

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN VINCENT HYLAND, JR.,

Defendant-Appellant.

UNPUBLISHED

February 8, 2002

No. 221670

Otsego Circuit Court

LC No. 92-001691-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN VINCENT HYLAND, JR.,

Defendant-Appellant.

No. 221671

Otsego Circuit Court

LC No. 92-001692-FC

Before: Fitzgerald, P.J., and Bandstra and K.F. Kelly, JJ.

PER CURIAM.

In 1992, following separate jury trials, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), against his two daughters who were then under thirteen years of age. He was sentenced on January 14, 1993 to two concurrent terms of 18 to 27-1/2 years' imprisonment. In a prior appeal, this Court affirmed defendant's convictions, but remanded for resentencing, holding that the trial court had improperly scored offense variable ("OV") 12 of the sentencing guidelines. See *People v Hyland*, 212 Mich App 701, 704, 712-714; 538 NW2d 465 (1995), vacated in part on other grounds in *People v Hyland*, 453 Mich 902; 554 NW2d 899 (1996).

On remand, defendant was sentenced to two concurrent terms of 18 to 27-1/2 years' imprisonment. He again appealed his sentences and this Court again remanded for resentencing, holding that the trial court erred in sentencing defendant without obtaining a proper waiver of counsel. *People v Hyland*, unpublished opinion per curiam of the Court of Appeals, issued April 24, 1998 (Docket No. 190476).

On remand, defendant was resentenced to two concurrent terms of fourteen to twenty-one years' imprisonment with credit for 2,668 days served. Defendant again appeals as of right and we affirm.

I. Representation at Sentencing

In his brief dated October 26, 1999¹ defendant argues that the sentencing court² erred in denying his request for substitute counsel for purposes of sentencing. We disagree. The court had already appointed substitute counsel to replace defendant's previously assigned attorney. In requesting yet another substitute, defendant stated only that he lacked confidence in his new attorney's ability to represent him because according to defendant, he was not sufficiently experienced. A review of the record belies defendant's position. Counsel appointed by the sentencing court indicated that he was familiar with the issues presented and otherwise ready in all respects to proceed. We find that defendant failed to demonstrate the requisite good cause necessary for substitution. *People v Traylor*, 245 Mich App 460, 463; 628 NW2d 120 (2001).

Defendant also argues that he is entitled to resentencing because, when he subsequently insisted on representing himself, the court failed to obtain an effective waiver of counsel. We disagree. The record reveals that the sentencing court questioned defendant extensively before allowing him to represent himself. Despite frequent interruptions by defendant, the sentencing court substantially complied with the requirements for an effective waiver set forth in *People v Anderson*, 398 Mich 361, 366-368; 247 NW2d 857 (1976), and MCR 6.005(D). *People v Adkins (After Remand)*, 452 Mich 702, 721-722; 551 NW2d 108 (1996). Although we note that the sentencing judge did not specifically read the charges against defendant and provide the specific minimum punishment along with the minimum mandatory sentence for the CSC charge³, this did not necessarily constitute an abuse of discretion or otherwise preclude substantial compliance. See *People v Adkins (After Remand)*, *supra* at 730-731.

The record reveals that defendant's request to represent himself was unequivocal, that defendant was sufficiently advised of the risks associated with self-representation, and that defendant knowingly, intelligently, and voluntarily waived his right to counsel. Additionally, the court allowed appointed counsel to remain on standby to assist defendant and allowed *both* defendant and standby counsel to address the court at sentencing. Accordingly, the sentencing court did not abuse its discretion in allowing defendant to represent himself at sentencing.

¹ We note at this juncture that defendant attempted to file a "Replacement" appellate brief addressing additional issues of which this Court did not accept. Accordingly, we address the issues herein as presented in defendant's brief dated October 26, 1999.

² As a matter of procedural history, after this case was remanded a third time to the trial court, the original trial judge recused himself. Accordingly, this case was reassigned to a different judge for sentencing only. Thus, the designation "sentencing court" as used herein refers only to the court that imposed sentence.

³ See MCR 6.005(I).

II. Adjournment of Sentence

In a related issue, defendant argues that the sentencing court erred by denying his motion for a stay of proceedings to permit him additional time to retain acceptable counsel. Additionally, defendant argues that the sentencing court should have adjourned his sentencing to consider his motions presented to the sentencing court on the very day of his sentencing. We disagree.

This Court will not reverse a trial court's denial of a motion to adjourn absent an abuse of discretion. MCR 2.503; *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). A motion for an adjournment must be based on good cause. MCR 2.503(B)(1). A review of the record reveals that the sentencing court permitted defendant a sixty-day adjournment to retain counsel with a level of expertise acceptable to defendant. When defendant failed to retain counsel, the sentencing court appointed counsel to protect defendant's interests at sentencing. Defendant's failure to procure retained counsel during the sixty-day adjournment leads to the inescapable conclusion that defendant lacked the requisite "good cause" for the requested adjournment.

