STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 22, 2009
v	No. 285299 Clare Circuit Court
KEVIN LEE BENCHECK, Defendant-Appellant.	LC No. 07-003013-FH

Before: Hoekstra, P.J., and Bandstra and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of child sexually abusive activity, MCL 750.145c(2), and fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(a) (person between the ages of 13 and 16). The trial court sentenced defendant to 160 months to 20 years in prison for the child sexually abusive activity conviction, and to a concurrent 16 months to 2 years in prison for the CSC IV conviction. We affirm defendant's convictions, vacate his sentence, and remand for resentencing.[1]

Defendant first argues that he was denied his Sixth Amendment[2] right to counsel at a critical stage of the proceedings—his plea withdrawal. We disagree. We review this unpreserved constitutional issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Reversal is warranted only if the error resulted in the conviction of an innocent defendant or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002).

The Sixth Amendment to the United States Constitution guarantees a defendant the right to the assistance of counsel for his defense. *People v Marsack*, 231 Mich App 364, 372; 586 NW2d 234 (1998). The right to counsel attaches when an adversary criminal proceeding is commenced against a defendant by a formal charge, a preliminary hearing, an indictment, an information, or an arraignment. *Id*. at 376-377. Once the right attaches and a defendant asserts

[1] Defendant is also before this panel in Docket No. 285298.

[2] US Const, Am VI.

his right to counsel, the Sixth Amendment provides that he must be afforded counsel at all critical stages of the proceedings. See *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004). A critical stage is "'a step of a criminal proceeding . . . that [holds] significant consequences for the accused.'" *People v Willing*, 267 Mich App 208, 228; 704 NW2d 472 (2005), quoting *Bell v Cone*, 535 US 685, 695-696; 122 S Ct 1843; 152 L Ed 2d 914 (2002) (alteration by *Willing* Court).

Defendant asserts that he was deprived of his right to counsel from June 6, 2007 until June 25, 2007, because of the breakdown in the relationship between himself and his original defense counsel, as well as from June 25, 2007, when original defense counsel was allowed to withdraw, until appointment of substitute counsel on July 2, 2007. Although we agree that a plea-withdrawal hearing is a critical stage in the proceedings because it "holds significant consequences for the accused," *Willing, supra* at 228; see also *United States v Segarra-Rivera*, 473 F3d 381, 384 (CA 1, 2007) (stating that a plea-withdrawal hearing is a critical stage for Sixth Amendment purposes), defendant was not denied counsel at his plea withdrawal hearing in this case. After four requests by defendant that counsel be removed, original defense counsel filed his motion to withdraw on June 6, 2007. However, he remained defendant's counsel of record and continued representing defendant until June 25, 2007, when the trial court simultaneously ordered that he be allowed to withdraw from the case, and that defendant's plea was withdrawn. Therefore, because defendant was represented by counsel up to and through the withdrawal of his plea, his Sixth Amendment claim to the contrary is without merit.

Further, we find defendant's assertion that the record contains no indication that he actually requested that his plea be withdrawn somewhat disingenuous. First, original defense counsel's motion to withdraw specifically states, "Defendant has requested to withdraw his plea against the advice of counsel." Additionally, defendant filed several motions, in propria persona, throughout the proceedings and his substitute counsel also filed at least one motion. Defendant was well aware of the procedures to follow to request a certain action from the trial court. Defendant clearly had the opportunity, both in propria persona and through substitute counsel, to raise the issue of his plea withdrawal with the trial court, but failed to do so.

We also reject defendant's argument that the trial court erred in ordering withdrawal of his plea. Defendant sought to withdraw his plea because "[p]rior to entry of the plea, the parties believed that registration under [Michigan's Sex Offenders Registration Act, MCL 28.721,] was discretionary with the Court." On appeal, however, defendant argues that because a misunderstanding about the mandatory nature of registering a sex offender does not satisfy the "interest of justice" standard set forth in MCR 6.310(B), the court erred in permitting the withdrawal. Defendant asserts that this issue is subject to plain error review because his trial counsel failed to request reinstatement of the plea bargain.

