

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERALD J. BAUER, JR.,

Defendant-Appellant.

UNPUBLISHED

July 2, 1996

No. 173465

LC No. 93 123382 FC

Before: Michael J. Kelly, P.J., and Bandstra and S.B. Miller,* JJ.

PER CURIAM.

Defendant was convicted in the Oakland County Circuit Court of one count of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and two counts of second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3) on his plea of nolo contendere. Defendant was sentenced to ten to twenty years on the CSC I and ten to fifteen years on each of the CSC II convictions. All the terms are concurrent. Defendant appeals as of right. Defendant challenges only the sentence and does not attack the plea..

The three incidents arise out of one night's contact with the victim, an eleven-year-old boy and friend of the family. Defendant was convicted on testimony that he placed his finger in the victim's anus and thereafter twice rubbed his buttocks. There was no claim of physical injury to the victim at the preliminary examination held on February 22, 1993.

Following sentencing defendant made a timely motion for resentencing based upon incorrect scoring of the guidelines. Defendant objected to the score of 25 points on OV 2 for physical injury. This scoring was challenged as erroneous at the time of sentencing, however, the court accepted the PSI report that a medical examination had verified physical injury to the victim's anal area. The prosecutor also told the court that she had been advised by the victim's mother that the child suffered problems with his bowels. The victim's mother then addressed the court at sentencing and said: ". . .and my son is suffering physically, there's a partial lack of bowel control."

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

The victim's impact and statement contained in the PSI also contains a statement attributable to the victim's mother that the victim was physically examined by his pediatrician who "told us this is not uncommon with an anal penetration."

Sentencing was held on February 7, 1994, and the victim statement (made by the mother) and the PSI were prepared for that event. Defendant's motion for resentencing was filed on March 7, 1994, and supported, in part, by a copy of a year old medical report of February 24, 1993 from Mercy Care Family Medical Center covering a sports physical exam of the victim. The examiner had been asked to examine the anal area because of a recent sexual molestation. The examiner found no evidence of injury. It was noted that a copy of the report was to be sent to Detective Cook at the request of the victim's mother. This court notes that this medical examination was held forty days after the penetration of the victim and almost a year before the complaints of bowel problems were reported at the time of sentencing.

Defendant's counsel raised the issue of the scoring of 0V2, as the basis for his motion for resentencing filed March 7, 1994. The testimony of the victim at the preliminary examination held February 22, 1993, was that he was not injured and did not require medical attention. Two days after the preliminary hearing on February 24, 1993, the victim was examined by Dr. Amy Kowalski at Mercy Care Family Medical Center. Dr. Kowalski reported to the victim, his mother and Detective Cook that her medical finding was that the victim suffered "no scars, hematomas, tears or anal dilation". The doctor concludes her report with the comment that her examination resulted in "normal findings".

In the opinion and order of the court denying defendant's motion for resentencing and reconsideration of the scoring of 0V2 at 25 points the testimony of the victim at the preliminary exam and the medical exam by Dr. Kowalski of February 24, 1993, were not considered. The opinion and order of the court of August 24, 1994 considers only the PSI report and the statement of the victim's mother, which refers to an unidentified pediatrician's uncorroborated hearsay statement.

It is our opinion that the trial court abused its discretion in the assessment of 25 points for 0V2 of the sentence guidelines. We must reverse.

Defendant also raises the issue of the court's refusal to allow the defendant's treating psychologist to speak at the sentencing as error. The court did not err in refusal of this request. MCR 6.425(D)(2)(c); *People v Lawson*, 172 Mich App 498, 501; 432 nw2d 354 (1988).

Conviction affirmed, the sentence is set aside and this matter is remanded for resentencing in accordance with the corrected scoring of 0V2 of the sentencing guidelines.

Affirmed in part; reversed in part and remanded for resentencing.

/s/ Michael J. Kelly

/s/ Stephen B. Miller