

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 18, 2011

v

MARK ANTHONY WILLSON,

Defendant-Appellant.

No. 298439
Bay Circuit Court
LC No. 06-010190-FC

Before: M. J. KELLY, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

After trial, a jury convicted defendant, Mark Anthony Willson, of two counts of first-degree criminal sexual conduct (CSC I),¹ and one count of third-degree criminal sexual conduct (CSC III).² The trial court sentenced Willson to 225 to 360 months in prison for each CSC I conviction and to 120 to 180 months for the CSC III conviction. The trial court sentenced Willson according to the statutory sentencing guidelines. Willson appealed, and this Court remanded the case for resentencing on the CSC I convictions under the judicial guidelines because the offenses occurred before January 1, 1999.³ The trial court imposed the same sentences on remand. Willson appeals as of right, and we affirm.

I. BASIC FACTS

Testimony at trial established that Willson sexually abused the complainant, who was Willson's adopted daughter. The sexual abuse began when the complainant was 12 years old and continued until the complainant was 23 years old. Willson sexually abused the complainant at their home and at their cabin. In addition, Willson sexually abused the complainant in Willson's work van, and at various job sites where the complainant worked with Willson. Willson took the complainant to places where witnesses would not detect the sexual abuse. The

¹ MCL 750.520b(1)(b).

² MCL 750.520d(1)(d).

³ *People v Willson*, unpublished opinion per curiam of the Court of Appeals, issued January 21, 2010 (Docket No. 289430).

sexual abuse always occurred on the complainant's birthday, Willson's birthday, and Willson's wedding anniversary. The complainant testified that when the sexual abuse began, Willson would show the complainant letters from an unseen person who came to be known as "It." The letters said that complainant's family would be hurt if she did not allow Willson to engage in vaginal and anal sex with her. The letters eventually stopped, but the threats from "It" continued to be delivered through Willson.

II. OFFENSE VARIABLE SCORES UNDER JUDICIAL SENTENCING GUIDELINES

A. STANDARD OF REVIEW

On appeal, Willson argues that the trial court erroneously scored three offense variables (OVs) under the judicial sentencing guidelines. Willson also argues that the scores for comparable variables under the legislative guidelines would be erroneous. But because Willson was not scored based on the legislative guidelines, we will not address these arguments. This Court reviews a trial court's imposed sentence for abuse of discretion.⁴ An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes.⁵

B. LEGAL STANDARDS

An abuse of discretion exists if the defendant's sentence violates the principle of proportionality.⁶ This principle "requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender."⁷ A judge's decision on the score of the sentencing guidelines will be upheld if there is evidence to support the score.⁸

Sentencing judges are not required to follow the judicial guidelines because the guidelines do not have the force of law.⁹ "Thus, the claim of a miscalculated variable is not in itself a claim of legal error" under the judicial guidelines.¹⁰ Accordingly, "application of the guidelines states a cognizable claim on appeal only where (1) the factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is

⁴ *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

⁵ *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

⁶ *Milbourn*, 435 Mich at 636.

⁷ *Id.*

⁸ *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993).

⁹ *People v Raby*, 456 Mich 487, 496; 572 NW2d 644 (1998).

¹⁰ *People v Mitchell*, 454 Mich 145, 175; 560 NW2d 600 (1997).

disproportionate.”¹¹ Where a defendant’s sentence falls within the judicial scoring guidelines, it is presumed proportionate unless the defendant proves otherwise due to unusual circumstances.¹²

C. *BLAKELY* CHALLENGE

Citing *Blakely v Washington*,¹³ Willson argues that there was no basis for his OV scores since the underlying facts were not found beyond a reasonable doubt. Willson also argues that there was no basis for the OV scores because he did not admit to the underlying facts. However, this Court and the Michigan Supreme Court have consistently rejected this argument and we need not address it further.¹⁴

D. 50-POINT SCORE FOR OV 12

Under OV 12, 50 points are warranted where the defendant committed “2 or more criminal sexual penetrations” that “aris[e] out of the same criminal transaction.”¹⁵ The sentencing manual defines “transaction” as “[t]he acts occurred in a continuous time sequence and displayed a single intent or goal.”¹⁶ In *People v Raby*,¹⁷ Judge SMOLENSKI wrote that “a defendant’s ongoing penetrations of a victim over an extended period can constitute acts that occurred in a continuous time sequence and displayed a single intent or goal.” Accordingly, in *Raby*, this Court concluded that the sentencing court did not err in scoring 50 points under OV 12 of the judicial guidelines where the “[d]efendant molested or penetrated the victim daily for more than two years.”¹⁸ And on appeal, the Michigan Supreme Court indicated that it had “no disagreement with that conclusion” even though it determined that it need not reach that scoring question.¹⁹

In this case, we conclude that the facts of record support the scoring of OV 12. The PSIR outlines that the sexual abuse occurred between 100 and 150 times. The complainant also stated that she had sex with Willson “a lot” of times. The complainant named many specific places where she was sexually abused and testified that the abuse occurred every year on her birthday, Willson’s birthday, and Willson’s anniversary. The continued abuse supports the 50-point score because it occurred on a regular basis over an extended period of time.

¹¹ *Id.* at 177.

¹² *People v Sharp*, 192 Mich App 501, 505; 481 NW2d 773 (1992).

¹³ *Blakely v Washington*, 542 US 296, 301; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

¹⁴ *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

¹⁵ Michigan Sentencing Guidelines Manual (1988), p 45.

¹⁶ *Id.*, p 10.

¹⁷ *People v Raby*, 218 Mich App 78, 83 554 NW2d 25 (1996), *aff’d* 456 Mich 487 (1998).

