# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODERICK LAMONT NASH,

Defendant-Appellant.

UNPUBLISHED
May 3, 1996

No. 163291
LC No. 92-004859

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARNELL MITCHELL, a/k/a
KRISTOPHER MITCHELL,

Defendant-Appellant.

No. 163634
LC No. 92-004859

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LORENZO THOMAS,

Defendant-Appellant.

No. 165797
LC No. 92-004859

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Before: Murphy, P.J., and Corrigan and Peter J. Houk,* JJ.

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*Circuit Court Judge, sitting on the Court of Appeals by assignment.

PER CURIAM.

In these consolidated appeals, defendants Roderick Lamont Nash, Darnell Mitchell, and Lorenzo Thomas were charged with multiple counts of first-degree criminal sexual conduct, MCL 750.520b(1)(d); MSA 28.788(2)(1)(d). Defendants Nash and Thomas had a bench trial and defendant Mitchell had a jury trial. Defendant Nash was convicted of one count of first-degree CSC, MCL 750.520b(1)(d); MSA 28.788(2)(1)(d), and two counts of assault and battery, MCL 750.81; MSA 28.276. He was sentenced to a fifteen to thirty year term of imprisonment and ninety days in the county jail, respectively. Defendant Mitchell was convicted of two counts of third-degree CSC, MCL 750.520d; MSA 28.788(4), and two counts of assault and battery, MCL 750.81; MSA 28.276. He was sentenced to an eight to fifteen year term of imprisonment and ninety days in the county jail, respectively. Defendant Thomas was convicted of one count of first-degree CSC, MCL 750.520b(1)(d); MSA 28.788(2)(1)(d), and two counts of assault and battery, MCL 750.81; MSA 28.276. He was sentenced to a twenty to forty year term of imprisonment and ninety days in the county jail, respectively. Each defendant now appeals as of right. We affirm the convictions and sentences of defendants Mitchell and Thomas, but reverse defendant Nash's convictions.

Defendants' convictions stem from events which occurred between February 4, 1992, and March 12, 1992, while they were inmates at the Wayne County Jail. The victim, Quinton Brooks, was an inmate of ward 502 of the Wayne County Jail. Between February 11, 1992, and March 12, 1992, defendants Nash, Mitchell and Thomas repeatedly beat Brooks and forced him to engage in acts of anal and oral sexual intercourse.

I. Appeal of Defendant Nash, #163291.

Defendant Nash argues that the trial court erred in denying his request to have this matter brought to trial within 180 days. We agree. Because his 180-day rule claim is outcome determinative, we do not reach defendant Nash's remaining issues. We are compelled to reverse on the basis of this claim.

MCL 780.131(1); MSA 28.969(1) provides in part:

> Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint.

The purpose of the 180-day rule is to dispose of untried charges against prison inmates so that sentences may run concurrently. *People v McCullum,* 201 Mich App 463, 465; 507 NW2d 3 (1993). Because MCL 780.131; MSA 28.969(1) imposes the 180-day rule only when the defendant is sentenced to state prison, the rule does not, in general, affect charges against inmates lodged in county jails, *People v Wyngaard,* 151 Mich App 107, 112; 390 NW2d 694 (1986), or defendants who are free on bond. *People v Taylor,* 185 Mich App 1, 4; 460 NW2d 582 (1990). The 180-day rule also does not apply to crimes perpetrated while the defendant was imprisoned or while the defendant was a prison escapee. MCL 780.131(2); MSA 28.969(1)(2), *People v Smith,* 438 Mich 715, 717-719; 475 NW2d 333 (1991).

The 180-day rule does not require that trial commence within 180 days. Rather, if apparent good-faith action is taken well within that period, and the prosecutor proceeds promptly toward readying a case for trial, the rule is satisfied. MCR 6.004(D), *People v Hendershot,* 357 Mich 300, 303; 98 NW2d 568 (1959); *People v Bell,* 209 Mich App 273, 278; 530 NW2d 167 (1995). However, the burden is on the prosecutor to justify the delay. *People v Wolak,* 153 Mich App 60, 64; 395 NW2d 240 (1986). Unexplained delays are chargeable to the prosecution. *People v England,* 177 Mich App 279, 285; 441 NW2d 95 (1989). When a prosecutor fails to make a good faith effort to bring a defendant's criminal charge to trial within 180 days of the time the prosecutor knows that the defendant is incarcerated in a state prison, the defendant is entitled to have the charge dismissed with prejudice. MCR 6.004(D)(2), *People v Taylor,* 199 Mich App 549, 552; 502 NW2d 348 (1993).

