Court of Appeals, State of Michigan

ORDER

People of MI v Gerald Howard Martis

Docket No. 300216

LC No. 09-014234-FC

Pat M. Donofrio
Presiding Judge

Cynthia Diane Stephens

Amy Ronayne Krause
Judges

For the reasons stated below, the Court VACATES defendant's sentences of April 30, 2010, and REMANDS the case to the trial court for resentencing with further clarification of the factual bases for defendant's convictions and sentencing guidelines scores.

It appears from the record that defendant came to the attention of the police when a 15-year-old mentally impaired girl reported to a school counselor that defendant had inappropriately touched her. In the course of the investigation, the police executed a search warrant and, among other things, confiscated defendant's computer. The police found an apparent photography studio and physical books of photographs, as well as a vast amount of horrific child pornography on the computer depicting other children in addition to many photos of the 15-year-old. Defendant was charged with an array of offenses, all apparently pertaining to the child pornography found on his computer. The record does not disclose whether any of the photographs upon which his charges were based depicted the 15-year-old. Defendant was apparently not charged with any other offense—or possibly any offense at all—pertaining to the 15-year-old. Pursuant to a plea arrangement, defendant pleaded guilty to two counts of using a computer to commit a crime, MCL 752.797(3)(f), and two counts of child sexually abusive activity, MCL 750.145c(2); the remaining charges were dismissed.

Initially, we are unable to determine what facts form the basis of those convictions. The factual basis for defendant's pleas, as adduced on the record pursuant to MCR 6.302(D)(1), was that he downloaded child pornography. That factual basis would be consistent with MCL 750.145(C)(4), knowing possession of child sexually abusive material, a charge that was dismissed. It would also be consistent with MCL 752.797(3)(f). But MCL 750.145c(2) prohibits generally the production of child sexually abusive material, not mere possession or acquisition. Defendant's apparent conduct pertaining to the 15-year-old would, insofar as we can determine, constitute a factual basis supporting convictions under MCL 750.145c(2), but no factual basis for any of defendant's pleas involved the 15-year-old. We are therefore unable to determine with any degree of confidence for what conduct defendant was convicted.

We are further unable to determine the factual bases for the sentencing guidelines scores that defendant challenges on appeal. "[O]ffense variables are generally offense specific." *People v Sargent*, 481 Mich 346, 348; 750 NW2d 161 (2008), however, whether or not the offense arises from the same transaction should be taken into account. *Id.* at 351. "Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *People v McGraw*, 484 Mich 120, 133; 771 NW2d 655 (2009).

OV 4 is scored at ten points if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). It appears that the trial court properly recognized that psychological injury to the 15-year-old's family is impermissible under OV 4. The trial court might have properly concluded that psychological injury occurred to the 15-year-old herself, despite the prosecutor's statement that she appeared not to have sustained any psychological trauma. However, if all charges pertaining to the 15-year-old were dismissed, it would be entirely improper to consider any psychological trauma she might have sustained. Again, we are unable to so determine.

The gravamen of the problem is that it is painfully clear that all of the individuals depicted in the photographs are victims, and moreover, they are victims of truly hideous acts. However, it is *not* clear whether they are victims *of defendant's convicted offenses*. If any of defendant's convictions relate to anything he did to the 15-year-old or if he was responsible for the creation of any of the pictures, then OV 4 could be scored at 10 points for those offenses. Otherwise, the record does not show that defendant's act of downloading child pornography, no matter how horrific, *itself* caused serious psychological injury to any person. Defendant's scores may be correct, but we cannot so determine from this record. The images in defendant's possession are, as the record unambiguously shows, shocking and appalling. But defendant's guidelines must be scored on the basis of the offenses for which he was actually convicted.

The scoring of OV 7 is for aggravated physical abuse. MCL 777.37. OV 7 should be scored at 50 points if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered *during the offense*" (emphasis added). OV 7 should be scored at 0 points if "[n]o victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered *during the offense*" (emphasis added). We find the same troubling lack of clarity in the record regarding OV 7 as we did for OV 4. The instructions for OV 7 clearly limit a court's consideration to a defendant's conduct "during the offense." The record does not show that the act of downloading images—which were unambiguously shown by the record to be horrific—is itself an act that would constitute sadism, torture, or excessive brutality to any person. However, defendant's conduct toward the 15-year-old could well constitute an appropriate basis for scoring OV 7 at 50 points.

