S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JON PATRICK KITTLE, a/k/a JON TACKET, a/k/a TIMOTHY L. PATRICK WILLIS,

Defendant-Appellant.

UNPUBLISHED
December 18, 2003

No. 240491
Kent Circuit Court
LC No. 97-011715-FC

Before: Smolenski, P.J., and Sawyer and Borrello, JJ.

PER CURIAM.

Defendant was convicted of four counts of first-degree criminal sexual conduct, in violation of MCL 750.520b(1)(b), and was sentenced as a fourth habitual offender, MCL 769.12, to four concurrent terms of 30 to 70 years' imprisonment. Defendant appealed his conviction of right, and we vacated his first-degree criminal sexual conduct convictions and remanded for entry of a judgment of conviction of four counts of third-degree criminal sexual conduct, in violation of MCL 750.520d(1)(a). *People v Kittle* (Unpublished per curiam, docket No. 211628, rel'd 8/11/00). The remand was predicated on an error in the jury instructions. Defendant was resentenced to four concurrent terms of 25 to 50 years' imprisonment, and now appeals his resentencing as of right.

Defendant argues that his sentence is disproportionate.[1] We review the trial court's imposition of sentence for an abuse of discretion. *People v Gatewood (On Remand)*, 216 Mich App 559-560; 550 NW2d 265 (1996). A trial court's sentence is an abuse of discretion if it violates the principle of proportionality, which requires that a sentence be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*,

[1] Because the crime in the instant case was committed before January 1, 1999, the judicial sentencing guidelines would normally apply. *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316, lv den 463 Mich 918; 619 NW2d 548 (2000). However, the judicial sentencing guidelines do not apply to habitual offenders, and may not be considered on appeal in determining an appropriate sentence for an habitual offender. *People v Cervantes*, 448 Mich 620, 625 (Riley, J.), 630 (Cavanagh, J.); 532 NW2d 831 (1995); *People v Gatewood (On Remand)*, 216 Mich App 559-560; 550 NW2d 265 (1996).

435 Mich 630, 636; 461 NW2d 1 (1990); *People v Moorer,* 246 Mich App 680, 684; 635 NW2d 47 (2001).

"Permissible factors that may be considered by the court when imposing a sentence include the severity and nature of the crime, the circumstances surrounding the criminal behavior, the defendant's attitude toward his criminal behavior, the defendant's social and personal history, and the defendant's criminal history, including subsequent offenses." *People v Oliver,* 242 Mich App 92, 98; 617 NW2d 721 (2000). Additionally, the trial court may consider the effect of the crime on the victim. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998).

The record of the initial sentencing and the resentencing reveal that the trial court considered all of the above-listed factors in determining defendant's sentence. The trial court considered the severity and nature of the crime of third-degree criminal sexual conduct, commenting that "the nature of the offense is one which is of some concern to the Court, and there is a certain predatory quality about it, and it's a situation where you, obviously, abused a father's trust in order to obtain access to his son in order to abuse him." Additionally, the trial court acknowledged that the sentence for third-degree criminal sexual conduct, as opposed to the original sentence for first-degree criminal sexual conduct, "even as an habitual offender, is for a less serious offense," and that "there is appropriate basis here for sentencing you more moderately th[a]n the Court sentenced you at the prior hearing." The trial court determined that based on the "the fact that we were here on a different level offense tha[n] we are now, warrants the Court giving you consideration and allowing for a reduced, albeit [], I don't think, dramatically reduced sentence in this case."

The trial court considered the circumstances surrounding defendant's criminal behavior:

> [T]he jury, in convicting you, found that roughly between 1992 and 1996 you systematically groomed and then sexually abused the victim in the case, []. You, apparently, became acquainted with the defendant's stepfather by frequenting his bar and in 1994 actually took up residence with the victim and his stepfather.
>
> It appears you began with full body massages with the victim when he was only about 12. Supplied him with alcohol and marijuana by the time he was 13 and began performing anal and oral sexual penetration with him by the time he was age 14.