Defendant's preservation argument diverts attention from the existing proceedings to a hypothetical proceeding that never occurred. "[F]orfeiture necessarily requires that there be a specific point at which the right must be asserted or be considered forfeited." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 69-70; 642 NW2d 663 (2002) (emphasis removed). Assuming there exists a right to raise an error on the part of the trial court in responding favorably to a request of a party, the hypothetical advanced by defendant identifies no specific point at which the issue should have been raised. If defendant's argument were credited, drawing a distinction between waiver and forfeiture would essentially be a superfluous activity. If defendant's argument is

accepted, most waivers predicated upon intentional acts could be transformed into a forfeiture by arguing that the act was error that could have been negated by a subsequent action that the actor failed to take advantage of. Instead of characterizing the failure to take a subsequent step as a failure to recognize and assert a right, it is just as reasonable (arguably more so) to assume the failure to take the alleged remedial measure is further evidence that the actor intended to take the action and does not wish to undo it.

The purpose of the preservation requirement is to assure that objections are raised "at a time when the trial court has an opportunity to correct the error, which could thereby obviate the necessity of further legal proceedings and would be by far the best time to address a defendant's constitutional and nonconstitutional rights." *People v Grant*, 445 Mich 535, 551; 520 NW2d 123 (1994). By requesting that the plea be withdrawn for the reasons stated, and then by failing to timely act to reverse the court's favorable response, defendant induced the reasonable belief in the prosecutor and the trial court "that it was [his] intention and purpose to waive." *Book Furniture Co v Chance,* 352 Mich 521, 526-527; 90 NW2d 651 (1958) (citation omitted). See also *Phinney v Perlmutter,* 222 Mich App 513, 537; 564 NW2d 532 (1997) ("Error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence.").

Further, this Court has "decline[d] to allow [a] defendant an appellate parachute fashioned from the fiber of his own agreement." *People v Simon*, 174 Mich App 649, 657; 436 NW2d 695 (1989) (concluding that when the defendant stipulated to the unavailability of a witness at trial, he conceded the prosecutor's due diligence in attempting to locate the witness). In other words, a party may not stipulate to a matter and then argue on appeal that the resultant action was error. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995). Accordingly, because defendant stipulated to withdrawal of his plea, his claim of error has been waived.

Defendant also argues that the trial court erred in denying his motion to suppress, as the warrant to search his home was based upon unreliable and stale information. A search warrant may not be issued absent probable cause. US Const, Am IV; Const 1963, art 1, § 11; MCL 780.651. "Probable cause to issue a search warrant exists where there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *People v Kazmierczak*, 461 Mich 411, 417- 418; 605 NW2d 667 (2000), quoting *Russo, supra* at 604. A magistrate's findings of probable cause in this regard must be based on all the facts related with the affidavit. MCL 780.653; see also *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001). When reviewing a magistrate's conclusion that probable cause to search existed, this Court, paying deference to the magistrate's determination that probable cause did exist, considers only whether the actual facts and circumstances presented to the magistrate would permit a reasonably cautious person to conclude that there was a substantial basis for the finding of probable cause. *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992).

Defendant first challenges the search warrant based on the unreliability of the informant. The informant in this case was a fifteen-year-old girl against whom defendant had a PPO. The girl, apparently while being arrested for disorderly conduct, reported that she had seen child pornography present at defendant's residence. Defendant asserts that because the informant had a motive to fabricate her story—to avoid arrest for disorderly conduct and to avenge the PPO that defendant filed against her—there was insufficient probable cause to issue the search warrant in this case. We disagree.

The affidavit in support of a search warrant may be based on information supplied by an informant. MCL 780.653. If the informant is named in the affidavit, all that is required by the statute is that the informant spoke with personal knowledge.[3] MCL 780.653(a). A finding of personal knowledge should be derived from the information provided, and not merely from a recitation that the informant had personal knowledge. *People v Stumpf*, 196 Mich App 218, 223; 492 NW2d 795 (1992). Viewing the affidavit in a commonsense, realistic manner, there was a substantial basis for a reasonably cautious person to conclude that the fifteen-year-old spoke with personal knowledge. The girl gave a detailed description of the photos and videos made of her, as well as the location and description of the photos defendant had of other girls. Moreover, there is no allegation or indication that the information provided by the girl was false. Therefore, the trial court did not err in refusing to suppress the seized evidence on this basis.