Additionally, defendant argues that the sentencing court erred by deciding to impose sentence on August 4, 1999 and then subsequently decide his tardy motions. Beyond a mere conclusory assertion, defendant does not elaborate upon or otherwise provide a legal basis supporting his claim. An appellant is not entitled to merely announce his position and leave it to this Court to discover and rationalize a cognizable basis for his claim. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997). Accordingly, we find no abuse of discretion in this regard.

III. Sentencing Guidelines

Defendant argues that the sentencing court erred in scoring OV 12 at fifty points and that his resulting sentences violate the principle of proportionality delineated in *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). We disagree.

A sentencing judge has discretion in determining the number of points provided that evidence on the record adequately supports a particular score. *People v Dilling*, 222 Mich App 44, 54; 564 NW2d 561 (1997). Since "[t]he scoring of the sentencing guidelines is not an end in itself but rather a means to achieve a proportionate sentence," if the sentence is proportionate to the offense, then there is no basis for appellate relief. *People v Raby*, 456 Mich 487, 496; 572 NW2d 644 (1998) (citing *People v Polus*, 197 Mich App 197, 208; 495 NW2d 402 (1992)).

Although this Court originally held that it was error to score fifty points for OV 12 based on prior acts of sexual penetration, *Hyland*, *supra* at 714, the legal premise for this Court's prior decision was subsequently rejected by a special panel of this Court in *People v Raby*, 218 Mich App 78, 82-84; 554 NW2d 25 (1996), the conclusion of which was affirmed by our Supreme

Court in *People v Raby*, 456 Mich 487, 496; 572 NW2d 644 (1998)⁴. Our Supreme Court's decision in *Raby* provided that a trial court's application of the guidelines will state a "cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate." *Raby*, 456 Mich 497-498.

Due to this intervening change in the law, the law of the case doctrine does not apply to this Court's original decision. See *Freeman v DEC Int'l, Inc (After Remand)*, 212 Mich App 34, 38; 536 NW2d 815 (1995). In the case sub judice, there was ample evidence presented to establish that defendant digitally penetrated his two daughters on a continuous and on-going basis over a three-year period. Because the sentencing court's factual determination at sentencing that multiple penetrations were committed is supported by the victims' testimony at trial, we find no error in the court's scoring decision with respect to OV 12. *Raby*, 456 Mich 496.

Moreover, defendant's sentences fall within the sentencing guidelines recommended minimum sentence range and, therefore, are presumptively neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). Although defendant advances a number of factors which he asserts demonstrate that his sentences are excessive, we conclude that none of the factors amount to "unusual circumstance" sufficient to overcome the presumptive validity of his sentences. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). We therefore conclude that the sentencing court did not abuse its sentencing discretion.

IV. Delay in Sentencing

Relying on MCR 6.425(D), defendant appears to argue that the time between this Court's April 24, 1998 opinion remanding for resentencing and the resentencing proceeding on August 4, 1999 was unreasonable⁵. We find no merit to this issue. MCR 6.425(D)(2) provides in pertinent part that "[t]he court must sentence the defendant within a reasonably prompt time after the . . . verdict unless the court delays sentencing as provided by law."

Assuming, without deciding, that MCR 6.425 applies to resentencing, we note that the fifteen-month delay between this Court's remand for resentencing and the resentencing proceeding was attributable to defendant. Indeed, the record reflects that defendant first filed a

⁴ In *Raby*, our Supreme Court agreed that it was not error for the trial court to score fifty points for OV 12, and affirmed this Court's decision insofar as it upheld the trial court's scoring. The *Raby* court did, however, reject the analysis contained in the opinion rendered by the Court of Appeals finding that it need not reach the underlying merits of the scoring issue because "[a] putative error in the scoring of the sentencing guidelines is simply not a basis upon which an appellate court can grant relief." *Id.* at 499.

⁵ Defendant also argues that the "statute of limitations" precludes defendant's sentence. Defendant, however, does not support this allegation with any legal authority. Indeed, as the appellant, defendant cannot merely announce his position and leave it to this Court to discover and rationalize a legal basis for his claim. *People v Hermiz*, 235 Mich App 248, 258; 597 NW2d 218 (1999).

motion for rehearing of this Court's April 24, 1998, decision, then filed an application for leave to appeal to our Supreme Court, both of which were denied, and then, on remand, filed a multitude of motions and requests for adjournment in the sentencing court. Indeed, the sentencing court granted defendant a sixty-day adjournment to retain counsel which defendant ultimately failed to do within the time allotted by the sentencing court. Under the circumstances, we reject defendant's claim that he was not sentenced within a reasonably prompt time as required by MCR 6.425(D). See *People v Richards*, 205 Mich App 438, 440-441; 517 NW2d 823 (1994).