The presentence investigation report, which the trial court considered in determining defendant's sentence, noted defendant's attitude toward his criminal behavior, indicating "when interviewed . . . defendant adamantly denied any sexual contact with the victim." The PSIR also stated "also worth mentioning is that when interviewed for the PSI on the previously mentioned CSC offense [second-degree with 4-year-old daughter of then girlfriend], the defendant adamantly denied any involvement." The investigating agent commented:

> [N]ot only is the defendant's ongoing involvement in predatory sex offenses disturbing, but equally disturbing is his ongoing denial of wrongdoing in the Instant Offenses, much like that of past offenses, and the fact that he has

> received community supervision for his past offenses as well as sex offender's therapy, and was in fact being supervised in the community on his most recent sex offense . . . when involved in the Instant Offenses.

Additionally, the trial court commented on defendant's attitude toward his criminal behavior at the first sentencing hearing:

> Well, Mr. Kittle, I understand that you are maintaining your innocence, and certainly that is your prerogative, and under the circumstances if you maintain your innocence I can expect that you would be unhappy with having been convicted at trial, although as a practical matter, having presided over the trial, it seemed to be the evidence was quite substantial and one might say fairly overwhelming and I have considerable confidence in the findings of the court and the verdict of the jury.

Concerning defendant's social, personal, and criminal history, especially the trial court's correct assertion that defendant is a sexual predator, the trial court referred to its comments at the first sentencing hearing, where it noted that defendant was a fifth felony offender and a third felony sex offender. The trial court characterized defendant as a someone who is "clearly dangerous and cannot be allowed to roam in the public at large." The trial court also recommended that defendant be "continued in programming to deal with the underlying pathology that causes the sex offenses of which [he] ha[s] been convicted." At the first sentencing hearing, the trial court also considered the effect of the crime on the victim, commenting that "given the fact that there was not serious or permanent physical injury imposed here, and we're not dealing with a young child but a teenage victim who I think ultimately will get over the offense, although after having suffered a serious psychological harm from the process."

"The factors considered in imposing sentence should be balanced with the following objectives: (1) reformation of the offender, (2) protection of society, (3) punishment of the offender, and (4) deterrence of others from committing like offenses." *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999). In the instant case, the trial court focused primarily on the reformation of defendant and the protection of society. As noted above, at the original sentencing hearing, the trial court commented that defendant was a "clearly dangerous" "sexual predator," who "cannot be allowed to roam in public at large," and needed to "be incarcerated for a very, very long period of time until [he] no longer pose[d] a threat to public safety." To reform defendant, the trial court recommended "that during [defendant's] long confinement [he] be placed in intensive and ongoing programming to deal with the sexual maladjustment issues which ha[d] brought [him] to this position and which [we]re reflected in [his] prior criminal history as well as in the hopes that [he] may ultimately gain some control over the problem that gives him difficulty." At the resentencing hearing, the trial court recommended continued programming for defendant to deal with his sexual dysfunction.

The record reveals that the trial court carefully considered the relevant and permissible factors when determining defendant's sentence, and balanced those factors with the objectives of imposing sentence. The sentence imposed by the trial court of four concurrent terms of 25 to 50 years' imprisonment for four counts of third-degree criminal sexual conduct was proportionate to the circumstances surrounding defendant and the crimes he committed, and did not constitute an abuse of discretion.

Defendant next argues that he is "legally and factually innocent of all degrees of criminal sexual conduct," and in a standard brief that his trial counsel was ineffective. "Where an appellate court remands for some limited purpose following an appeal as of right in a criminal case, a second appeal as of right, limited to the scope of the remand, lies from the decision on remand. From the second appeal under those circumstances, a defendant is entitled to the full panoply of ancillary rights, such as the right to the assistance of appointed counsel if indigent." *People v Kincade (On Remand)*, 206 Mich App 477, 481; 522 NW2d 880 (1994). Our Supreme Court has held that "the scope of the second appeal is limited by the scope of the remand." *People v Jones*, 394 Mich 434, 436; 231 NW2d 649 (1975). Because this Court remanded the case specifically for resentencing, the issues in the instant appeal are limited to issues arising out of resentencing. Because the issues defendant now raises did not arise out of resentencing, and because defendant did not raise them on his first appeal as of right, he has forfeited his right to review of the issues by failing to timely assert them. *People v Carter,* 462 Mich 206, 215-216; 612 NW2d 144 (2000). Even if we were to consider these factors, we hold that the evidence presented at trial warrant conviction and further, that defendant was not denied effective assistance of counsel.