The record in this case reveals that defendant Nash was incarcerated in the Wayne County Jail on August 3, 1991, on an unrelated first-degree murder charge. He was convicted of second-degree murder on February 28, 1992, and was sentenced to life imprisonment on March 15, 1992. Thus, defendant Nash was incarcerated in the Wayne County Jail from August 3, 1991 to March 15, 1992, first awaiting trial and then awaiting sentencing in the unrelated murder case. The instant offenses occurred between February 11, 1992 and March 12, 1992, at the Wayne County Jail. Defendant was not charged with the instant offenses, however, until April 8, 1992, after he had been sentenced to life imprisonment for second-degree murder. In other words, although the instant offenses were all perpetrated before defendant Nash was sentenced in the unrelated murder case, he was not charged in the instant case until after he was sentenced to prison. Trial commenced in this case on January 11, 1993, approximately 277 days after defendant was charged.

On June 12, 1992, defense counsel for defendant Nash first requested that Nash's trial be conducted within 180 days of his arraignment. At the pretrial conference held on July 24, 1992 and July 31, 1992, defense counsel again requested the trial be conducted within 180 days of the arraignment. The trial court held that because defendant's sentence in the instant case might be consecutive to the life sentence in the unrelated murder case, the 180-day rule would not apply. Trial was then scheduled for January 11, 1993. Defense counsel renewed her 180-day rule motion the first day of trial, but the motion was denied on the basis that since the judge previously assigned to the case

had already denied the motion, his ruling would stand. The only indication on the record as to the reason that trial was delayed for approximately 277 days was "docket congestion." The trial court acknowledged that docket congestion would be chargeable against the prosecution.

As above indicated, the 180-day rule applies to persons incarcerated in a state penal institution. *Wyngaard, supra,* 151 Mich App 112. Whether the 180-day rule applies to inmates confined at a county jail depends on the circumstances of their assignment to that facility. *England, supra,* 177 Mich App 284. Here, although defendant was being held in the Wayne County Jail awaiting trial in an unrelated murder case when the incidents in question in this case occurred, he had been sentenced to life imprisonment in the unrelated murder case prior to charges being brought in this case. Under these circumstances, we believe that defendant was an "inmate" detained in a local facility awaiting incarceration in a state prison and the 180-day rule applies. *Id.* 277 days elapsed between the arraignment on April 10, 1992, and the commencement of trial on January 11, 1993. The only reason for the delay appears to be docket congestion. This Court has repeatedly held that delay attributable to docket congestion is inexcusable and must be attributed to the prosecution. *England, supra,* 177 Mich App 285; *People v Wolak,* 153 Mich App 60, 66-67; 395 NW2d 240 (1986); *People v Harris,* 132 Mich App 427; 346 NW2d 571 (1984); *People v Love,* 132 Mich App 423; 346 NW2d 534 (1983). It does not appear from the record that any of the delay was attributable to defendant Nash. Under these circumstances, we conclude that the 180-day rule was violated.

We note that the 180-day rule does not apply in a case where a mandatory consecutive sentence is required upon conviction. *People v Smith,* 438 Mich 715, 718; 475 NW2d 333 (1991); *People v McCullum,* 201 Mich App 463, 465; 507 NW2d 3 (1993). In this case, we do not believe that the sentencing judge was required to impose a consecutive sentence.

MCL 768.7a; MSA 28.1030(1) (1) provides in pertinent part:

> (1) A person who is incarcerated in a penal or reformatory institution in this state . . . and who commits a crime during that incarceration . . . which is punishable by imprisonment in a penal or reformatory institution in this state shall, upon conviction of the that crime, be sentenced as provided by law. The term of imprisonment imposed for the crime shall begin to run at the expiration of the term or terms of imprisonment which the person is serving or has become liable to serve in a penal or reformatory institution in this state. [Emphasis added.]

