

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT ERIK SMITH,

Defendant-Appellant.

UNPUBLISHED

December 14, 2006

No. 262933

Calhoun Circuit Court

LC No. 03-000213-FH

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant pleaded guilty to attempted carrying a concealed weapon, MCL 750.227; MCL 750.92, indecent exposure, MCL 750.335a, and being a sexually delinquent person, MCL 750.10a. The trial court sentenced defendant as a sexually delinquent person to a term of one day to life imprisonment for his indecent exposure conviction. After this Court denied defendant's delayed application for leave to appeal, our Supreme Court remanded this matter "for consideration of defendant's claim of sentencing error as on leave granted." 472 Mich 906; 696 NW2d 711 (2005). We affirm defendant's sentence.

Defendant argues that he is entitled to resentencing because the trial court failed to exercise its discretion in sentencing him based on a mistaken belief in the law. Defendant failed to object to his sentence on this basis at the sentencing hearing. Therefore, this issue is unpreserved. See *People v Sexton*, 250 Mich App 211, 227; 646 NW2d 875 (2002). Generally, this Court reviews a trial court's sentencing decisions for an abuse of discretion. *Id.* A defendant is generally entitled to resentencing where a sentencing court fails to exercise its discretion because of a mistaken belief in the law. *Id.* at 228. And, "a defendant pressing an unpreserved claim of error 'must show a plain error that affected substantial rights.'" *Id.*, quoting *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

At the time defendant was convicted in this case, the indecent exposure statute read:

Any person who shall knowingly make any open or indecent exposure of his or her person or of the person of another is guilty of a misdemeanor, punishable by imprisonment for not more than 1 year, or by a fine of not more than \$1,000.00, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life:

Provided, That any other provision of any other statute notwithstanding, said offense shall be triable only in a court of record. [MCL 750.335a.]

A person charged with indecent exposure may also be charged as a sexually delinquent person if his offense has become repetitive or consists of compulsive acts that indicate a disregard of the consequences or of the recognized rights of others. MCL 750.10a; *People v Murphy*, 203 Mich App 738, 742; 513 NW2d 451 (1994). Where a defendant is convicted of indecent exposure and being a sexually delinquent person, the trial court may sentence the defendant to imprisonment for not more than one year, to a fine of not more than \$1,000, or to an indeterminate prison term of one day to life imprisonment. *People v Kelly*, 186 Mich App 524, 531; 465 NW2d 569 (1990).

In this case, the trial court concluded that it “[did not] have any discretion as it relates to the sentence as to a sexually delinquent person,” and it sentenced defendant to a term of one day to life imprisonment. We conclude that, contrary to defendant’s argument, the record in this case does not reflect that the trial court mistakenly believed that it had no alternative but to sentence defendant to one day to life imprisonment. The record in this case discloses that the trial court understood that life imprisonment was a *possible* maximum sentence, and not the *only* maximum sentence that it could impose. At the plea hearing, the trial court informed defendant twice that “the maximum *possible* penalty” for the indecent exposure conviction was life imprisonment and that the conviction “*could* carry up to life.” Based on the nature of defendant’s crime and his history of committing sexual offenses, the trial court elected to sentence defendant as a sexually delinquent person and impose a sentence of one day to life imprisonment. The trial court did not sentence defendant based on a misunderstanding of the law. See *Sexton, supra* at 228. The trial court did not mistakenly conclude that it was precluded from exercising any discretion in sentencing defendant. Cf. *People v Daniels*, 69 Mich App 345; 244 NW2d 472 (1976). It concluded that it did not have discretion “*as it relates to the sentence as to a sexually delinquent person.*” The record reflects that the trial court understood that it did not have discretion regarding the length of the indeterminate sentence that it could impose under the alternate sentencing scheme for sexually delinquent persons codified in MCL 750.335a, but that it had discretion whether to sentence defendant as a sexually delinquent person. The trial court exercised its discretion in sentencing defendant as a sexually delinquent person, and it correctly determined that it had no choice but to impose the sentence given.

This Court has held that “[t]he statute on indecent exposure provides for a *mandatory* prison sentence of one day to life for a sexually delinquent person.” *Murphy, supra* at 749 (emphasis added). “Sexual delinquency is not merely a penalty enhancement provision related to the principal charge; it is an alternate sentencing provision tied to a larger statutory scheme.” *Kelly, supra* at 528, citing *People v Helzer*, 404 Mich 410, 419; 273 NW2d 44 (1978).

Because the statute at issue provides that the minimum of the indeterminate term *shall* be one day and the maximum *shall* be life, we conclude that that is the prescribed length of the indeterminate term. [*Kelly, supra* at 529.]

Once the trial court elected to impose the alternate sentence for sexually delinquent persons announced in MCL 750.335a, it did not have discretion to impose any indeterminate sentence other than one in which the minimum sentence was one day and the maximum sentence was life.

Kelly, supra at 529. Thus, defendant has failed to establish plain error affecting substantial rights, and, he is not entitled to resentencing. *Sexton, supra*.

Defendant also raises two additional issues unrelated to his sentence; however, the Supreme Court remanded this case to our Court specifically “for consideration of defendant’s claim of sentencing error” Accordingly, we conclude that defendant’s other issues are not properly before us.

We affirm.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder