STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 3, 2000
v	No. 216303 Grand Traverse Circuit Court
ARTHUR JOSEPH ROUSE, Defendant-Appellant.	LC No. 98-007676-FC

Before: Doctoroff, P.J., and Holbrook, Jr. and Smolenski, JJ.

PER CURIAM.

Defendant entered a conditional guilty plea to two counts of third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4), reserving his right to appeal all pretrial issues. He was sentenced to ten to fifteen years' imprisonment for each CSC III conviction, to be served concurrently. Defendant appeals as of right. We affirm.

A multi-county grand jury indicted defendant on six counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), alleging that, between the summer of 1984 and July 1987, defendant induced three boys, who were between the ages of eight and twelve, to perform oral sex on him and to permit him to engage in anal intercourse with them. In conjunction with his guilty plea, defendant admitted that he induced a nine-year old boy to perform oral sex on him in 1984.

Defendant first contends that the trial court erred in denying his motion to dismiss on the ground of pre-arrest delay. We disagree. A pre-arrest delay challenge implicates constitutional due process issues, which this Court reviews de novo. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999).

Procedural due process guarantees protect a defendant, to a limited extent, against delay between the commission of an offense and arrest or indictment for that offense. *United States v Lovasco*, 431 US 783, 798; 97 S Ct 2044; 52 L Ed 2d 752 (1977); *Cain*, *supra* at 109. This Court applies a two-step balancing test to determine whether a pre-arrest delay requires reversing a defendant's conviction. *Cain*, *supra* at 108; *People v Bisard*, 114 Mich App 784, 790; 319 NW2d 670 (1982). First, a defendant must initially demonstrate actual prejudice, as opposed to mere

speculative prejudice, as well as show that the ability to defend against the charges was "meaningfully impaired . . . to such an extent that the disposition of the criminal proceeding was likely affected." *Bisard, supra* at 790; *People v Adams*, 232 Mich App 128, 135; 591 NW2d 44 (1998). Second, if a defendant meets this burden, the prosecutor then bears the burden of persuading the court that the reason for the delay was sufficient to justify whatever prejudice results. *Bisard, supra* at 790; *Adams, supra* at 139.

In the instant case, defendant's general and unsupported assertion of prejudice based on pre-arrest delay is insufficient to meet his burden of showing actual and substantial prejudice that meaningfully impaired his ability to defend against the charges. *Adams, supra* at 135. Therefore, we conclude that the trial court properly denied defendant's motion. *Bisard, supra* at 788-790.

Next, defendant claims that the trial court erred in denying his motion to dismiss on the ground of speedy trial. Again, we disagree. Whether a defendant was denied a speedy trial is a mixed question of law and fact. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). This Court reviews a trial court's factual findings under the clearly erroneous standard, and we review the constitutional issue de novo. *Id.* at 459; *People v Levandoski*, 237 Mich App 612, 619; 603 NW2d 831 (1999). In determining whether a defendant has been denied a speedy trial, this Court balances the length of the delay, the reasons for the delay, the defendant's assertion of the right, and whether the defendant inured prejudice from the delay. *Barker v Wingo*, 407 US 514, 530; 92 US 2182; 33 L Ed 2d 101 (1972), *Gilmore, supra* at 459.

Here, nearly all the delay between defendant's initial arrest and the hearing on his motion to dismiss was caused by defendant either eluding authorities, contesting extradition back to Michigan, or requesting time to review the grand jury transcripts. Although defendant was within his rights to contest extradition proceedings and review the transcripts, the time needed to do so is charged to defendant. *Cain, supra* at 113; *Gilmore, supra* at 460; *People v Rosengren*, 159 Mich 492, 507; 407 NW2d 391 (1987). Moreover, because defendant asserted his right to a speedy trial nearly three years after his initial arrest and approximately six months after his arraignment, and because there is no specific evidence of prejudice, we conclude that, on balance, the trial court properly denied defendant's motion to dismiss on speedy trial grounds. *Cain, supra* at 111; *Gilmore, supra* at 462; *People v Wyngaard*, 151 Mich App 107, 111-112; 390 NW2d 694 (1986).