According to MCL 777.39, OV 9 should be scored at 25 points if "[t]here were 10 or more victims who were placed in danger of physical injury or death, or 20 or more victims who were placed in danger of property loss." A "victim" includes "each person who was placed in danger of physical injury or loss of life or property." Defendant was scored 25 points for each of the four convictions. Again, if any of defendant's convictions involved the 15-year-old, we would find no error in this scoring. But the downloading of images onto a computer does not itself place a specific victim in danger of physical injury or death. The trial court noted that "without the demand for this kind of material it's clear that we wouldn't have these kinds of victims." But this may be too broad a conclusion: clearly, if defendant had paid for, traded for, or in any way encouraged or participated in the production of any of the images he downloaded, the trial court would be correct. Downloading child pornography in a context that benefits the producer in any way could be considered part of a transaction that does place a victim in danger of physical injury. It is less clear that downloading something freely available does so: such an act may be too attenuated from the physical conduct directed at the depicted children to constitute part of the same transaction for purposes of OV 9.

The record here does not unambiguously reveal how defendant downloaded the pictures. He claimed at his plea hearing that he did so accidentally, and the prosecution contended that the extensiveness of his collection belied that claim. Either way, the only factual basis for defendant's plea,

MCR 6.302(D)(1), was that he downloaded child pornography. Furthermore, the record is unclear whether any of the *charged* photographs involved the 15-year-old or were taken by defendant himself. Again, we simply cannot determine whether OV 9 was properly scored.

Finally, OV 10 addresses the exploitation of a vulnerable victim. MCL 777.40. To score 15 points under OV 10, the defendant must have exploited a vulnerable victim and engaged in conduct that meets the statutory definition of "predatory." *People v Cannon*, 481 Mich 152, 162; 749 NW2d 257 (2008). The term "predatory conduct" includes "only those forms of 'preoffense conduct' that are commonly understood as being 'predatory' in nature, e.g. lying in wait and stalking, as opposed to purely opportunistic criminal conduct or 'preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequent escape without detection.'" *People v Huston*, 489 Mich 451, 462; 802 NW2d 261 (2011), quoting *Cannon*, 481 Mich at 162. The "preoffense conduct" need not be directed at a particular or specific victim. *Huston*, 489 Mich at 459. The record is replete with evidence that defendant engaged in terrible and predatory conduct toward a specific vulnerable victim, the above-mentioned 15-year-old. However, again, we cannot determine on this record whether any of defendant's convictions arose out of any conduct involving her.

We simply cannot determine whether any of the challenged offense variable scores were proper, and so we must remand for clarification. We are not unmindful of the trial court's observation that this was one of the most horrific cases the learned and experienced trial judge had ever seen, and we appreciate that there may, in fact, be some basis for departing from the sentencing guidelines, and so we do not hold that defendant's sentence is necessarily inappropriate even if the trial court determines that some of the offense variable scores are improper. A trial court may consider "facts underlying uncharged offenses, pending charges, and acquittals" in deciding whether to depart from the sentencing guidelines. *People v Parr*, 197 Mich App 41, 46; 494 NW2d 768 (1992); *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994). Even if those facts concern offense or offender characteristics that are taken into account to some degree in the scoring of the guidelines, a court may base a departure on those facts if the characteristic has been given inadequate or disproportionate weight, MCL 769.34(3)(b), and other requirements for departure are satisfied. See *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003).

Because this Court is limited to considering the record, and because we cannot determine whether defendant's sentences are proper on the basis of this record, we VACATE them and we REMAND for resentencing. The trial court shall provide on the record further articulation of the factual bases for defendant's convictions and sentencing guidelines scores. The trial court is not precluded from imposing the same sentence. The trial court shall cause a transcript of the hearing to be prepared and

filed within 35 days after the completion of defendant's resentencing hearing. We retain jurisdiction in this matter. The parties may file supplemental briefs with this Court within 21 days after hearing transcript is filed.

A true copy entered and certified by Larry S. Royster, Chief Clerk, on

January 12, 2012
Date

Chief Clerk