

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
April 18, 2013

v

CARLOS ALBERTO NAVA, JR.,
Defendant-Appellant.

No. 310726
Ottawa Circuit Court
LC No. 11-035763-FC

Before: WILDER, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

Defendant Carlos Alberto Nava, Jr. appeals as of right his convictions for three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (person under 13). The trial court sentenced defendant to 180 to 600 months' imprisonment on Count I of his CSC I offenses and to 300 to 600 months' imprisonment for Counts II and III. We affirm.

Defendant's sentences on Counts II and III were imposed pursuant to MCL 750.520b(2)(b), which provides that an individual who is 17 years of age or older and who commits the offense of CSC I against a victim who is less than 13 years of age shall be sentenced to a minimum of 25 years' (300 months') imprisonment.¹

Defendant argues that the 25-year mandatory minimum sentence is cruel and/or unusual punishment under the Michigan and United States Constitutions. We recently rejected this same argument in *People v Benton*, 294 Mich App 191, 203-207; 817 NW2d 599 (2011). Accordingly, we conclude that defendant's constitutional claim lacks merit because both the doctrine of stare decisis and the Michigan Court Rules require this Court to adhere to *Benton's* resolution of the issue. See MCR 7.215(C)(2), (J)(1); *People v Waclawski*, 286 Mich App 634, 677; 780 NW2d 321 (2009).

¹ The mandatory 25-year minimum was established by 2006 PA 169 and took effect in 2006. Thus, this mandatory minimum did not apply to defendant's actions in Count I because that crime occurred before 2006.

Next, defendant argues that the 25-year mandatory minimum sentence set forth in MCL 750.520b(2)(b) violates the separation of powers doctrine. “Statutes are presumed to be constitutional and must be so construed unless their unconstitutionality is readily apparent.” *People v Russell*, 266 Mich App 307, 310; 703 NW2d 107 (2005) (quotation omitted). Ordinarily, we review de novo the issue of whether a statute violates the constitutional principle of separation of powers. *People v Garza*, 469 Mich 431, 433; 670 NW2d 662 (2003). However, defendant failed to preserve this issue. Thus, our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

In Michigan, the separation of powers doctrine is set forth in Const 1963, art 3, § 2:

The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

Regarding criminal sentencing, the Michigan Constitution provides that “[t]he legislature may provide for indeterminate sentences as punishment for crime and for the detention and release of persons imprisoned or detained under such sentences.” Const 1963, art 4, § 45. Thus, “the ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature.” *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001); see also *People v Raihala*, 199 Mich App 577, 579 n 1; 502 NW2d 755 (1993) (emphasis added) (“[T]he power to establish sentences, including indeterminate sentences, is an *exclusively* legislative function.”). The judiciary, by contrast, imposes sentences and administers the sentencing statutes enacted by the Legislature. *Hegwood*, 465 Mich at 436-437. When it imposes a sentence, the judiciary has the power to exercise discretion. *People v Conat*, 238 Mich App 134, 147; 605 NW2d 49 (1999). “However, this sentencing discretion is limited by the Legislature, which has the power to establish sentences.” *Id.*; see also *Hegwood*, 465 Mich at 440 (“[T]he Legislature may impose restrictions on a judge’s exercise of discretion in imposing [a] sentence.”). “[T]here are offenses with regard to which the judiciary has no sentencing discretion, offenses about which discretion is sharply limited, and offenses regarding which discretion may be exercised under the terms set forth in the sentencing guidelines legislation.” *Garza*, 469 Mich at 434. Importantly, the only discretion sentencing courts have is that which is given to them by the Legislature; courts do not, on their own, have discretion in imposing and administering sentences. *People v Palm*, 245 Mich 396, 404; 223 NW 67 (1929); *Conat*, 238 Mich App at 147.

In the case at bar, defendant argues that MCL 750.520b(2)(b) violates the separation of powers doctrine because it removes discretion from trial courts by precluding them from imposing a minimum sentence of less than 25 years’ imprisonment. The statute does not violate the separation of powers doctrine simply because the Legislature chose to limit the discretion available to sentencing courts. See *Garza*, 469 Mich at 434; *People v Hall*, 396 Mich 650, 658; 242 NW2d 377 (1976). Instead, the mandatory minimum sentence is an example of the Legislature executing its exclusive constitutional authority to provide for penalties for criminal offenses. *Hegwood*, 465 Mich at 436. And to the extent that the Legislature limited a sentencing court’s discretion with respect to CSC I sentences, that also was part of the Legislature’s vested constitutional authority. *Id.* at 440.

