STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v GERALD LEE BABCOCK, Defendant-Appellee.	FOR PUBLICATION December 26, 2000 9:10 a.m. No. 223624 Jackson Circuit Court LC No. 99-095646-FH Updated Copy February 16, 2001

Before: Talbot, P.J., and Hood and Gage, JJ.

TALBOT, P.J.

Defendant was charged with one count of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), involving his twelve-year-old "cousin." In exchange for defendant pleading guilty of two counts of second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3), the prosecutor dropped the first-degree criminal sexual conduct charge. Although the legislatively created sentencing guidelines range for the minimum appropriate sentence was thirty-six to seventy-one months, the trial court sentenced defendant to three years' probation, with the first year to be served in jail. All but sixty days of defendant's jail term were suspended. This Court granted the prosecutor's application for leave to appeal. We vacate and remand for resentencing.

On appeal, the prosecutor argues that the trial court's reasons for departing from the minimum statutory guidelines range were not substantial and compelling. Defendant, on the other hand, contends that his sentence was proportionate. The issues raised by the parties require

us to review the recent sentencing guidelines legislation and the manner in which the statute affects the scope of appellate review.

By its very nature, sentencing is the community's response to crime. As such, the ultimate authority to provide for sentencing is constitutionally vested in the Legislature, Const 1963, art 4, § 45,[1] and delegated by the Legislature to the trial courts. See MCL 769.1(1); MSA 28.1072(1).[2] The Legislature empowered the trial court judiciary with the "unique role as the link between a defendant and a victim and between community values and the goals of the criminal justice system." *People v Milbourn*, 435 Mich 630, 670; 461 NW2d 1 (1990) (Boyle, J., dissenting). As Justice Boyle explained, *id.* at 680-681:

> The Michigan Constitution gives the Legislature the authority to provide for sentencing, a power which the people gave to that department of government. Pursuant to that authority, the Legislature enacted statutes which set the maximum punishment and gave the authority to set the minimum punishment to the trial court judiciary. Thus, indeterminate sentencing is a legislative delegation of constitutional authority to trial judges to tailor their sentences to the particular offender and the particular offense "within the legislatively prescribed range" of punishment for each felony. *Ante*, p 651.

Historically, the trial courts could impose any sentence they deemed appropriate provided the sentence was indeterminate and did not exceed that which was authorized by law. Const 1963, art 4, § 45; MCL 769.1(1); MSA 28.1072(1); see also *Cummins v People*, 42 Mich 142, 144; 3 NW 305 (1879); *People v Harwood*, 286 Mich 96, 98; 281 NW 551 (1938); *In re Callahan*, 348 Mich 77, 80; 81 NW2d 669 (1957).

A lengthy period of appellate intervention began, however, with *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972), when our Supreme Court created the requirement that a minimum sentence imposed under the indeterminate sentence act could not exceed two-thirds of

the maximum term. In *People v Coles*, 417 Mich 523, 550; 339 NW2d 440 (1983), the Court held that sentences were subject to appellate review and implemented a subjective "shocks the conscience" standard as the method for determining whether a sentence constituted a judicial abuse of discretion. The decision to impose this test was deemed justified because, even if the language of the governing constitutional and statutory provisions did not *authorize* appellate review, neither did it limit it. *Id.* at 534-535.

The first edition of the Michigan Sentencing Guidelines was developed soon after *Coles, supra*, was published. In an effort to gauge the "seriousness of a particular offense by a particular offender, as well as the disparity in sentencing between courtrooms," the guidelines' commission reviewed an extensive database of cases, representing the actual sentencing practices of trial judges, and created the first guidelines' ranges. *Milbourn, supra* at 655. To "facilitate judicial review," the Supreme Court called for trial courts to use its commission-created Michigan Sentencing Guidelines, Administrative Order No. 1984-1, 418 Mich lxxx. See also Administrative Order No. 1985-2, 420 Mich lxii; Administrative Order No. 1988-4, 430 Mich ci. A few years later the Supreme Court made it an abuse of discretion for a trial court to impose a minimum sentence longer than the defendant was expected to live, reasoning that, no matter the severity of the crime, a criminal defendant should not be given an order it was impossible to obey. *People v Moore*, 432 Mich 311, 326; 439 NW2d 684 (1989).

The Court later abandoned the "shocks the conscience" test as unworkable and replaced it with the equally amorphous "principle of proportionality." *Milbourn, supra* at 635, 644-649. The Court held that a given sentence was invalid if it was not proportionate to the seriousness of the matter, taking into account the nature of the offense and the background of the offender. *Id.*

at 651. Proportionality became the standard for measuring all sentences, and the guidelines were deemed a persuasive mechanism for judging whether the sentence was proportionate. The Court, *id.* at 656, also described the administratively ordered use of its guidelines as a "barometer" for determining appropriate sentencing practices, and explained that "[e]ven where some departure appears to be appropriate, the extent of the departure (rather than the fact of the departure itself) may embody a violation of the principle of proportionality." *Id*. at 660.

