STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED February 19, 2013
v	No. 310108 Eaton Circuit Court
JOSHUA JAMES WHITTUM, Defendant-Appellee.	LC No. 10-020332-FH

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

PER CURIAM.

The prosecution appeals by delayed leave granted the trial court's resentencing of defendant to concurrent prison terms of two years each for his plea-based convictions of four counts of child sexually abusive activity, MCL 750.145c(2).[1] We again reverse and remand.

Defendant's convictions resulted from his having exchanged sexually revealing imagery of himself with several girls between 14 and 17 years old. The parties agreed that as part of the plea bargain that defendant's minimum sentences for child sexually abusive activity would not exceed 48 months' imprisonment, which was slightly higher than the low end of the range recommended by the sentencing guidelines.

At the original sentencing, the trial court expressed concern that the guidelines minimum was overly harsh, given how widespread in the population the mischief defendant engaged in was, along with defendant's lack of a criminal record, the victims' consensual participation in the activity, defendant's family responsibilities and support, his work history, and his having cooperated with law enforcement all the way to offering his guilty plea. The court elected to depart from the guidelines and impose two-year minimum sentences for the convictions of child sexually abusive activity.

[1] Defendant also pleaded guilty to three counts of distribution of obscene material to a minor, MCL 722.675, and one count of attempted such distribution, MCL 750.92, and received concurrent sentences of one year incarceration for each.

The prosecution appealed. This Court rejected as valid reasons for a downward departure that defendant pleaded guilty, that voluntary dissemination of sexual imagery was commonplace among young adults, that defendant had no prior criminal record, that defendant's family members and a former employer wrote letters favorable to him, that defendant had graduated from high school, and that defendant had family responsibilities, on the ground that none was so exceptional as to keenly grab the attention, and thus did not constitute substantial or compelling reasons to depart. *People v Whittum*, unpublished opinion per curiam of the Court of Appeals, issued January 19, 2012 (Docket No. 301798), p 4. The Court vacated defendant's sentences for child sexually abusive activity and instructed the trial court on remand to resentence defendant within the guidelines, or to articulate the reasons behind any decision to depart from them, while admonishing the trial court that if again departing, it should confine its reasons for doing so to substantial and compelling, objective and verifiable, factors. *Id.* at p 5.

At resentencing, the trial court re-imposed its earlier sentences for child sexually abusive activity. The court announced several reasons for the departure that this Court had previously rejected, but implied that if some reasons were invalid it nonetheless deemed any valid ones reason enough for the departure. The trial court thus failed to appreciate that this Court's earlier decision concerning the validity of certain factors continued to bind it as law of the case.

> Under the law of the case doctrine, an appellate court ruling on a particular issue binds the appellate court and all lower tribunals with regard to that issue. The law of the case mandates that a court may not decide a legal question differently where the facts remain materially the same. The doctrine applies to questions specifically decided in an earlier decision and to questions necessarily determined to arrive at that decision. [*Webb v Smith*, 224 Mich App 203, 209; 568 NW2d 378 (1997) (citations omitted).]

Further, we decline, in this instance, to overlook the trial court's failure to distinguish valid from invalid sentencing considerations simply because the court stated that any valid factors included within an inventory of invalid ones would have justified the same result. Accordingly, we again remand this case for resentencing for defendant's convictions of child sexually abusive activity.

The prosecution argues that resentencing should take place before a different judge. We agree that such action is appropriate in this instance. See *People v Hughes*, 165 Mich App 548, 550; 418 NW2d 913 (1987) (reassignment is appropriate where the "original judge would reasonably be expected upon remand to have substantially difficulty in putting out of his . . . mind views or findings determined to be erroneous").

Reversed and remanded for resentencing before a different judge. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Michael J. Kelly