The purpose of the consecutive sentencing statute is to deter persons convicted of one crime from committing other crimes by removing the security of concurrent sentencing. The statute should be construed liberally in order to achieve the deterrent effect intended by the Legislature. *People v Smith,* 423 Mich 427, 442; 378 NW2d 384 (1985); *People v Weatherford,* 193 Mich App 115, 118; 483 NW2d 924 (1992).

While it is true that Nash was incarcerated in the county jail on a murder charge when he committed the instant felony offenses, he was not sentenced for murder until after the instant offenses were committed.[1] A county jail, when utilized in the execution of a sentence or a term of probation, is a

"penal or reformatory institution" for purposes of MCL 768.7a; MSA 28.1030(1) (1). *People v Dukes,* 198 Mich App 569, 570; 499 NW2d 389 (1993); *Weatherford, supra,* 193 Mich App 120; *People v Sheridan,* 141 Mich App 770; 367 NW2d 450 (1985). By implication, when a county jail is not utilized in the execution of a sentence or a term of probation but is merely used to confine a person charged with a crime, it is not a "penal or reformatory institution" for purposes of the consecutive sentence statute. Here, when Nash committed the instant offenses, he was not under sentence or on probation. He was awaiting trial and then sentencing for murder. Under these circumstances, the Wayne County Jail was not being utilized in the execution of a sentence or a term of probation and, therefore, defendant Nash was not a person incarcerated in a penal or reformatory institution to which the consecutive sentence statute applies. See *Dukes, supra,* 198 Mich App 570; *Weatherford, supra,* 193 Mich App 120; *Sheridan, supra,* 141 Mich App 770. It appears, therefore, that the sentencing judge was not required to impose a consecutive sentence under the consecutive sentencing statute.

MCL 768.7b(2)(a); MSA 28.947(2)(2)(a) provides that a sentencing judge may impose consecutive sentencing under certain circumstances and states in pertinent part:

> (2) Beginning January 1, 1992, if a person who has been charged with a felony, pending the disposition of the charge, commits a subsequent offense that is a felony, upon conviction of the subsequent offense . . . the following shall apply:
>
> (a) Unless the subsequent offense is a major controlled substance offense, the sentences imposed for the prior charge offense and the subsequent offense <u>may</u> run consecutively. [Emphasis added.]

This Court has held that a case is "pending disposition" until the defendant is sentenced for the offense. *People v Dukes,* 189 Mich App 262, 267; 471 NW2d 651 (1991). Here, defendant was originally charged with murder in an unrelated case and committed the instant felony offenses before being sentenced in the murder case. Under MCL 768.7b(2)(a); MSA 28.947(2)(2)(a), the sentencing judge was permitted to impose a consecutive sentence upon defendant Nash but he was not required to do so.

Because the sentencing judge was not required to impose a consecutive sentence upon defendant Nash under either MCL 768.7a; MSA 28.1030(1) (1) or MCL 768.7b(2)(a); MSA 28.947(2)(2)(a), the 180-day applies to this case. *McCullum, supra,* 201 Mich App 465. As we indicated above, the 180-day rule was violated. The trial court was, therefore, divested of its jurisdiction in this matter and was required to dismiss the charges against defendant Nash with prejudice. MCL 780.133; MSA 28.969(3); *England, supra,* 177 Mich App 286.

II. <u>Appeal of Defendant Mitchell, #163634</u>.

Defendant Mitchell argues that the trial court erred when it denied his motion that codefendants Nash and Thomas appear in civilian clothes. We disagree.

Before the jury was impaneled, defendant Mitchell, who was going to have a jury trial, requested that codefendants Nash and Thomas, who were going to have bench trials, be dressed in civilian clothing. The trial court denied this request. A defendant can be denied due process by being compelled to attend trial while wearing prison clothes. *People v Lee,* 133 Mich App 299, 300; 349 NW2d 164 (1993). However, to justify reversal of a conviction on the basis of improper attire, the defendant must show that prejudice resulted. *People v Meyers (On Remand),* 124 Mich App 148, 164; 335 NW2d 189 (1983).