The principle of proportionality has been subject to criticism. In *People v Merriweather*, 447 Mich 799, 805; 527 NW2d 460 (1994), Justice Boyle noted that this Court's opinion reversing the sentence imposed on the basis that it was disproportionate, "vividly evidence[s] that elaborate rationalizations for lowering sentences distance the appellate judiciary from meaningful connection with reality and distort the concept of individualized justice." *Id.* In her view, by mediating the victim's tragedy through the "processes of proportionality and guidelines' evaluation, the focus of the reviewing court shifts from the horror of [the victim's] blood, feces, and burned flesh, to the image of an enfeebled and sympathetic defendant . . . ." *Id*. Justice Boyle also wrote:

> I do not retreat from the view that in *People v Milbourn* . . . the Court violated separation of powers and usurped the authority constitutionally confided by the people of this state in their Legislature, . . . and by the Legislature in the trial courts . . . . [*Id.* at 805.]

The *Merriweather* majority went on to reject the premise that every prisoner must be eligible for parole, implicitly overruling *Moore*, *supra*. *Id.* at 805, 808-809, 811.

However, throughout the complex and sometimes tumultuous history of judicially created sentencing review, there has never been any legitimate dispute that the Legislature holds ultimate

authority for determining the appropriate sentencing scheme for our state. Const 1963, art 4, § 45. For that reason, even at the height of its involvement in creating a framework for appellate sentencing review, our Supreme Court determined that it was "not prepared to *require* adherence" to the judicially created sentencing guidelines because of their lack of legislative mandate. *Milbourn*, *supra* at 656-657.

The Legislature has now reasserted its constitutional authority over the sentencing process by enacting MCL 769.34; MSA 28.1097(3.4). This statute codifies the new sentencing guidelines applicable to crimes committed on or after January 1, 1999, MCL 769.34(1) and (2); MSA 28.1097(3.4)(1) and (2); *People v Greaux*, 461 Mich 339, 342, n 5; 604 NW2d 327 (2000),[3] and establishes clear and definitive standards for sentencing and sentencing review.

The statutory scheme returns a carefully defined sentencing responsibility to trial courts. Among other things, the statute requires trial courts in most instances to impose a minimum sentence within the appropriate sentence range. MCL 769.34(2)(a) and (b); MSA 28.1097(3.4)(2)(a) and (b). Recognizing that circumstances may exist that would warrant a departure, the statute permits trial courts to depart from the guidelines, but only where there is a substantial and compelling reason to do so. MCL 769.34(3); MSA 28.1097(3.4)(3).

The issues raised by the parties require us to examine the provisions of the statute that provide for appellate review. Statutory interpretation is a question of law that we review de novo on appeal. *People v Stone Transport, Inc*, 241 Mich App 49; 613 NW2d 737 (2000). The primary rule of statutory construction is to ascertain and give effect to the intent of the Legislature. *People v Borchard-Ruhland*, 460 Mich 278, 284; 597 NW2d 1 (1999). To determine the Legislature's intent, this Court must first look to the specific language of the

statute. *Id*. If the plain and ordinary meaning of the statute is clear, judicial construction is not permitted. *Id.* A court may not go beyond the words of the statute to determine the Legislature's intent unless the statutory language is ambiguous. *Id.* at 284-285.

Under the statute, the scope of this Court's review of a sentence imposed within the guidelines is specifically curtailed:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals *shall affirm* that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. [MCL 769.34(10); MSA 28.1097(3.4)(10) (emphasis added).]

The clear language of this subsection compels the conclusion that the Legislature intended to preclude any appellate scrutiny of sentences falling within the appropriate guidelines range absent scoring errors or reliance on inaccurate information. This conclusion is supported by the mandatory language requiring that this Court "shall affirm" sentences inside the guidelines, *People v Kelly*, 186 Mich App 524, 529; 465 NW2d 569 (1990), and by another provision in the same statute, which requires trial courts to advise a defendant that the defendant may appeal *only* when the sentence "is longer or more severe than the appropriate sentence range." MCL 769.34(7); MSA 28.1097(3.4)(7).

The pivotal question here is whether and to what extent this Court may review sentences imposed outside the guidelines range. In addition to requiring that this Court affirm minimum sentences within the guidelines except in limited circumstances, the Legislature provided clear direction regarding this Court's review in cases where trial courts depart from the guidelines range:

> If, upon a review of the record, the court of appeals finds the trial court did not have *a substantial and compelling reason* for departing from the appropriate sentence range, the court shall remand the matter to the sentencing judge or another trial court judge for resentencing under this chapter. [MCL 769.34(11); MSA 28.1097(3.4)(11) (emphasis added).]