Defendant next argues that his prior and current appellate counsel were ineffective. Because the issues in the instant appeal are limited to issues arising out of resentencing, this Court may only consider defendant's ineffective assistance of counsel claim as to his current appellate counsel, and not his appellate counsel on his initial appeal as of right. A claim of ineffective assistance of counsel must be preceded by an evidentiary hearing or motion for new trial before the trial court, or will be considered by this Court only to the extent that claimed counsel mistakes are apparent on the record. *People v Johnson,* 144 Mich App 125, 129-130; 373 NW2d 263 (1985). Again, were we to consider these arguments we would hold they are without merit. Because we are to consider only those issues before us, defendant cannot claim that prior appellate counsel was ineffective when most of these same issues were raised in defendant's initial appeal to this Court.

Defendant also asserts that his current appellate counsel's "untimely filing [of the appellate brief] has already prejudiced defendant's right to appeal by the forfeiture of oral argument. MCR 7.212(A)(4)," and that "counsel is intentionally attempting to prejudice defendant's appeal of right through the artificial creation of procedural default." MCR 7.212(A)(4) provides that "any party failing to timely file and serve a brief required by this rule forfeits the right to oral argument." However, defendant has not demonstrated that his appellate counsel's deficiency, i.e., the failure to timely file resulting in forfeiture of oral argument, seriously prejudiced defendant. Defendant has failed to show that his current appellate counsel's performance was deficient under an objective standard of reasonableness, or how any such deficiency prejudiced defendant; therefore, defendant is not entitled to a new appeal.

Defendant next argues that he was erroneously convicted of offenses that he was never charged with, and that the trial court abused its discretion in admitting prior bad acts evidence, pursuant to MRE 404(b). Where this Court considered and ruled on the same issue which defendant again raises in his second appeal as of right, "the doctrine of 'law of the case' is dispositive." *People v Radowick*, 63 Mich App 734, 739; 235 NW2d 28 (1975). "The doctrine is explained in *People v Whisenant*, 384 Mich 693, 702; 187 NW2d 229 (1971), where [our Supreme] Court cited with approval the opinion of this Court in *People v Whisenant*, 19 Mich App 182, 189; 172 NW2d 524 (1969):

> It is fundamental law that the last utterance of an appellate court determines the law of the case, and upon remand for another trial subsequent to the appeal, the trial court is bound to follow the law as stated by an appellate court. If a litigant has any objection to the law as stated by the appellate court, his redress is an application for rehearing to the deciding court or an appeal to a still higher tribunal." [*Radowick, supra*, 739.]

This Court has already determined that defendant established plain error affecting his substantial rights, where the trial court "failed to state that the prosecution must also prove defendant was a member of the same household as the complainant," and that "because the aggravating circumstance [necessary for a finding of guilt on first-degree criminal sexual conduct] was omitted, the instruction given was that appropriate for a charge of third-degree criminal sexual conduct." This Court held that it was not necessary to order a new trial:

> Rather, because the jury returned a verdict on what were proper instructions for third-degree criminal sexual conduct, we vacate defendant's conviction of first-degree criminal sexual conduct and remand for entry of a judgment of conviction of four counts of third-degree criminal sexual conduct. See *People v Coddington*, 188 Mich App 584, 606; 470 NW2d 478 (1991); *People v Garrett*, 161 Mich App 649, 652; 411 NW2d 812 (1987). [*People v Kittle* (Unpublished per curiam, docket No. 211628, rel'd 8/11/00.]

Additionally, this Court has already determined that the trial court did not abuse its discretion in admitting evidence that "defendant had sexually abused another male, similar in age to the complainant in this case, a number of years earlier," under MRE 404(b), where such evidence was admitted for the proper purpose of showing defendant's modus operandi, and where its probative value was not substantially outweighed by the danger of unfair prejudice. Pursuant to the doctrine of law of the case, this Court will not reconsider issues which have already been decided.

Affirmed.

/s/ Michael R. Smolenski
/s/ David H. Sawyer
/s/ Stephen L. Borrello