Defendant's next assignment of error is that the amendment to MCL 767.24(2); MSA 28.964(2),[1] which took effect on March 30, 1988, violates his constitutional right to equal protection.

[1] The amended MCL 767.24; MSA 28.964, provides:

> (1) ... Except as otherwise provided in subsection (2), all ... indictments [other than for certain offenses not at issue here] shall be found and filed within 6 years after the commission of the offense. However, any period during which the party charged did not usually and publicly reside within this state shall not be considered part of the time within which the respective indictments shall be found and filed.

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US Const, Am XIV; Const 1963, art 1, § 2. Again, we disagree. Whether a statute violates equal protection is a question of law that this Court reviews de novo. *People v Conat*, 238 Mich App 134, 144; 605 NW2d 49 (1999); *People v Pitts*, 222 Mich App 260, 272; 564 NW2d 93 (1997).

The United States and Michigan Constitutions guarantee equal protection of the law. US Const, Am XIV; Const 1963, art 1, § 2; *Conat*, *supra* at 153. Where, as here, different treatment is not based on a suspect classification and does not infringe on the exercise of a fundamental right, the rational basis test applies. *Conat*, *supra* at 153; *Doe v Dep't of Social Services*, 439 Mich 650, 662; 487 NW2d 166 (1992). Under the "rational basis" test, the legislation is presumed to be constitutional and the party challenging it has the burden of proving that it is arbitrary and, therefore, irrational. *Pitts*, *supra* at 273. The constitutionality of subsection 24(2) will be upheld if the classification scheme it creates is rationally related to a legitimate government purpose. *Id*. Under this test, the wisdom, need, or appropriateness of the scheme is not measured. *People v Sleet*, 193 Mich App 604, 607; 484 NW2d 757 (1992).

As a preliminary matter, we conclude that defendant has no standing to contest the constitutionality of subsection 24(2). Generally, one may not claim standing to vindicate the constitutional rights of a third party. *People v Rocha*, 110 Mich App 1, 16-17; 312 NW2d 657 (1981); *Barrows v Jackson*, 346 US 249, 255; 73 S Ct 1031; 97 L Ed 1586 (1953). Exceptions to this general rule exist when a party challenges a statute as being overbroad, or when third-party standing is found to exist, i.e., where a single application of a statute injures the claimant and impinges on the constitutional rights of third parties. *Rocha*, *supra* at 17. The existence of third-party standing depends on whether there is a substantial relationship between the claiming and third parties, the impossibility of third parties otherwise asserting their own constitutional rights, and the need to avoid dilution of those rights that would result if third-party standing is not granted. *Id.* None of these circumstances exists in the instant case.

Furthermore, even if defendant has standing, we find that subsection 24(2) withstands rational basis scrutiny. Subsection 24(2) distinguishes between victims of CSC offenses who are under twenty-one years old and victims of other crimes who are under twenty-one years old. The Legislature had a rational basis for treating these classes of victims differently in that permitting a longer period of limitation regarding CSC offenses committed against persons under twenty-one years old helps avoid the problem that youths often report CSC offenses in a less than timely manner. *People v Russo*, 439 Mich 584, 596; 487 NW2d 698 (1992); *People v Cooper* (*After Remand*), 220 Mich App 368, 374; 559 NW2d 90 (1996). Further, the distinction is a means of assuring that alleged CSC offenses are more

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> (2) Notwithstanding subsection (1), if an alleged victim was under 18 years of age at the time of the commission of the offense, an indictment for an offense under section 145c or 520b to 520g of the Michigan penal code, Act No. 328 of the Public Acts of 1931, being sections 750.145c and 750.520b to 750.520g of the Michigan Compiled Laws, may be found and filed within 6 years after the commission of the offense or by the alleged victim's twenty-first birthday, whichever is later.

easily investigated and prosecuted, which is a legitimate government objective. *Russo, supra* at 596. As long as the classification is reasonable, states may enact a law that affects some groups of people differently and the law is not invalid merely because it results in some inequity. *Pitts, supra* at 273. Therefore, defendant has not shown that the classification scheme in subsection 24(2) is not rationally related to a legitimate government purpose. *Pitts, supra* at 273.