Next, defendant briefly argues that the search warrant should not have been issued because the information in the affidavit in support of the search warrant was stale. A warrant becomes "stale" if too much time passes from observation of the contraband to the issuance of the search warrant. See e.g., *Russo, supra* at 604-605. The length of time that may transpire before a warrant becomes stale depends on the circumstances of each case. *Id*. at 605-606. Moreover, time is not the only factor to be considered in determining whether probable cause exists to believe that evidence is presently located at the place to be searched. Other factors include "whether the crime is a single instance or an ongoing pattern of protracted violations, whether the inherent nature of a scheme suggests that it is probably continuing, and . . . whether [the property sought] is likely to be promptly disposed of or retained by the person committing the offense." *Id*.

In *Russo*, our Supreme Court upheld a six and one-half year delay between the complainant last seeing explicit photos and videos of herself, and the issuance of a search warrant. Relying on a 1984 study by a subcommittee of the United States Senate, our Supreme Court concluded that it was likely that the defendant, a pedophile, would retain possession of the child pornography for an extended length of time. *Id.* at 599-601. Here, the time frame is far less than in *Russo*. There was only a delay of about a year between the last time the fifteen-year-old saw photos of herself and the other girls (late 2004 or early 2005), on defendant's computer, and the issuance of the search warrant in January 2006. Given the pornographic nature of the photos and videos of the young girls in this case, it was likely that defendant would retain the materials. Therefore, the trial court did not err in declining to suppress the evidence on this basis.

Defendant next challenges the trial court's upward departure from the sentencing guidelines. In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination subject to review for clear error, the determination that the factor is objective and verifiable is reviewed as a matter of law, and the determination that the factor

[3] Defendant's argument regarding the reliability of Fineis's testimony is misplaced. MCL 780.653(a) imposes no such requirement where the informant is named in the affidavit. Credibility of the informant and reliability of the information come into play with unnamed informants. MCL 780.653(b).

constituted a substantial and compelling reason for departure and the amount of the departure are reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

Defendant first argues that the trial court did not have substantial and compelling reasons for its departure from the sentencing guidelines. We agree in part. Under the sentencing guidelines act, MCL 769.31, *et seq*., a trial court must impose a sentence within the guidelines range unless there is a "substantial and compelling" reason for departure and the court states that reason on the record. MCL 769.34(3); see also *Babcock*, *supra* at 255-256. To determine whether a reason is "substantial and compelling" the Court must look to the following factors set forth in *Babcock*: (1) the reason must be objective and verifiable; (2) the reason should keenly or irresistibly grab the attention of the reviewing court; (3) the reason must be of considerable worth in deciding the length of a sentence; and (4) the reason must be something that exists only in exceptional cases. *Babcock*, *supra* at 257-258, citing *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). If a trial court finds that there are substantial and compelling reasons to believe that sentencing the defendant within the guidelines range is not proportionate to the seriousness of the defendant's conduct and criminal history, then the trial court may depart from the guidelines. *Id.* at 264. But any departure by the trial court must be proportionate to both the seriousness of the defendant's conduct and the defendant's criminal history. *Id*. The sentence imposed must be within the range of principled outcomes, or it will be found to be an abuse of the trial court's discretion. *Id*. at 269.

Here, the trial court articulated the following reasons for departure[4]:

> I do find that the guidelines do not take into account various factors, factors that this kind of behavior and conduct of Mr. Bencheck's been going on for 15 years. Doesn't take into account the affect [sic] on his family, the uncharged acts against his own daughters, uncharged acts against others.
>
> People like you, Mr. Bencheck, have a very low rate of rehabilitation. I do not find that you are amenable to rehabilitation. I think societal protection necessitates a longer sentence than what the guidelines provide.