V. Victim Statements

Defendant contends that he is entitled to resentencing because the sentencing court considered impermissible "hearsay" evidence. However, a review of defendant's brief on appeal reveals that defendant is actually challenging certain statements rendered by the victims admitted during his *trial*. Defendant's claim is thus without merit.

MRE 1101 provides, in pertinent part:

(b) Rules Inapplicable. The rules other than those with respect to privileges do not apply in the following situations and proceedings.

* * *

(3) Miscellaneous Proceedings. Proceedings for extradition or rendition; *sentencing*, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise. (Emphasis added.)

Consequently, any use of the victims' hearsay statements to others concerning defendant's molestation at defendant's sentencing did not constitute error requiring reversal.

Defendant also argues that the testimony provided by the victims was "unlawfully acquired." In a confused discussion contained in his brief on appeal, defendant submits that his children were "kidnapped" and "plac[ed] with a psychologist and an unlawful third party" both of whom allegedly "coerced" the children into providing statements against defendant resulting in a "federal conspiracy."

Because this court remanded solely for resentencing, the scope of the proceedings on remand, and also in this third appeal, is limited to sentencing issues. See *People v Jones*, 394 Mich 435-436; 231 NW2d 649 (1975); *People v Kincade (On Remand)*, 206 Mich App 477, 481; 522 NW2d 880 (1994). Consequently, issues pertaining to whether defendant's children were "kidnapped" before they testified against defendant at trial and the extent to which this affected the trial testimony, are issues outside of the instant appeal. Accordingly, this issue does not state a claim meriting relief in this Court.

VI. Judicial Bias

Defendant contends that the sentencing judge was biased against him thereby entitling him to resentencing. The record does not support defendant's contention. A judge will not be disqualified absent a showing of actual bias or prejudice. *Cain v Dep't of Corrections*, 451 Mich 470, 497, n 30; 548 NW2d 210 (1996); *Band v Livonia Associates*, 176 Mich App 95, 118; 439 NW2d 285 (1989). In support of this claim, defendant refers to a statement made by the sentencing judge, wherein the judge stated that defendant's case was a "difficult" one. Considered in context, the statement fails to show that the judge was biased against defendant. On the contrary, the record reveals that the judge's patience and conduct towards defendant was exemplary under the circumstances. Indeed, defendant was sentenced to lesser terms than imposed by the predecessor judge. We therefore find no merit to this issue.

VII. Use of the Psychological Report

Defendant asserts that he is entitled to resentencing because the sentencing court erroneously relied on a psychological report that was prepared as part of a child custody evaluation in defendant's previous divorce case. When this Court remanded for resentencing the second time, it instructed the trial court to address defendant's objections to the use of this report.

On remand, a review of the record indicates that the presentence information report was corrected to remove all references to the psychological report. Although the prosecutor presented a redacted version of the report for use in determining whether defendant's actions had caused psychological injury to his daughters, the redacted report did not contain information obtained from conversations with defendant, which was the basis for defendant's prior challenge to the report. We therefore find that defendant's claims concerning improper use of information protected by the psychiatrist-patient privilege are without merit, because MCL 330.1750 was not applicable to the contents of the redacted report.

VIII. Error in Scheduling Order

Defendant argues that "reversible error" occurred because the sentencing court sent him a scheduling order showing a sentencing date of June 12, 1999, instead of June 2, 1999, which was the date defendant appeared for sentencing. We disagree. The record reflects that because of this error, the court granted defendant a sixty-day continuance and defendant was not resentenced until August 4, 1999. This was sufficient to cure any prejudice caused by the error in the prior scheduling order.

IX. Ex-Parte Communications

Finally, defendant argues that the sentencing judge engaged in an "ex parte" communication with an attorney that defendant sought to represent him and that this communication was prejudicial. A review of the record reveals that defendant failed to bring this issue before the court at the time of defendant's resentencing thereby precluding the sentencing court from addressing and resolving the issue. Accordingly, defendant failed to properly preserve this issue for appellate review.

Consideration of unpreserved claims of error is disfavored. *People v Carines*, 460 Mich 750, 761; 597 NW2d 130 (1999). However, we will consider defendant's unpreserved claim of error with respect to the alleged "ex parte" communication for outcome determinative plain error. *Id.* at 763.

A review of the record demonstrates that beyond defendant's mere assertion, defendant otherwise failed to produce evidence establishing that the sentencing court engaged in any communications with defendant's prospective attorney. Because the record does not contain a scintilla of evidence establishing that an "ex parte" conversation occurred, we are unable to discern plain error requiring reversal.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly