STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROY LEE SMITH,

Defendant-Appellant.

UNPUBLISHED
June 7, 1996

No. 165443
LC No. 91-24012-FC

Before: Holbrook, Jr., P.J., and Fitzgerald and W.J. Nykamp,* JJ.

PER CURIAM.

Defendant was convicted by a jury of third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4), and subsequently pleaded guilty of being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. He was sentenced to serve 15 to 50 years in prison. He appeals as of right and we affirm.

Defendant first argues that he was denied his right to a speedy trial under Article III of the Interstate Agreement on Detainers (IAD), MCL 780.601; MSA 4.147(1). We find this argument to be without merit.

Article III(a) of the IAD, provides in pertinent part:

Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officers' jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint. [MCL 780.601; MSA 4.147(1).]

In this case, defendant began his term of imprisonment within the meaning of the IAD on July 7, 1992, when he began serving his prison sentence in Florida at the Lake Butler facility. Prior to that, he

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

was detained in a Florida county jail, apparently on a probation violation. "The IAD does not apply to pretrial detainees or to parolees awaiting revocation because neither has actually 'entered upon a term of imprisonment.'" *People v Wilden (On Rehearing),* 197 Mich App 533, 539; 496 NW2d 801 (1992). Thus, the IAD did not apply to defendant at the time of the LEIN communications between Michigan and Florida, which occurred in March and April of 1992, or the Michigan Office of the Governor's requisition for rendition in May 1992. Once defendant began his term of imprisonment, a formal detainer was lodged within 180 days of defendant's trial date of January 11, 1993.

Furthermore, because a formal detainer was not lodged against defendant while he was a prisoner, prior to September 9, 1992 at the earliest, there was no corresponding duty on the part of Florida officials to inform defendant of a detainer's existence or his rights under the IAD. In sum, we conclude that defendant was not denied his right to a speedy trial under the IAD.

Defendant next argues that the trial court abused its discretion in denying his motion for a new trial on grounds of newly discovered evidence. We find no abuse of discretion.

This Court remanded this matter to the trial court for an evidentiary hearing on defendant's motion for a new trial. At the hearing, defendant presented a newly discovered witness who was apparently the first person to see the complainant after the assault. The essence of the witness' testimony was that he did not recall any abrasions on the complainant's face. Defendant asserts that this evidence impeaches the complainant's credibility that she was struck numerous times across the face, and bolsters defendant's testimony that complainant consented to sexual intercourse. The standard for granting a new trial on the basis of newly discovered evidence requires a showing by defendant that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) probably would have caused a different result, and (4) was not discoverable and producible at trial with reasonable diligence. *People v Miller (After Remand),* 211 Mich App 30, 46-47; 535 NW2d 518 (1995). In this case, the trial court denied defendant's motion for a new trial, explaining as follows:

> The People concede that the evidence meets the first and fourth prongs of the [newly discovered evidence] test. However, upon examination of the trial transcript, the Court finds that [the witness'] testimony does not contradict the evidence that the [complainant] was hit in the face, nor does it lend credibility to defendant Smith's testimony that he did not strike complainant other than one slap. Thus, [the witness'] testimony is cumulative and would not render probable a different result on retrial.
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> The Court finds it highly improbable that, taking [the witness'] testimony into account, a different outcome would result upon retrial. Thus, defendant Roy Lee Smith has not met the second and third prongs of the . . . test.

Having reviewed the transcript of the evidentiary hearing, we find no abuse of discretion by the trial court in denying defendant's motion for new trial. The witness' proposed testimony would not have

resulted in a different outcome at trial. See, e.g., *People v Kennedy,* 22 Mich App 524, 528; 177 NW2d 669 (1970); *People v Boynton,* 46 Mich App 748, 750; 208 NW2d 523 (1973).

Defendant next argues that the trial court abused its discretion in denying his request that the prosecutor provide a bill of particulars. We find no abuse of discretion. Defendant was adequately apprised of the charges against him, given that (1) the prosecutor issued a "long form" information pursuant to MCL 767.45; MSA 28.985, (2) a preliminary examination was conducted in this case, at which the complainant testified regarding the alleged offense, and (3) at defendant's request, the prosecutor noted the specific pages of the preliminary examination transcript which set forth the facts of the charged offense. Moreover, the fact that defendant was tried on only one count of CSC where the complainant testified that multiple acts occurred, the jury was properly permitted to find defendant guilty on any one alleged instance. *People v Yarger,* 193 Mich App 532, 536; 485 NW2d 119 (1992). Accordingly, the trial court did not abuse its discretion in denying defendant a bill of particulars.

Finally, we find no merit to defendant's argument that his sentence is disproportionately harsh. Defendant was convicted as a four-time habitual offender. The sentencing court articulated the following reasons for defendant's 15 to 50 year sentence:

> The Defendant was on probation at the time of this offense. This sentence was imposed for the protection of society, because of the seriousness of the crime, and the serious effect the crime has had on the victim. Also, in reviewing the defendant's past record, it appears he is getting worse instead of better.

Under the circumstances of this offense and this offender, we find no abuse of discretion by the court. The sentence is valid and proportional. *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990); *People v Cervantes,* 448 Mich 620; 532 NW2d 831 (1995).

We note, however, that defendant's judgment of sentence appears to indicate that defendant was sentenced to serve *two* concurrent prison terms for his CSC conviction and his habitual offender conviction. Whether this was a typographical error or a procedural error, we remand this matter to the trial court with directions to amend the judgment of sentence to indicate that defendant's 15 to 50 year sentence for his CSC conviction is vacated. See MCL 769.13; MSA 28.1085; *People v Hardin,* 173 Mich App 774, 778; 434 NW2d 243 (1988).

Affirmed, but remanded to the trial court as directed above. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Wesley J. Nykamp
/s/ E. Thomas Fitzgerald