

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLARENCE DANIEL FISK,

Defendant-Appellant.

UNPUBLISHED

January 10, 2006

No. 256125

Bay Circuit Court

LC No. 01-001223-FH

Before: O’Connell, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his sentence of twenty to thirty years in prison imposed on his jury conviction of criminal sexual conduct in the second degree (CSC II), the victim being under thirteen years of age, MCL 750.520c(1)(a). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The statutory sentencing guidelines recommended a minimum term range of thirty-six to 142 months. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to twenty to thirty years in prison. The trial court articulated four reasons for exceeding the guidelines, including that: (1) the guidelines failed to take into account one of defendant’s prior convictions; (2) this was defendant’s second conviction of CSC II involving a child; (3) defendant committed the instant offense soon after he was paroled from his sentence for the prior CSC II offense; and (4) the victim identified two incidents of sexual touching, one of which was not accounted for by the guidelines.

In *People v Fisk*, unpublished opinion per curiam of the Court of Appeals, issued September 11, 2003 (Docket No. 239367), we affirmed defendant’s conviction but remanded for resentencing. We concluded that the trial court erred in considering defendant’s prior convictions as a reason for departing from the guidelines because the guidelines accounted for defendant’s prior record in its entirety, but that the remaining factors cited constituted substantial and compelling reasons for exceeding the guidelines. *Id.*, slip op at 4-5.

On remand, the trial court again sentenced defendant to twenty to thirty years in prison. The trial court relied on the three factors approved by the *Fisk* Court as substantial and compelling reasons for exceeding the guidelines.¹

We review a departure from the sentencing guidelines pursuant to the principle of proportionality. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003); *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). We review the extent of a departure for an abuse of discretion. *Babcock, supra* at 264-265.

Defendant does not argue that the trial court lacked substantial and compelling reasons to exceed the guidelines, but contends that the extent of the departure resulted in a disproportionate sentence. We disagree.

The principle of proportionality “is a function of the seriousness of the crime and of the defendant’s criminal history.” *Id.* at 264. When reviewing a departure from the guidelines, this Court should defer to the trial court’s direct knowledge of the facts and familiarity with the defendant. *Id.* at 270. Defendant sexually assaulted an eight-year-old child. He did so notwithstanding that he had served a lengthy prison term for a similar offense and had completed a sex offender counseling program after being paroled. The trial court recognized that, by committing the instant offense, defendant was continuing his pattern of assaultive behavior toward children and determined that, under the circumstances, a lengthy prison term was necessary and appropriate. Defendant’s behavior demonstrated that he was unwilling to conform his conduct to the requirements of the law. The departure from the guidelines was significant, but the sentence imposed was within the range of principled outcomes. *Id.* at 269. The trial court did not abuse its discretion, and defendant is not entitled to resentencing.

A party may not raise on appeal an issue challenging the scoring of the guidelines or challenging the accuracy of information relied on in determining a sentence 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); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004).

Defendant argues that he is entitled to resentencing because the trial court scored the guidelines based on facts that were not found beyond a reasonable doubt by a 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). We disagree.

Our Supreme Court has stated that *Blakely, supra*, does not apply to Michigan’s system of indeterminate sentencing. *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,

¹ The trial court did not advise defendant of his right to appeal his sentence on the basis of the departure from the guidelines, as required by MCL 769.34(7) and MCR 6.425(E)(4). However, because defendant has appealed on this issue, the error is harmless. *People v Hicks*, 259 Mich App 518, 537; 675 NW2d 599 (2003).

89 n 4; 689 NW2d 750 (2004), lv gtd in part 472 Mich 881 (2005). No plain error occurred. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Michael J. Talbot