The plain and unambiguous language of this subsection directs appellate courts to limit their review to whether the trial court had "a substantial and compelling reason" to depart from the guidelines. Although the Legislature did not define "substantial and compelling" within the context of this new statute, it used the same phrase in the controlled substances act: "The court may depart from the minimum term of imprisonment . . . if the court finds on the record that there are substantial and compelling reasons to do so." MCL 333.7401(4); MSA 14.15(7401)(4).[4] The substantial and compelling standard as applied in that context was interpreted at length in *People v Fields*, 448 Mich 58; 528 NW2d 176 (1995). The Legislature is presumed to be aware of any existing judicial interpretation of words and phrases in the same subject area, and its silence suggests agreement with the court's construction. *Fletcher v Fletcher*, 447 Mich 871, 880; 526 NW2d 889 (1994); *Craig v Larson*, 432 Mich 346, 353; 439 NW2d 899 (1989); *Browning v Michigan Dep't of Corrections*, 385 Mich 179, 186; 188 NW2d 552 (1971). The fact that the Legislature chose to use this phrase again after it had been interpreted by our Supreme Court, and did not provide a different definition, evidences that it intended a similar interpretation of the phrase here.

In *Fields*, our Supreme Court recognized that "the words 'substantial and compelling' constitute strong language," and found it "reasonable to conclude that the Legislature intended 'substantial and compelling reasons' to exist only in exceptional cases." *Fields, supra* at 67-68. "[T]he reasons justifying departure should 'keenly' or 'irresistibly' grab our attention, and we should recognize them as being 'of considerable worth' in deciding the length of a sentence." *Id.*

at 67. It is not enough for a factor to be merely substantial; it must be both substantial *and* compelling before departure is permitted, and the Legislature is presumed to "have consciously elevated the burden of proof" by its choice of the term "compelling." *Id.* at 83 (Boyle, J., concurring). In keeping with the language of the statute and the intent of the Legislature, the *Fields* Court also determined that the factors relied on by the trial court must be objective and verifiable. *Id.* at 69-70. We believe the same interpretation, with its implicit reliance on reason and common sense, is appropriate here.

For the same reasons, we also conclude that the Legislature intended that appellate courts employ the standards of review set forth in *Fields*. In *Fields*, the Court held that

> the existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. The determination that a particular factor is objective and verifiable should be reviewed by the appellate court as a matter of law. A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion. [*Id.* at 77-78 (citations omitted).]

The traditional meaning of the term "abuse of discretion" is well settled and oft quoted:

> The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an "abuse" in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. [*Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).]

The *Spalding* standard has been relied on over the years by both this Court and our Supreme Court, and it was recently reaffirmed by the Supreme Court as "essentially intact." See *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 228; 600 NW2d 638 (1999). See also *Bean v Directions Unlimited, Inc*, 462 Mich 24, 35; 609 NW2d 567 (2000); *People v*

Thenghkam, 240 Mich App 29, 49; 610 NW2d 571 (2000); *People v Wilhite*, 240 Mich App 587, 595; 618 NW2d 386 (2000).

Defendant seems to suggest that, regardless of whether there were substantial and compelling reasons to depart from the guidelines' range, his sentence should still be affirmed as proportionate under *Milbourn*, *supra*. As a result of defendant's assertion that his sentence should be reviewed for proportionality, the question remains whether the statute permits appellate courts to further review the sentence once it has determined that a substantial and compelling reason to depart exists.

The Legislature was well aware that there would be guidelines departures, because it specifically incorporated a structure for departures into the statute. MCL 769.34(3); MSA 28.1097(3.4)(3), MCL 769.34 (11); MSA 28.1097(3.4)(11). We find no language in the statute that allows for additional review of a sentence outside the guidelines once a substantial and compelling reason has been found. The Legislature was clearly aware of the existing case law, choosing to embrace the *Tanner* rule, MCL 769.34(2)(b); MSA 28.1097(3.4)(2)(b), as well as the *Milbourn* principle generally precluding guideline departures on factors already incorporated in the guidelines. MCL 769.34(3); MSA 28.1097(3.4)(3); *Milbourn*, *supra* at 660-661. The decision to incorporate some judicially established principles and not to provide for further review of sentencing departures, including a *Milbourn* review for proportionality, evidences a conscious decision to exclude that method of review from the framework of this statute. *People v Cash*, 419 Mich 230, 241; 351 NW2d 822 (1984). It is axiomatic that legislation cannot be written to address every negative proposition, and we are unwilling to presume that any *un*stated concept was intended by the Legislature. There is no question that the Legislature could have

provided for additional review of sentencing departures if it had chosen to do so. We will not read the Legislature's omission as an accident or an ambiguity. Because the statutory language is not ambiguous, further construction is not permitted. *Borchard-Ruhland*, *supra* at 284-285. If we are wrong and proportionality review was intended, the Legislature can easily amend the statute to include it. This Court will not reach beyond the statute's clearly written language. *Id.* at 284.[5]