Defendant Mitchell claims that he was denied a fair trial when he was compelled to try his case before a jury with his codefendants dressed in jail attire. Although defendant admits that no published cases support his position, he relies on an unpublished opinion that held that a defendant was denied a fair trial when he was compelled to try his case before a jury with his codefendant dressed in jail attire. We note that an unpublished opinion is not precedentially binding on this Court. MCR 7.215(C)(1). Further, the facts in that case are distinguishable from these facts. Not only was the codefendant in that case wearing jail attire, his clothing was torn, he was unable to button his shirt, and the jury could see his bare chest. In this case, the record does not reflect that Mitchell's codefendants were so attired. Defendant Mitchell has failed to demonstrate that he was prejudiced by his codefendants' dress. Because defendant Mitchell has failed to show prejudice, reversal is not required. *Meyers, supra,* 124 Mich App 164.

III. Appeal of Defendant Thomas, #165797.

Defendant Thomas claims that the insufficient evidence was presented at trial to support his conviction of first-degree CSC. We disagree. Under MCL 750.520b(1)(d)(ii); MSA 28.788(1)(d)(ii), a person is guilty of first-degree criminal sexual conduct if he engages in sexual penetration with another, is aided or abetted by one or more other persons, and the actor uses force or coercion to accomplish the sexual penetration.

Quinton Brooks testified that defendant Thomas, aided by defendant Nash, repeatedly came into Brooks' cell at the Wayne County Jail, beat Brooks, and then forced him to engage in acts of anal and oral intercourse. Viewing this evidence in a light most favorable to the prosecution, we hold that a rational trier of fact could have found that the essential elements of first-degree CSC were proven beyond a reasonable doubt. *People v Petrella,* 424 Mich 221, 268-270; 380 NW2d 11 (1985); *People v Wardlaw,* 190 Mich App 318, 319; 475 NW2d 387 (1991).

Finally, we reject defendant Thomas' claim that his twenty- to forty-year sentence for first-degree CSC is disproportionate under *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990). In Michigan, a defendant's sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *Milbourn, supra,* 435 Mich 635-636. Sentences which fall within the guidelines' range are presumed to be neither excessively severe nor unfairly disparate. *People v Broden,* 428 Mich 343, 354-355; 461 NW2d 1 (1987); *People v Tyler,* 188 Mich App 83, 85; 468

NW2d 537 (1991). Nevertheless, a sentence within a guidelines' range can conceivably violate the principle of proportionality in unusual circumstances. *Milbourn, supra,* 435 Mich 661.

Here, defendant Thomas' minimum sentence was at the lowest end of the sentencing guidelines' recommended range of twenty to forty years, and we believe his sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender. First, the offense committed by defendant Thomas was extremely serious. The victim testified that Thomas, aided by Nash, repeatedly beat him and forced him to engage in acts of anal and oral intercourse. This was done while the defendants and the victim were housed in the Wayne County Jail. Furthermore, defendant Thomas had previously been convicted of four counts of assault with intent to commit first-degree CSC, and was serving a five- to ten-year sentence when he committed the instant offenses. The fact that the victim did not make a victim's impact statement to the probation department does not lessen the seriousness of the offenses.

In light of the seriousness of the offenses and defendant Thomas' prior criminal record, we conclude that the minimum sentence, which was at the lowest end of the guidelines' range, does not violate the principle of proportionality. *Milbourn, supra,* 435 Mich 635-636.

We affirm the convictions and sentences of defendants Mitchell and Thomas. Defendant Nash's convictions are reversed.

/s/ William B. Murphy
/s/ Maura D. Corrigan
/s/ Peter D. Houk

[1] The instant offenses occurred between February 4, 1992 and March 12, 1992, at the Wayne County Jail. Defendant was convicted of second-degree murder on February 28, 1992, but he was not sentenced until March 15, 1992.