STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee/Cross-Appellant Appellant,	UNPUBLISHED October 29, 1999
v	No. 209613 Ottawa Circuit Court
GARY ALLEN SMITH, Defendant-Appellant/Cross-Appellee.	LC No. 97021201 AFTER REMAND

Before: Sawyer, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

This case is before us for a second time, following our remand to the trial court for articulation of the reasons for defendant's sentence. Following a bench trial, defendant was convicted of first-degree criminal sexual conduct (CSC-1), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), involving a four-year-old child. Defendant had two prior convictions for first-degree criminal sexual conduct involving children. The child victim in this case is even younger than the children involved in defendant's previous convictions. The probation department recommended that defendant serve a term of twenty-five to fifty years for his third CSC-1 conviction.

Defendant was sentenced as an habitual offender-third, MCL 769.11; MSA 28.1083, to six to fifteen years' imprisonment. No guidelines range was prepared, due to the prosecutor's misconception that sentencing guidelines could not be considered by the trial court in habitual offender cases. Because we were unable to determine from the record any reason for the trial court's decision to sentence defendant to a lower sentence for his habitual-third conviction than he had received for his previous CSC-1 convictions, we remanded for articulation. We retained jurisdiction. Now, having reviewed the transcript of the remand hearing, we vacate defendant's sentence and remand for resentencing before a different judge.

We note initially that it appears that, even on remand, no guidelines range has ever been prepared. Although the guidelines do not apply to habitual offender cases, *People v Cervantes*, 448 Mich 620, 625-626; 532 NW2d 831 (1995), the trial court must impose a sentence that is

proportionate and preparation of a guidelines range can be useful. *People v Haacke,* 217 Mich App 434, 438; 553 NW2d 15 (1996).

On remand, the trial court again emphasized defendant's post-arrest involvement with his church. The trial court commented on letters written on defendant's behalf by people who believe defendant "changed" and repented after committing this crime because of his involvement in his religion. The trial court also voiced its opinion that the Department of Corrections and parole board have a "philosophy" that rarely permits the release of persons convicted of criminal sexual conduct until their maximum term has been served. As a result, the trial court concluded, defendant would probably not be released in six years, and the court's focus was really on the fifteen year maximum sentence. It appears from the record that the trial court itself did not consider a six-year minimum sentence sufficient in this case, but that it believed that defendant would actually serve a fifteen year minimum sentence.

It was error for the trial court to rely on its unsupported perception that defendant might not be eligible for parole at the end of his minimum term and might be required to serve his maximum term. Parole eligibility is not a valid sentencing consideration. *People v Wybrecht,* 222 Mich App 160, 173; ___ NW2d ___ (1997); *People v Biggs,* 202 Mich App 450, 456; 509 NW2d 803 (1993). Accordingly, we remand for resentencing. Solely to preserve the appearance of justice, *People v Hill,* 221 Mich App 391, 398; ___ NW2d ___ (1997), defendant's resentencing shall be done by a different judge.

Defendant's conviction is affirmed. We vacate defendant's sentence and remand for resentencing before a different judge. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Michael J. Talbot