Two of the trial court's reasons for departure satisfy the four-prong *Babcock* test—defendant's 15-year history of sexually assaulting minors, including his own daughter, and the impact of his crimes on his family. First, both reasons are objective and verifiable. "Objective and verifiable factors are those that are external to the minds of the judge, defendant and others involved in making the decision and are capable of being confirmed." *Abramski*, *supra* at 74. Here, the ongoing nature of defendant's conduct and the effect that it had on his family are objective and verifiable. Indeed, the Presentence Investigation Report contains information about defendant molesting his own daughter throughout her teenage years, as well as her friends. Second, defendant's conduct clearly grabbed the attention of the trial court, as it does this

[4] Defendant was sentenced in the instant matter at the same time he was sentenced in Docket no. 285298.

Court's attention. Third, the reasons are of considerable worth in deciding the length of a sentence because it shows defendant's inability to control his sexual desires. Therefore, defendant's conduct warranted a departure by the trial court. Lastly, defendant's conduct of assaulting young girls, including his own daughter, is something that exists only in exceptional cases.

However, the third reason articulated by the trial court, the need for societal protection because of defendant's inability to rehabilitate, does not meet the *Babcock* test. A trial court's determination that a defendant's lack of potential for rehabilitation constitutes a substantial and compelling reason for deviation from the sentencing guidelines if that determination is supported by objective and verifiable facts. *People v Daniel*, 462 Mich 1, 7 n 8; 609 NW2d 557 (2000). *Daniel* noted that in *Fields* the Court had "adopted the basic tenets set forth by a special panel of the Court of Appeals in *People v Hill*, 192 Mich App 102; 480 NW2d 913 (1991)" with respect to sentence departures for certain drug offenses. *Id.* at 6-7. In *Hill*, this Court adopted the reasoning set forth in *People v Downey*, 183 Mich app 405; 454 NW2d 235 (1990), as modified by *People v Krause*, 185 Mich App 353; 460 NW2d 900 (1990) directing that "trial courts may depart from mandatory minimum sentences for substantial and compelling reasons that are objective and verifiable. Trial courts will be permitted to consider both prearrest and postarrest factors in determining whether to depart from the mandatory minimum sentences." *Hill, supra* at 105.

Downey noted that:

> the factors which go into determining the rehabilitative potential of the defendant may be considered when determining if substantial and compelling reasons exist to deviate from the presumptive sentence.
>
> . . . A nonexhaustive list of factors which may be considered . . . are: (1) the facts of the crime which mitigate defendant's culpability (see for example the factors listed in Minnesota's and Washington's statutes), (2) defendant's prior record, (3) defendant's age, and (4) defendant's work history. [*Downey, supra* at 414.]

In the case now before us, the trial court focused on the fact that defendant's conduct spanned a 15-year period, and that this conduct consisted of charged and uncharged criminal acts. The court also noted the impact on defendant's family. There is no indication in the record, however, that defendant had attempted rehabilitation and failed, or that the trial court considered defendant's age, prior record, work history, or any other specific factors in determining that defendant was not amenable to rehabilitation.

Because it is unclear whether the trial court would have departed to the same extent without this invalid reason, defendant is entitled to resentencing. *People v Havens*, 268 Mich App 15, 17-18; 706 NW2d 210 (2005) (noting that remand for sentencing is necessary when the stated reasons for departure are partially invalid and the appellate court cannot ascertain whether the trial court would have departed to the same extent regardless of the invalid reasons).

Defendant also argues that the trial court violated MCL 769.34(3) by considering his 15-year history of sexually assaulting minors, including his own daughter, as a reason for departure because such conduct was already considered and scored under offense variable (OV) 13. We disagree.

A departure from the guidelines cannot be based on "an offense characteristic or offender characteristic that has already been taken into account when determining the appropriate sentencing range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b).

Defendant was scored 25 points under OV 13 for a continuing pattern of criminal behavior. More specifically, OV 13 provides for a score of 25 points if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). However, when determining the appropriate points under OV 13, only crimes within a five-year period, including the sentencing offense, can be counted. MCL 777.43(2)(a).

Here, the trial court did not violate MCL 769.34(3)(b) because defendant's 15-year history of sexually assaulting minors, including his own daughter, was not considered under OV 13. OV 13 only covers a five-year period, including the sentencing offense. Therefore, defendant's uncharged acts against his daughter and friends, which occurred more than 15 years before sentencing, were not covered by the offense variable.

Defendant further argues that the trial court failed to justify the extent of its departure. When departing from the guidelines, in addition to identifying objective and verifiable factors, the trial court must also explain why the factors cited support the extent of the departure. *People v Smith*, 482 Mich 292, 303; 754 NW2d 284 (2008). In other words, the "trial court must justify why it chose the particular degree of departure." *Id*. at 318. Here, the trial court departed from the sentencing guidelines range of 45 to 75 months and sentenced defendant to 160 months to 20 years in prison for the child sexually abusive activity conviction, and to a concurrent 16 months to 2 years in prison for the CSC IV conviction. The trial court gave no explanation for the extent of the departure, and thus it failed to justify the departure made. A court's articulation must include "an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been." *Id*. at 311.

Because the trial court departed in reliance on a reason that was not substantial and compelling, and because it failed to justify the extent of its departure, defendant's sentence must be vacated and this case remanded for resentencing either under the guidelines or in accordance with *Babcock* and *Smith*.

Finally, relying on *People v Dunbar*, 264 Mich App 240, 251-255; 690 NW2d 476 (2004), defendant argues that the trial court erred in imposing $500 in attorney fees without indicating that it had considered defendant's ability to pay. However, *Dunbar* was recently overruled on this very point. *People v Jackson*, 483 Mich 271, 290; 769 NW2d 630 (2009).

Jackson noted that the Court had "for purposes of an ability-to-pay analysis, we have recognized a substantive difference between the imposition of a fee and the enforcement of that imposition." *Id.* at 291-292. *Jackson* further noted that:

> whenever a trial court attempts to enforce its imposition of a fee for a court-appointed attorney under MCL 769.1k, the defendant must be advised of this enforcement action and be given an opportunity to contest the enforcement on the basis of his indigency. Thus, trial courts should not entertain defendants' ability-to-pay-based challenges to the imposition of fees until enforcement of that imposition has begun. [*Id.* at 292 (emphasis omitted).]

Further, *Jackson* concluded that "MCL 769.1*l* inherently calculates a prisoner's general ability to pay and, in effect, creates a statutory presumption of nonindigency." *Id*. at 295. An "imprisoned defendant bears a heavy burden of establishing . . . extraordinary financial circumstances" sufficient to overcome this presumption. *Id.* at 296.

On April 25, 2008, the court ordered enforcement of the fee imposition, which included attorney fees:

> 2. For payment toward the obligation, the Department of Corrections shall collect 50% of all funds received by the defendant over $50.00 each month.
>
> 3. If the amount withheld at any one time is $100.00 or less, the Department of Corrections shall continue collecting funds from the defendant's prisoner account until the sum of the amounts collected exceeds $100.00, at which time the Department of Corrections shall remit that amount to this court . . . .

Although defendant filed an affidavit of indigency along with his request for an appointed appellate attorney, he has not contested his ability to pay the imposed fees. Thus, we resolve this issue as did *Jackson*:

> In this case, the trial court did not err by imposing the fee for his court-appointed attorney without conducting an ability-to-pay analysis. Further, it did not err by issuing the remittance order under MCL 769.1*l* because defendant is presumed to be nonindigent if his prisoner account is only reduced by 50 percent of the amount over $50. However, if he contests his ability to pay that amount, he may ask the trial court to amend or revoke the remittance order, at which point the trial court must decide whether defendant's claim of extraordinary financial circumstances rebuts the statutory presumption of his nonindigency. [*Id.* at 298-299.]

We affirm defendant's convictions, vacate his sentence, and remand this matter to the trial court for resentencing. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Deborah A. Servitto