Accordingly, we hold that, once this Court determines as a matter of law that the trial court's stated factor for departure was objective and verifiable, our review is limited to whether the trial court abused its discretion in concluding that the factor constituted a substantial and compelling reason to depart. If we conclude that a substantial and compelling reason exists, the defendant's sentence must be affirmed as long as the sentence otherwise comports with the statute and other requirements of law. Const 1963, art 4, § 45; MCL 769.1(1); MSA 28.1072(1). We find no authorization in the statute for this Court to further review the overall sentence under the *Milbourn* principle of proportionality. We are, of course, not so presumptuous as to suggest that this Court could overrule *Milbourn.* Until and unless our Supreme Court says otherwise, *Milbourn* remains good law. However, we simply cannot conclude that the Legislature intended to incorporate the principle of proportionality into the new sentencing review framework. Consequently, we reject defendant's argument that his sentence should be reviewed for proportionality.

We now turn to the record before us. The trial court stated several reasons for its desire to depart from the guidelines range. The trial court first pointed to defendant's lack of a prior criminal record. Although a defendant's prior record is an objective and verifiable factor, *Fields*,

supra at 77, it is already taken into consideration in scoring the prior record variables of the sentencing guidelines. Factors that are considered in scoring the guidelines cannot be used a second time to justify a sentencing departure unless the court finds "from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b); MSA 28.1097(3.4)(3)(b). The trial court made no such finding, and there is nothing in the record to suggest that such a finding would have been appropriate.

The trial court also stated that the crime involved "a family situation . . . something that might not happen again." We agree that the existence of a family situation is objective and verifiable. It is clear, however, from the instructions to the guidelines that the Legislature intended for family victimization to be used in the scoring process to enhance rather than reduce the sentencing range. See Offense Variable 10, MCL 777.40; MSA 28.1274(50). The trial court further noted that it was clear from defendant's appearance in court and from the record before him that defendant "still didn't fully appreciate what he's done." The trial court's impressions are by definition subjective. To the extent that there may be evidence that defendant blamed the twelve-year-old victim and did not accept responsibility for his acknowledged crime, this factor would again serve to enhance rather than reduce his sentence. Because the trial court failed to articulate a substantial and compelling reason for a downward departure, we conclude that it abused its discretion in imposing a sentence outside the guidelines range.

We therefore vacate defendant's sentence and remand for resentencing. MCL 769.34(11); MSA 28.1097(3.4)(11). On remand, the trial court is free to impose any minimum sentence

within the appropriate guidelines range or to depart from that range if there is a substantial and compelling reason to do so.

Vacated and remanded for resentencing. We do not retain jurisdiction.

Gage, J., concurred.

/s/ Michael J. Talbot
/s/ Hilda R. Gage

[1] Const 1963, art 4, § 45 provides:

> The legislature may provide for indeterminate sentences as punishment for crime and for the detention and release of persons imprisoned or detained under such sentences.

[2] MCL 769.1(1); MSA 28.1072(1) provides in relevant part:

> A judge of a court having jurisdiction may pronounce judgment against and pass sentence upon a person convicted of an offense in that court. The sentence shall not exceed the sentence prescribed by law.

[3] The actual guidelines, instructions, and definitions are primarily found in new chapter XVII of the Code of Criminal Procedure, 1998 PA 317, MCL 777.1 *et seq.*; MSA 28.1274(11) *et seq.*

[4] The Legislature has also used the term "substantial and compelling" as the standard for departure in the parole guidelines. MCL 791.233e(6); MSA 28.2303(6)(6). However, there is little reported case law addressing the standard in that context. See, e.g., *In re Parole of Johnson*, 219 Mich App 595; 556 NW2d 899 (1996); *In re Parole of Scholtz*, 231 Mich App 104; 585 NW2d 352 (1998).

[5] We should not be surprised by the Legislature's abandonment of a proportionality review of the length of the sentence itself. At the onset of sentencing review, Justice Cavanagh predicted that "[t]he scope of review may subsequently evolve, by means of case law or statutory enactment, into something more definite or even different from that which we announce today." *Coles*, *supra* at 549. As the Court anticipated, the scope and method of sentencing review has evolved drastically, first by case law and now by the authoritative enactment of legislation.