

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLARENCE BERNARD ROSS,

Defendant-Appellant.

UNPUBLISHED

December 19, 2006

No. 266376

Wayne Circuit Court

LC No. 03-006826-01

Before: Meter, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Defendant appeals by right the sentences imposed on his jury convictions of four counts of criminal sexual conduct in the second degree (CSC II), the victim being under 13 years of age, MCL 750.520c(1)(a). Defendant was sentenced to concurrent terms of 43 months to 15 years in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The applicable statutory sentencing guidelines established a minimum term range of 43 to 107 months. On December 11, 2003, the trial court sentenced defendant to concurrent terms of five years' probation. The trial court cited the fact that defendant was the principal caregiver for his brother, who is a paraplegic, as a substantial and compelling reason for departing below the guidelines.

Plaintiff appealed by right. This Court found that the trial court's reason for departure was objective and verifiable, and could constitute a substantial and compelling reason for departing below the guidelines under certain circumstances. However, this Court concluded that a remand was necessary because the trial court failed to articulate on the record why that reason justified the particular sentence imposed in this case, and how a sentence of probation would be more proportionate to defendant's circumstances and those of the offenses than would a sentence within the guidelines.¹

¹ *People v Ross*, unpublished per curiam opinion of the Court of Appeals, issued August 9, 2005 (Docket No. 253415), slip op at 2.

During resentencing, defense counsel noted that the presentence investigation report (PSIR) indicated that defendant was no longer his brother's primary caregiver. Counsel argued that defendant remained his brother's caregiver because his mother was also permanently disabled. Counsel informed the trial court that defendant's mother had stated that defendant was required to come to her house at least every other day to care for his brother. Counsel further argued that while the report stated that defendant's probation officer had described defendant's probation adjustment as "marginal," no supporting evidence for that assertion was found in the report. However, counsel admitted that defendant had not paid all the fees that he owed to the court.

The trial court concluded that it could find no reason to sentence defendant outside the guidelines. The court specifically noted defendant's "not favorable" probation report, and the fact that he had not paid the fees or costs that were initially assessed. The court also noted that the report indicated that defendant was no longer his brother's primary caregiver, although it did find that that was "probably a matter of debate." The court sentenced defendant to concurrent terms of 43 months to 15 years in prison.

Defendant's new sentence fell within the applicable guidelines scoring range. In general, under the sentencing guidelines act, 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 in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309-311; 684 NW2d 669 (2004); *People v Garza*, 469 Mich 431; 670 NW2d 662 (2003).

Defendant argues that the trial court was not permitted to revisit the pertinent facts during resentencing, but was required to simply review the question whether the fact that he was caring for his brother rendered his sentence proportionate. He maintains that this Court had already determined that he was a primary caregiver, and that this role was a valid reason to depart below the guidelines. He contends that this issue was the law of the case, and thus could not be revisited upon remand. We disagree.

The law of the case doctrine generally precludes a trial court on remand from revisiting legal questions and deciding them differently than the appellate court "on a subsequent appeal in the same case where the facts remain materially the same." *People v Fisher*, 449 Mich 441, 444-445; 537 NW2d 577 (1995), quoting *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). However, the trial court remains free on remand to decide, or reconsider, legal issues that have not been decided by the appellate court. "The power of the lower court on remand is to take such action as law and justice may require so long as it is not inconsistent with the judgment of the appellate court." *Fisher, supra* at 446-447, quoting *Sokel v Nickoli*, 356 Mich 460, 464; 97 NW2d 1 (1959). If a case is remanded without instructions, a lower court has the "same power as if it made the ruling itself." *Fisher, supra* at 447. "However, when an appellate court gives clear instructions in its remand order, it is improper for a lower court to exceed the scope of the order." *K & K Const, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005).

The law of the case doctrine is not applicable to the present appeal. First, the question whether defendant was the primary caregiver for his brother is a factual issue, not a legal one. Contrary to defendant's assertion, this Court did not consider the issue whether defendant was

his brother's primary caregiver in the previous appeal. The *Ross* Court found only that this factor could properly be used as a rationale for sentence departure under the right circumstances. *Ross*, slip op at 2 n 10, citing *People v Babcock*, 250 Mich App 463, 471; 648 NW2d 221 (2002), rev'd on other grounds 469 Mich 247, 265; 666 NW2d 231 (2003). Nor did the language of this Court's remand clearly limit the trial court's ability to reconsider the fact relied on for departure, or to consider other factors on resentencing. Instead, the opinion simply vacated the earlier sentence. Under the law of the case doctrine, the trial court would have been prevented from determining that defendant's role as a primary caretaker could not, as a matter of law, constitute a substantial and compelling reason to depart. However, it was free to decide the other issues involved during resentencing. See *People v Williams (After Second Remand)*, 208 Mich App 60, 65; 526 NW2d 614 (1994) (When a case is remanded from our Court because the entire sentence is invalid, every aspect of the sentence is before the judge de novo unless the remand indicates otherwise.).

In doing so, the trial court on remand was free to reconsider whether a departure was warranted. A resentencing is a new sentencing, with all its included requirements. *People v Ezell*, 446 Mich 869; 522 NW2d 632 (1994); *Williams (After Second Remand)*, *supra* at 65. Thus, while defendant challenges the use of a new presentence report and the trial court's consideration of intervening circumstances that may have occurred since the initial sentencing, we find this was within the trial court's responsibilities when determining the appropriate sentence for defendant. See *People v Triplett*, 407 Mich 510, 515; 287 NW2d 165 (1980).

Defendant also argues that the trial court should have held an evidentiary hearing at resentencing to determine whether he continued to be his brother's sole caregiver. We disagree.

Once a defendant challenges the contents of the presentence report, the prosecutor must prove by a preponderance of the evidence that the facts are as asserted. *People v Ratkov (On Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993), remanded on other grounds 447 Mich 984 (1994). If the court finds the challenged information to be inaccurate, the defendant is entitled to have the information stricken from the report. *People v Britt*, 202 Mich App 714, 718; 509 NW2d 914 (1993). If the record provides insufficient evidence on which to base a decision, the court may order the presentation of further proofs. *Ratkov (On Remand)*, *supra* at 126. A court may consider all record evidence before it, including, but not limited to, testimony taken at a preliminary examination or trial. *Id.* at 125.

Here, after thoroughly reviewing the trial court's discussion on remand, we find that the trial court relied on the fact that defendant had not complied with the terms of his probation, rather than on whether defendant continued to be his brother's primary caregiver. During sentencing, defendant did not challenge the report of his lackluster probation performance, but instead claimed that it was difficult to meet his obligations. Thus, contrary to defendant's argument, the trial court did not deny defendant the ability to challenge the "decisive factor" here. Under the circumstances, we thus find that defendant has not shown that the trial court relied on inaccurate information when determining the sentence.

Affirmed.

/s/ Patrick M. Meter
/s/ Peter D. O'Connell
/s/ Alton T. Davis