¹⁸ *Id.* at 83 (SAAD and BANDSTRA, JJ., concurring), 88 (MARKMAN, J., concurring).

¹⁹ *Id.* at 83.

E. 15-POINT SCORE FOR OV 5

We note that the scoring of OV 5 was not in error. Under OV 5, 15 points are scored where the “[v]ictim was moved to another place of greater danger or to a situation of greater danger, or was held captive significantly beyond that which was necessary to commit the offense.”²⁰ The complainant’s testimony established that Willson took the complainant to places where Willson’s actions were concealed from observation both at home²¹ and various locations away from the home.²²

F. FAILURE TO PRESERVE ERROR FOR OV 4 SCORE

Willson’s arguments about error with OV 4 were not properly preserved for appeal. Therefore, we will not address the merits of the arguments. But even if we were to consider Willson’s argument under the plain error rule,²³ Willson could not establish the prejudice required because changes in the OV 4 score would not affect the appropriate guidelines range.²⁴

III. FAILURE TO CONSIDER MITIGATION EVIDENCE

A. STANDARD OF REVIEW

Since Willson is challenging the constitutionality of the trial court’s alleged failure to consider mitigating evidence and because this constitutional challenge was not raised before the trial court, the Court’s review is limited to plain error affecting Willson’s substantial rights.²⁵

B. LEGAL STANDARDS

Plain error review has three requirements that must be met to avoid forfeiture.²⁶ First, error must have occurred.²⁷ Second, the error must have been plain (that is, clear and obvious).²⁸ Finally, the plain error must have affected substantial rights.²⁹ The third requirement generally

²⁰ Michigan Sentencing Guidelines Manual, p 44.

²¹ *People v Hack*, 219 Mich App 299, 313; 556 NW2d 187 (1996).

²² *People v Jarvi*, 216 Mich App 161, 163; 548 NW2d 676 (1996).

²³ *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

²⁴ *Drohan*, 475 Mich at 163-164.

²⁵ *Carines*, 460 Mich at 763-764.

²⁶ *Id.* at 763.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

requires a showing of prejudice and it is the defendant who bears the burden of persuasion with respect to prejudice.³⁰

C. ANALYSIS

Willson argues that the trial court failed to consider mitigation evidence, including his strong family support. Willson also asserts that the nature and length of the sexual abuse coupled with Willson's alcohol abuse support the inference that he has a mental disease or defect. This suggests that a downward departure from the guidelines is appropriate. Willson asserts that the trial court should have evaluated the potential for rehabilitation through alcohol, drug, and psychiatric treatment. Finally, Willson alleges that the trial court failed to articulate why the imposed sentence was proportionate.

The record suggests that the trial court was aware of all valid mitigating factors—including Willson's strong family support—and presumably took them into account.³¹ Also, we note that Willson reported no substance abuse problem or mental health issues. Further, there is no established requirement that a sentencing court must order an assessment of the defendant's rehabilitative potential through treatment programs on its own will. Rather, MCR 6.425(A)(1)(e) requires that the PSIR include "the defendant's medical history, substance abuse history, if any, and if indicated, a current psychological or psychiatric report." As to the allegation that the trial court did not articulate the reasons why Willson's maximum and minimum sentences are proportionate, we again stress that a sentence within the guidelines is presumed proportionate.³²

There is no recognized requirement that a trial court articulate why a minimum sentence within the guidelines is proportionate beyond acknowledgment of the guidelines.³³ Moreover, the trial court does not need to articulate why it came to a certain maximum sentence when the statute provides for "life or any term of years."³⁴ In the present case, the record clearly demonstrates that the trial court relied on the sentencing guidelines.

IV. CRUEL AND UNUSUAL PUNISHMENT

A. STANDARD OF REVIEW

A trial court's imposed sentence is reviewed for abuse of discretion.³⁵ An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled

³⁰ *Id.*

³¹ *People v Nunez*, 242 Mich App 610, 618; 619 NW2d 550 (2000).

³² *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987).

³³ *People v Bailey (On Remand)*, 218 Mich App 645, 646-647; 554 NW2d 391 (1996).

³⁴ MCL 750.520b(2)(a).

³⁵ *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

outcomes.³⁶ An abuse of discretion exists if the defendant’s sentence violates the principle of proportionality.³⁷ This principle “requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.”³⁸

B. ANALYSIS

Willson failed to establish a mistake or unusual circumstance that would transform his presumptively proportionate sentence into cruel and unusual punishment.³⁹ Therefore, we will not address the merits of the argument.

V. CONCLUSION

For the reasons stated above, we conclude that the trial court committed no error when it scored Willson 50 points for OV 12 and 15 points for OV 5. We also conclude that Willson’s arguments about error with OV 4 were not properly preserved for appeal, and Willson could not establish the prejudice required because changes in the OV 4 score would not affect the appropriate guidelines range. In addition, we conclude that Willson’s reliance on *Blakely v Washington* provides no redress as this Court and the Michigan Supreme have consistently rejected the argument that there was no basis for the OV scores when the defendant does not admit to the underlying facts. We further conclude that the trial court did not commit plain error affecting Willson’s substantial rights regarding his mitigation evidence. The trial court’s sentence was within the sentencing guidelines and is presumed proportionate. Since Willson failed to establish mistake or unusual circumstances, the sentence does not rise to the level of cruel and unusual punishment.

We affirm.

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck

³⁶ *Babcock*, 469 Mich at 269.

³⁷ *Milbourn*, 435 Mich at 636.

³⁸ *Id.*

³⁹ *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790, (2002), quoting *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997) (“a proportionate sentence is not cruel and unusual” punishment).