court ordered that "[f]ine, costs, and fees not paid within 56 days of the due date are subject to a 20% late penalty on the amount owed." The total of the costs, without the late fee, is $737. A 20% late penalty on that total is $147.40, not $212.40. Thus, the trial court plainly erred.

It appears that the error occurred after the trial court used the costs from the earlier judgment of sentence to calculate the late fee, which it then included in the new judgment of sentence. Farren's appellate lawyer and the prosecutor agree that, when the late fee is applied to costs of $737, the total should be $884.40. However, MCL 600.4803(1) allows for the imposition of a 20% late fee if, in relevant part, a defendant fails to pay court costs within 56 days after the amount is due. Because the amended judgment of sentence replaced the first judgment of sentence, the trial court could not impose a late fee for failing to timely pay the costs ordered in that judgment. Rather, the late fee could only be assessed if Farren should fail to pay the costs within 56 days of the amended judgment of sentence. For this reason, we vacate the judgment of sentence to the extent that it orders Farren to pay costs that include a late penalty and remand this matter for the ministerial task of amending the judgment of sentence. On remand, the trial court shall order Farren to pay $737 in costs and shall provide that he will be assessed a late fee if he does not pay the costs within 56 days of the amended judgment. See MCR 7.216(A)(7).

Farren next argues that the trial court erred when it again departed from the sentencing guidelines. He relies on our Supreme Court's decision in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), for the proposition that any departure must be reasonable.

In *Lockridge*, 498 Mich at 364, our Supreme Court held that Michigan's sentencing guidelines were unconstitutional to the extent that the guidelines required the trial court to sentence a defendant on the basis of facts not found by the jury. Although the Court determined that trial courts must still score and refer to the sentencing guidelines, it held that the guidelines were advisory only. *Id.* at 365, 392. It further provided that sentencing courts would no longer have to articulate a substantial and compelling reason to impose a sentence that departed from the recommended minimum sentence range. *Id.* at 364-365, 365 n 1. The Court stated that "sentences that depart from that threshold are to be reviewed by appellate courts for reasonableness." *Id*. at 365. In *People v Steanhouse*, ___ Mich App ___, ___; ___ NW2d ___ (2015) (Docket No. 318329, issued October 22, 2015); slip op at 24, this Court held that the

reasonableness of a sentence should be evaluated in accord with the proportionality test stated in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), and its progeny.

On appeal, the prosecutor argues that this Court can and should conclude that the minimum sentence selected by the trial court was proportionate to both the offender and the nature of his offenses. Therefore, the prosecutor concludes, we should affirm Farren's sentences as reasonable. Contrary to Farren's contention on appeal, we do not believe that the trial court departed because it felt that he was guilty of a more serious offense than attempted CSC II. Rather, the trial court evidently considered the nature and number of Farren's prior offenses and the seriousness of the attempt at issue and concluded that the guidelines did not adequately account for his background and the seriousness of the offense. It then examined the sentencing grid that would have applied to a completed CSC II offense in order to obtain some guidance as to what might constitute an appropriate departure, which is appropriate. See *People v Smith*, 482 Mich 292, 309; 754 NW2d 284 (2008) (stating that it is helpful for a sentencing court to review the various sentencing grids when contemplating the extent of a departure). On review of the trial court's stated reasons for departing, we agree with the prosecution and conclude that the departure appears proportionate to the offender and offense under the totality of the circumstances. See *Milbourn*, 435 Mich at 651. Nevertheless, we do not affirm Farren's sentences.

In *Steanhouse* this Court held that it is appropriate to remand a case to the sentencing court where the sentencing court was unaware that its departure determination was subject only to a reasonableness requirement. *Id.* at ___; slip op at 25. On this record, we cannot state whether the trial court would have imposed a different sentence had it known that its departure determination would be subject only to a reasonableness requirement. Accordingly, we follow the procedure stated in *Steanhouse* and remand this case for a *Crosby* proceeding. See *Lockridge*, 498 Mich at 395-399.

Farren claims in the brief he submitted on his own behalf that his judgment of sentence improperly included an enhancement to his CSC conviction. The trial court listed the four crimes at issue, listed the fact that Farren was a fourth-habitual offender, and included a reference to the CSC enhancement statute, MCL 750.520f. The record is clear that the trial court properly understood this Court's previous decision and agreed that the five-year mandatory minimum requirement set out in MCL 750.520f did not apply. Consequently, the inclusion of the reference appears to be a clerical error, which the trial court should correct on remand.

Farren also argues that the author of his presentence investigation report (PSIR) improperly referred to him as a sexual predator. The author stated: "Based on the number of CSC convictions on his record, all involving minors as victims, it is clearly evident that Mr. Farren is a sexual predator." Given the context of the statement and the explanation, the author's characterization is no more than a lay opinion concerning Farren's rehabilitative potential given his history of criminal sexual acts. As such, it was not error to allow this reference to remain in the PSIR. See, e.g., *People v Uphaus*, 278 Mich App 174, 182; 748 NW2d 899 (2008); *People v Spanke*, 254 Mich App 642, 649-650; 658 NW2d 504 (2003). We similarly reject Farren's contention that the reference violated his Sixth Amendment right to a jury trial because the trial court relied on this reference to depart from the guidelines. Michigan's statutory sentencing guidelines are now advisory. *Lockridge*, 498 Mich at 391-392. As such, the trial court's

conclusion that Farren's history of sexual predation warrants a lengthier sentence is a matter of reasonableness that can be reviewed after the trial court resentences Farren, should Farren elect to pursue that course of action.

We vacate the judgment of sentence to the extent that it improperly included a late fee and a reference to MCL 750.520f. We remand this case for the ministerial task of correcting the judgment of sentence consistent with this opinion. We further order the trial court shall hold a *Crosby* proceeding on remand.

Vacated in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Michael J. Kelly