Next, defendant argues that the trial court impermissibly denied his motion to dismiss the indictment based on his claim that the grand jury was without authority when it indicted him. We disagree. This Court reviews a trial court's decision to dismiss an indictment for a clear abuse of discretion. See *People v Hampton*, 194 Mich App 593, 596; 487 NW2d 843 (1992); *People v Reigel*, 120 Mich 78, 87; 78 NW 1017 (1899). An abuse of discretion occurs when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *People v Gadomski*, 232 Mich App 24, 32; 592 NW2d 75 (1998); *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). Whether the grand jury was without authority when it indicted defendant is a question of law, which we review de novo. *People v Houston*, 237 Mich App 707, 712; 604 NW2d 706 (1999).

The grand jury's statutory term expired on November 1994, and defendant was indicted on February 1, 1995. Thus, the indictment occurred after its statutory period ended. *People v Weathersby*, 204 Mich App 98, 106; 514 NW2d 493 (1994). However, there was no evidence that the grand jury considered new matters or evidence after its statutory term expired; rather, the evidence indicated that the grand jury was called back after its statutory term expired merely to finish its deliberations. Therefore, we conclude that the indictment was not void because it was the product of a valid *de facto* grand jury. *Weathersby, supra* at 106-107; *People v Kaplan*, 256 Mich 36, 38-39; 239 NW2d 349 (1931).

Defendant next argues that his ten- to fifteen-year sentence was not proportionate to the seriousness of the offense and the offender. We disagree. This Court reviews a defendant's sentence for an abuse of discretion. *People v Rice* (*On Remand*), 235 Mich App 429, 445; 597 NW2d 843 (1999); *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). A sentencing court abuses its discretion when it violates the principle of proportionality. *Milbourn, supra* at 635-636. While a sentence within an applicable sentencing guidelines range is presumptively neither excessively severe nor unfairly disparate, *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987), a sentencing court may depart from the guidelines when the range is disproportionate to the seriousness of the crime and the defendant's prior record. MCR 6.425(D)(1); *Milbourn, supra* at 636. In plea-based sentences such as the instant case, the sentencing court's consideration of factors not adequately addressed in the guidelines is more compelling. *People v Brzezinski*, 196 Mich App 253, 256; 492 NW2d 781 (1992).

Although defendant pleaded guilty to two counts of CSC III, he was originally charged with six counts of CSC I. The sentencing guidelines' recommended range for CSC III was 2½to 6 years' imprisonment and the statutory maximum sentence was 15 years' imprisonment. MCL 750.520d; MSA 28.788(4). In explaining its reasons for departing from the sentencing guidelines, the trial court noted that defendant actually committed CSC I because he admittedly induced a nine-year-old boy to

perform oral sex on him twice; therefore, by his plea bargain, defendant avoided the possibility of life imprisonment under CSC I. MCL 750.520d(2); MSA 28.788(4)(2). Second, the trial court stated that the sentencing guidelines do not consider the number of victims that defendant allegedly sexually assaulted. Because the trial court properly considered factors not accounted for in the guidelines, we conclude that defendant's sentence was not disproportionate to the offense or the offender. *People v Duprey*, 186 Mich App 313, 318; 463 NW2d 240 (1990); *Brzezinski*, *supra* at 256. Further, while defendant has worked steadily and has supported his family since the offenses, and has a record of only one misdemeanor, these facts do not take away from the serious nature of the offenses that he admittedly committed. *Cain*, *supra* at 132; *Duprey*, *supra* at 315. Defendant is not entitled to resentencing.

