

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL LEE MAXSON, II,

Defendant-Appellant.

UNPUBLISHED
December 1, 2005

No. 255729
Tuscola Circuit Court
LC No. 03-008831-FH

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

PER CURIAM.

Defendant appeals as of right his sentences of nine to twenty-five years and six to fifteen years imposed on his convictions of criminal sexual conduct in the first degree (CSC I), MCL 750.520b, and criminal sexual conduct in the second degree (CSC II), MCL 750.520c, respectively. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

Defendant was charged with CSC I and CSC II as a result of allegations that Matthew Williams bit complainant's penis after defendant dared him to do so, and that defendant touched complainant's penis with his hand. The incidents allegedly occurred when defendant, Williams, and complainant spent the night at the home of a friend after attending a graduation party. Williams testified that he and his friends were extremely intoxicated, that complainant did not object to the conduct, and that the acts occurred after he and defendant dared each other to engage in the conduct. Complainant testified that the acts occurred without his consent. Williams testified to the contrary.

The statutory sentencing guidelines recommended a minimum term range of 108 to 180 months (nine to fifteen years) for CSC I. The trial court scored Offense Variable (OV) 4, MCL 777.34, psychological injury to victim, at ten points, OV 10, MCL 777.40, exploitation of vulnerable victim, at five points, and OV 13, MCL 777.43, continuing pattern of criminal

behavior, at twenty-five points. The trial court sentenced defendant to concurrent terms of nine to twenty-five years for CSC I and six to fifteen years for CSC II, with credit for 155 days.¹

II. SENTENCING

A. Standard of Review

If a minimum sentence is within the appropriate sentencing guidelines range, we must affirm the sentence and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied on by the trial court in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). A party may not raise on appeal an issue challenging the scoring of the guidelines or challenging the accuracy of information relied upon in determining a sentence which is within the appropriate guidelines range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand. MCL 769.34(10); *Kimble*, *supra*. If the issue is not preserved, review is for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

B. Analysis

Defendant argues that he is entitled to resentencing because the trial court scored OV's 4, 10, and 13 at ten, five, and twenty-five points, respectively, based on facts that were not found beyond a reasonable doubt by the jury as required by *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Defendant asserts that had OV's 4, 10, and 13 each been scored at zero points, the guidelines would have recommended a minimum term range of 51 to 85 months for CSC I. We affirm. Our Supreme Court has stated that *Blakely*, *supra*, does not apply to Michigan's system of indeterminate sentencing because under that system, the maximum term is not set by the sentencing court, but rather is determined by statute. MCL 769.8(1); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). We are bound by the statement in *Claypool*, *supra*. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd in part 472 Mich 881 (2005).

III. EFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* Because there was no *Ginther*² hearing held in the trial court, this Court's review is limited to mistakes that are apparent from

¹ Neither party alleges that defendant's minimum term of six years exceeded the guidelines.

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

the lower court record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

B. Analysis

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.* at 600.

In calculating the sentencing guidelines the trial court has discretion to determine the number of points to be scored, provided that evidence in the record supports a particular score. A scoring decision for which there is any evidence in the record will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Defendant's assertion that the facts on which the trial court relied to score OV's 4, 10, and 13 were not proven by sufficient evidence is unsubstantiated. He has not shown that had trial counsel objected to the scoring of OV's 4, 10, and 13, the trial court would have changed its scoring decisions. Defendant has not established that trial counsel rendered ineffective assistance. *Carbin, supra*.

Affirmed.

/s/ Michael R. Smolenski
/s/ Bill Schuette
/s/ Stephen L. Borrello