In an analogous situation, our Supreme Court in *Hall* held that a mandatory term of life imprisonment for felony murder did not violate the separation of powers doctrine. The Court held that “[t]he separation of powers clause, Const 1963, art 3, § 2, is not offended by the legislature delegating sentencing discretion in part and retaining sentencing discretion in part.” *Hall*, 396 Mich at 658. Applying *Hall* to the present case leads us to the conclusion that the Legislature “retaining sentencing discretion in part” by requiring a 25-year mandatory minimum sentence for a CSC I conviction similarly does not offend the separation of powers clause. Although the 25-year mandatory minimum set forth in MCL 750.520b(2)(b) restricts the trial court’s sentencing discretion, it is a “permissible legislative limitation on the sentencing discretion of [the] courts.” *Conat*, 238 Mich App at 148.

Defendant’s reliance on *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), and *United States v Gall*, 552 US 38; 128 S Ct 586; 169 L Ed 2d 445 (2007), is misplaced. Both *Apprendi*, 530 US at 490, and *Booker*, 543 US at 232-235, 243-244, are inapposite to the issue in the case at bar because they addressed the issue of whether a sentencing court could enhance a defendant’s *maximum* sentence *beyond that which was authorized by Congress* based on facts that were neither submitted to the jury nor established beyond a reasonable doubt. Contrastingly, the issue in the case at bar involves a *minimum* sentence that is *expressly authorized by the Legislature* and based on facts determined by the jury, i.e., that the offender was 17 years of age or older and the victim was less than 13 years of age. Additionally, *Gall*, 552 US at 59-60, does not support defendant’s position because the case held that when the sentencing court departed from the federal sentencing guidelines, a reviewing court was to apply a deferential abuse of discretion standard to its review. Here, there is no dispute as to how this Court should review defendant’s sentence. Thus, these cases are inapplicable to the case at bar and they do not provide support for defendant’s position.

Defendant also argues that the mandatory 25-year minimum sentence provided by MCL 750.520b(2)(b) is unconstitutional because it increased his minimum sentence beyond the minimum sentence available under the recommended minimum sentence as calculated under the legislative guidelines. He argues that the trial court’s inability to sentence in accordance with the guidelines establishes a violation of the separation of powers doctrine. While defendant is correct that the 25-year minimum is higher than the minimum set forth by the calculated guidelines in his case, the guidelines do not apply because the Legislature established a statutory minimum in MCL 750.520b(2)(b). As the Legislature explained under MCL 769.34(2)(a), “If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections, *the court shall impose sentence in accordance with that statute. Imposing a mandatory minimum sentence is not a departure under this section.*” (Emphasis added.) Therefore, the fact that defendant’s minimum guidelines range was lower than the 25-year mandatory minimum is of no consequence related to defendant’s claim of a violation of the separation of powers doctrine.

Finally, in addition to arguing that the 25-year minimum sentence imposed by MCL 750.520b(2)(b) impermissibly intrudes on the constitutional authority of the judiciary, defendant argues that the statute violates the separation of powers doctrine because it gives unconstitutional authority to the executive branch – namely, prosecutors. He contends that the mandatory 25-year minimum sentence gives prosecutors, who choose which charges to bring, unconstitutional

authority over punishments by allowing them to select charges that carry lengthy mandatory minimum sentences.

We rejected a similar argument in *Conat*, 238 Mich App at 148-150, because courts, not prosecutors, impose sentences. Nothing in the plain language of MCL 750.520b(2)(b) disturbs that paradigm. Thus, “[t]he court still retains its judicial function of imposing a sentence as prescribed by law; the prosecutor does not impose the sentence.” *Id.* As we recognized in *Conat*, a prosecutor’s exercise of his charging discretion will routinely affect the sentence that is available to a court upon conviction. *Id.* at 149. However, “[t]hese decisions do not offend notions of separation of powers, but are merely instances of the executive branch, through the office of the prosecutor, exercising its power to enforce the laws by bringing criminal charges against offenders.” *Id.* at 150. The separation of powers doctrine is not violated simply “where prosecutors are given the authority to decide which crimes to charge a defendant with and where this decision affects the severity of punishment imposed if the defendant is convicted.” *Id.*

In sum, defendant has not demonstrated the existence of plain error with regard to his argument that the 25-year mandatory minimum set forth in MCL 750.520b(2)(b) violates the separation of powers doctrine.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Michael J. Riordan