

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN JOHN HARRIS,

Defendant-Appellant.

UNPUBLISHED

March 22, 2002

No. 235175

Berrien Circuit Court

LC No. 99-411139-FC

Before: Meter, P.J., and Markey and Owens, JJ.

PER CURIAM.

Defendant appeals as on leave granted after remand from our Supreme Court his plea-based conviction for first-degree criminal sexual conduct, MCL 750.520b. We vacate the sentence and remand for resentencing.

In exchange for the dismissal of two other charges, defendant entered a no contest plea to one count of first-degree criminal sexual conduct, MCL 750.520b. The parties agreed that the legislative sentencing guidelines would control defendant's sentence. The parties were under the mistaken impression that the applicable sentencing guideline range was 85 to 135 months' imprisonment. The trial court sentenced defendant to 110 months to 50 years' imprisonment.

Defendant's appellate counsel discovered that the guidelines had been improperly scored and moved for resentencing before the trial court. Plaintiff conceded that the guidelines had been improperly scored. Thus, it is undisputed that the applicable sentencing guidelines range for defendant's sentence should have been 51 to 85 months' imprisonment. However, plaintiff argued that defendant received what he "bargained for," that is, a sentence within the 85 to 135 month range. Thus, plaintiff requested that defendant's motion be denied.

It should be noted that both parties indicated that they did not want to disturb the plea agreement. Accordingly, the trial court was not asked to set aside the plea agreement in light of the mistake. The trial court opined in pertinent part:

The agreement that—that I think was the core of the agreement was the sentencing range, just as if a sentencing cap of some sort had been interposed. The—the defendant knew what he was getting, that he would be sentenced within that range, and was agreeable to that. And, this was not a set—you know—to be sentenced within the guidelines, which they were anticipated to be higher, they

clearly turned out to be lower. I think had—had the guideline range, let—for the sake of argument, it turned out to be higher than 81 to 135 months. The defendant clearly, would be saying, you can't sentence me to anything other than 81 to 135 months, regardless of how high they are, because that's what I agreed to. That's what the range was supposed to be. He got what he bargained for. Now, be it, perhaps, with some misinformation, but then again, that's what occurs in any plea agreement, and sometimes people decide—decide not to—to take a roll of the dice, and in—in any event, both sides got what they bargained for.

To say that the prosecution doesn't want to retry this case, or revisit this case, I think there needs to be some closure for the victim. Eight months down the road is—is clearly, a substantial period of time where a victim may be undergoing some counseling, or maybe trying to put her life together, and particularly, at the age of 11, needs to have some closure. I can understand why the prosecutor would not want to re—have to go back, and reinvestigate, or re-file this case, and prepare the . . . victim for . . . trial. And, the defendant doesn't want to have a trial. And—but, did he get what he bargained for, this Court is satisfied that he got precisely what he bargained for. This Court is also very reluctant to disturb a plea agreement that was struck between the parties, where the defendant knew what the sentencing guidelines range would be, on the minimum side, and was agreeable to that.

Consequently, the trial court denied defendant's request for resentencing.

On appeal, defendant contends that the trial court erred by denying his request for resentencing because his sentence exceeded the appropriate guidelines range and the trial court failed to articulate substantial and compelling reasons for the departure. Defendant concedes that, upon resentencing, plaintiff would be able to argue for a departure from the appropriate sentencing guidelines.

We review de novo issues concerning the proper application of the legislative sentencing guidelines. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). MCL 769.34(2) provides in pertinent part that “the minimum sentence imposed by a court of this state for a felony . . . committed on or after January 1, 1999 shall be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed.” Here, it is undisputed that defendant was not sentenced within the “appropriate sentence range.” Nevertheless, where there is a substantial and compelling reason for departing from the “appropriate sentence range,” the trial court may do so, provided that the reasons for the departure are stated on the record. MCL 769.34(3). If we find that “the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range,” we must remand for resentencing. MCL 769.34(11).

In *Hegwood*, our Supreme Court recognized that “the ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature.” *Hegwood, supra* at 436. The *Hegwood* Court further opined that it is “the responsibility of a circuit judge to impose a sentence, but only within the limits set by the Legislature.” *Id.* at 437. Here, it is undisputed that the “limits” set by the Legislature was a sentencing guideline range of 51 to 85 months’

imprisonment. Thus, it was the responsibility of the trial court to sentence defendant within those limits, absent, of course, substantial and compelling reasons to deviate from those limits.

Here, the trial court did not realize that it was departing from the “appropriate sentence range” when it imposed the minimum sentence of 110 months’ imprisonment. Thus, the trial court had no reason to articulate its reasons for imposing that sentence. In rejecting defendant’s request for resentencing, however, the trial court placed particular emphasis on the plea bargain agreement. Upon learning that the parties’ plea bargain agreement was, at the very least, tainted by a mutual mistake regarding the appropriate sentencing range, we believe that the proper course of action would have been to vacate the plea agreement. However, the instant matter has been further complicated by the parties’ positions that they would prefer to adhere to the remaining plea agreement’s terms. In light of the parties’ positions, we conclude that a remand for resentencing is necessary to implement the aforementioned Legislative intent.¹

We note that defendant also requests resentencing before a different judge. However, where, as here, the reason for resentencing does not involve a trial court’s prejudices or improper attitudes regarding the defendant, resentencing before a different judge is not necessary. *Hegwood, supra* at 440-441 n 17. Upon remand, plaintiff is, of course, free to argue in favor of an upward deviation from the appropriate sentencing guidelines range. If the sentencing judge intends to exceed the appropriate guidelines, defendant shall be given the opportunity to withdraw his plea.

Reversed and remanded. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ Donald S. Owens

¹ Given our resolution of this issue, we need not reach defendant’s second issue concerning whether trial counsel’s failure to notice the scoring error deprived him of his constitutional right to effective assistance of counsel.