Defendant also raises several issues in his supplemental brief. First, defendant argues that the trial court improperly denied his motion to quash the indictment on the ground that the indictment was unsigned. Again, we disagree. Here, Judge Philip Rodgers, who presided over the multi-county grand jury, ordered that the foreperson's signature be redacted from copies of the indictment for security purposes. However, the Grand Traverse County assistant prosecutor and Judge Rodgers each formally acknowledged that the grand jury foreperson signed the original indictment. Further, the trial court allowed defendant's trial counsel to inspect the original indictment to see whether the foreperson signed the original indictment, after which defendant's trial counsel never raised the issue again. Therefore, we conclude that defendant's argument that the indictment was invalid for lacking the foreman's signature is without merit. The trial court did not abuse its discretion regarding defendant's motion to dismiss the indictment. *Hampton*, *supra*.

Next, defendant claims that the amendment to MCL 767.24; MSA 28.964 does not apply to the instant case because the charged offenses occurred before the amendment took effect. Again, we disagree. This Court reviews questions of statutory interpretation de novo. *People v Denio*, 454 Mich 691, 698; 564 NW2d 13 (1997). Here, the offenses for which defendant was indicted occurred in the summer of 1984, against a victim who was then eight years old. In February 1995, defendant was indicted. The amended §24 became effective March 1, 1988. MCL 767.24; MSA 28.964 and Historical and Statutory Notes. Because the offenses in the indictment were not yet time-barred at the time the amendment took effect in 1988, and because the victim was under eighteen years at the time of the alleged offenses, subsection 24(2) would time bar the charges on the victim's twenty-first birthday, or September 10, 1996. *Russo*, *supra* at 588. Because the indictment occurred in 1995, before the new period of limitation expired, the trial court properly denied defendant's motion to dismiss because the period of limitation had not yet expired. *Id.*

Defendant next claims that he was denied the effective assistance of counsel at sentencing. For a defendant to successfully establish a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance "fell below an objective standard of reasonableness," and "that the representation so prejudiced defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1995). There is a strong presumption that counsel provided effective assistance of counsel and the defendant bears the burden of overcoming that presumption. *Stanaway*, *supra* at 687. Additionally, in the context of guilty pleas, the pertinent inquiry is whether the defendant tendered the plea voluntarily

and understandingly. *People v Swirles*, 218 Mich App 133, 138; 553 NW2d 357 (1996); *People v Bordash*, 208 Mich App 1, 2; 527 NW2d 17 (1994). Because defendant did not request an evidentiary hearing on this issue in the trial court, our review is limited to the existing record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996); *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992).

Defendant argues that defense counsel's performance was deficient because counsel failed to object to the use of the 1988 sentencing guidelines at sentencing. We disagree and conclude that it was not unreasonable for defense counsel not to have objected to the use of the 1988 guidelines. Administrative Order No 1988-4,[2] requires that sentencing courts use the second edition of the sentencing guidelines in all sentencing proceedings that, as was the case here, take place after October 1, 1988. 430 Mich ci; *People v Fisher*, 442 Mich 560, 581-582; 503 NW2d 50 (1993); *People v Potts*, 436 Mich 295, 298; 461 NW2d 647 (1990). Contrary to defendant's assertion, the use of the second edition is tied to the date that sentences are imposed, and not to the date that offenses are committed. *Fisher*, *supra*, 442 Mich at 581. Therefore, it was not unreasonable for defense counsel not to object at sentencing to the use of the second edition of the guidelines where the objection would have been futile. *Id*.; *People v Snider*, 239 Mich App 393, 424; 608 NW2d 502 (2000). Administrative Order 1998-4 does not violate a defendant's due process rights. *Fisher*, *supra* at 582. Moreover, the record indicates that defendant was aware of all the consequences inherent in pleading guilty and that his guilty plea was entered voluntarily and understandingly. *Swirles*, *supra* at 138; *Bordash*, *supra* at 2. Therefore, appellate relief is not warranted.

Defendant also contends that the trial court should have quashed the indictment because the assistant prosecuting attorney improperly appeared before and injected prejudicial information in front of the multi-county grand jury. However, because a factual record on this issue was not developed in the trial court, we conclude that the claim is unpreserved for appeal. Defendant has failed to establish that a plain error occurred that affected the outcome of the case. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Next, defendant claims that the trial court abused its discretion by not commenting on defendant's family's letters during sentencing and by viewing certain victim impact letters. We disagree. A sentencing court must articulate on the record the criteria considered and the reasons supporting its decision regarding the length and nature of the sentence imposed. *Rice*, *supra* at 446; *People v Sandlin*, 179 Mich App 540, 542; 446 NW2d 301 (1989). In determining an appropriate sentence, courts should consider reforming the offender, protecting society, punishing the offender, and deterring others from committing the offenses. *Snow*, *supra* at 592.

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[2] Administrative Order No 1988-4 provides:

> The Sentencing Guidelines Advisory Committee is authorized to issue the second edition of the sentencing guidelines, to be effective October 1, 1988. Until further order of the Court, every judge of the circuit court and of the Recorder's Court for the City of Detroit must thereafter use the second edition of the sentencing guidelines when imposing a sentence for an offense that is included in the guidelines.

With respect to defendant's argument that the trial court failed to discuss on the record letters he received from defendant's family, defendant fails to cite any case law to support his argument that the trial court must discuss letters that he received. Further, upon a complete review, the record demonstrates that the trial court discussed defendant's prior record, the nature of the crimes, and the proper number of days' credit defendant deserved, and stated that the maximum sentence was required "for purposes of punishment and also for purposes of protection of the public." Thus, there is no indication that the court was not cognizant of the information contained in the PSIR in imposing sentence. Further, the sentencing court articulated on the record the proper criteria for imposing sentence and proffered legitimate reasons supporting its decision to depart from the sentencing guidelines. *Brzezinski*, *supra* at 256. The court's failure to mention defendant's family's letters is not cause for resentencing. *Rice*, *supra* at 446-447.

Moreover, to the extent that defendant argues that the trial court improperly considered letters written by victims of the remaining counts in the indictment of which defendant did not plead guilty, defendant did not object at trial regarding this claim. Thus, the claim is unpreserved for review. Defendant has failed to establish that a plain error affected the outcome of the case. *Carines*, *supra* at 763; *People v Kisielewicz*, 156 Mich App 724, 728; 402 NW2d 497 (1986); *People v Doss*, 122 Mich App 571; 332 NW2d 541 (1983). However, even if we were to review the claimed error, we would not find any error because letters regarding other charges dismissed against a defendant as the result of a plea bargain that a defendant entered may be admitted in the presentence report. *Kisielewicz*, *supra* at 728; *People v Beal*, 104 Mich App 159, 164; 304 NW2d 513 (1981); *People v Brooks*, 95 Mich App 500, 505; 291 NW2d 94 (1980).

Lastly, defendant claims that this Court abused its discretion by denying his motion for the petition concerning the grand jury. The issue was previously raised and addressed by this Court in an interlocutory appeal. Docket No. 167257. Because there have been no material changes in the facts since the prior appeal, the law of the case doctrine precludes this panel from reviewing the issue. *People v Freedland*, 178 Mich App 761, 770; 444 NW2d 250 (1989); *Muilenberg v The Upjohn Co*, 169 Mich App 636, 641; 426 NW2d 767 (1988). Thus, defendant's only recourse on this issue is to seek leave to appeal to the Supreme Court. *Freedland*, *supra* at 770; *Tebo v Havlik*, 418 Mich 350, 379-381 n 17 & 18; 343 NW2d 181 (1984) (Levin, J., dissenting).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.
/s/ Michael R. Smolenski