STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDOLPH BIERNAT,

Defendant-Appellant.

UNPUBLISHED
July 11, 2000

No. 223271
Wayne Circuit Court
LC No. 93-013575

Before: Jansen, P. J., and Hood , and Saad, JJ.

PER CURIAM.

In 1994, defendant pleaded nolo contendere to six counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and one count of child sexually abusive activity, MCL 750.145c(2); MSA 28.342a(2). Before sentencing, he absconded to Canada where he lived under an assumed identity for five years. Eventually, he was arrested and extradited to the United States. Defendant's motion to withdraw his pleas was denied by the trial court and he was sentenced to serve concurrent prison terms of 50 to 100 years on each of the CSC convictions and 12 to 20 years on the child sexually abuse activity conviction. He appeals as of right, and we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant asserts that the trial court abused its discretion in denying his motion to withdraw his pleas where he was not informed during the plea-taking process that a probationary sentence was not available for his CSC offenses. At the plea-taking, the trial court advised defendant that the six counts of first-degree CSC "carrie[d] any number of years up to life" and the count of child sexually abusive activity "carrie[d] up to twenty years." Defendant contends that these statements were ambiguous because they did not expressly inform him that the potential sentences involved incarceration in prison as opposed to a county jail or probation. We agree with the trial court that the requirements of the court rules were met. Pursuant to MCR 6.302(B)(2), the trial court was required to advise defendant of the maximum possible prison sentence and any mandatory minimum sentence. In this case, defendant was properly advised of the possible maximum prison sentences for his offenses. No mandatory minimum sentence was applicable to the offenses, and the trial court was under no obligation to inform defendant sua sponte that the offenses were non-probationary. Furthermore, we note that a motion to withdraw a

guilty plea is generally regarded as frivolous where circumstances indicate that the true motivation behind the motion is sentencing concerns. *People v Ward*, 459 Mich 602, 614; 594 NW2d 47 (1999); *People v Holmes*, 181 Mich App 488; 449 NW2d 917 (1990). Here, given that defendant does not assert that he is innocent of the offenses and the primary motivation for the motion to withdraw his pleas was dissatisfaction with sentencing, we find no abuse of discretion by the trial court in denying the motion.

Defendant next argues that his sentences of 50 to 100 years for his first-degree CSC convictions are disproportionately harsh inasmuch as they constituted a significant departure from the 8- to 20-year minimum sentences recommended by the guidelines, and that the sentencing court abused its discretion in failing to adequately articulate reasons for such a departure. We find no abuse of discretion. Even though sentences that depart from the sentencing guidelines are subject to careful scrutiny on appeal, *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994), "the 'key test' of proportionality is not whether the sentence departs from or adheres to the recommended range, but whether it reflects the seriousness of the matter." *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). An upward departure from the guidelines may be justified by introducing legitimate factors not considered by the guidelines and by reference to factors considered, but weighted inadequately, within the guidelines. *People v Castillo*, 230 Mich App 442, 448; 584 NW2d 606 (1998).

In departing from the guidelines in this case, the sentencing court outlined the following factors that were not adequately reflected in the guidelines: (1) the victim was the defendant's adopted daughter, (2) defendant sexually abused the victim repeatedly over a seven-year period, beginning when the victim was only seven years old, (3) defendant videotaped the sexual abuse for his own "gratification and pleasure," which caused the victim further "shame and humiliation," (4) the victim sought help from adults when she was twelve years old, but the system failed her, (5) after the victim was returned to defendant's home, he threatened to commit suicide if she did not allow him to continue the sexual abuse, (6) defendant's decision to abscond to Canada after entering his pleas, (7) the severe and permanent psychological damage suffered by the victim, and (8) defendant's portrayal of himself as a victim of a dysfunctional family, and his failure to appreciate the seriousness of his crimes. Having reviewed the record, we find no abuse of discretion by the sentencing court in finding that the guidelines did not sufficiently reflect the extreme circumstances of this case. See *People v Lemons*, 454 Mich 234, 256-260; 562 NW2d 447 (1997); *Houston, supra*; *People v Merriweather*, 447 Mich 799; 527 NW2d 460 (1994).

Affirmed.

/s/ Kathleen Jansen
/s/ Harold Hood
/s/ Henry William Saad