

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

June 25, 1996

Plaintiff-Appellee,

v

No. 177591

LC No. 90-012974

RANDY TOMLIN,

Defendant-Appellant.

Before: White, P.J, and Smolenski, and R.R. Lamb,* JJ.

PER CURIAM.

Defendant appeals as of right his two to fifteen year sentence for third-degree criminal sexual conduct, MCL 750.420d(1)(b); MSA 28.788(4)(1)(b), which was imposed upon resentencing. We affirm.

First, defendant argues that he should be released from prison because he will continue to be denied parole on the basis that he maintains his innocence. This Court lacks subject matter jurisdiction to address this issue. The release of a prisoner on parole shall be granted solely upon the initiative of the parole board, and the board has complete discretion to grant or deny parole. MCL 791.235(1); MSA 28.2305(1); *People v Gregorczyk*, 178 Mich App 1, 10; 443 NW2d 816 (1989). However, the decision of a parole board in granting or denying parole is appealable by the prisoner to the circuit court in the county from which the prisoner was committed. MCL 791.234(7); MSA 28.2304(7). In this case, defendant appealed his denial of parole to the Recorder's Court, and was unsuccessful. Thereafter, no further action was taken by defendant. This issue cannot now be raised on appeal from an order of resentencing.

Next, we find that defendant's current sentence is proportionate under *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). A sentence imposed within the sentencing guidelines range is presumptively neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). In this case, defendant's sentence of two to fifteen years' imprisonment fell below the guidelines' range. The court indicated the departure was due to defendant's

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

exemplary prison record. Further, contrary to defendant's assertion, the record does not suggest that the trial court considered that defendant maintained his innocence as a factor in increasing his sentence. Defendant's eligibility for parole, as well as the parole decision itself, are beyond the power of the sentencing court. It is therefore improper to argue that the sentence is disproportionate because defendant will "probably" serve his maximum sentence due to his refusal to admit guilt.

We find no merit to defendant's argument that his sentence violates the indeterminate sentence act, MCL 769.8; MSA 28.1080, because he will necessarily serve his maximum sentence of fifteen years due to his refusal to admit guilt. A sentence that provides for a minimum term not exceeding two-thirds of the maximum is a proper indeterminate sentence. *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972). Defendant's minimum sentence of two years does not exceed two-thirds of his maximum term of fifteen years.

We also find no merit in defendant's argument that his sentence constitutes cruel and unusual punishment because it requires him to give up his belief in his innocence, and to submit to sexual offender counseling. Defendant in this issue is again objecting to the conditions of confinement, and not the sentence imposed. The trial court did not order sexual offender counseling upon resentencing, nor did it require defendant to admit guilt. As stated above, this appeal as of right of defendant's sentence is not a proper forum for review of the practices of correctional authorities.

We reject defendant's assertion that he is being denied equal protection by having to attend group therapy sessions as a condition of parole for the same reason.

Finally, we reject defendant's argument that, based on the trial court's imposition of a minimum sentence which defendant had already served, it must have intended that he be immediately released upon resentencing. We find no suggestion in the trial court's comments upon resentencing to support this argument, and we find it meritless.

Affirmed.

/s/ Helene N. White
/s/ Michael R. Smolenski
/s/ Richard R. Lamb