

STATE OF MICHIGAN
COURT OF APPEALS

IN RE KENNETH BRENT ARGUE, Minor.

UNPUBLISHED
July 19, 1996

STATE OF MICHIGAN,

Petitioner-Appellee,

v

No. 182413
LC No. 94009869 DL

KENNETH BRENT ARGUE, Minor,

Respondent-Appellant.

Before: Young, P.J., and Corrigan and M.J. Callahan,* JJ.

PER CURIAM.

Respondent appeals of right the probate court's order committing him to a residential treatment program for adolescent sexual offenders. Respondent pleaded guilty to one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), involving his coercion of five-year-old boy to perform fellatio on him in a public park. Respondent's crime occurred less than five months after the court placed him on probation for two counts of fourth-degree criminal sexual conduct. We affirm.

Respondent first argues that the probate court abused its discretion in committing him to an inpatient residential program for adolescent sexual offenders, rather than allowing him to remain at home on a tether and participate in an outpatient treatment program. Respondent contends that the probate court's decision contradicts the experts who testified that he would be better served by remaining at home. We disagree.

We review a probate court's sentencing decision for an abuse of discretion. *People v Coles*, 417 Mich 523; 339 NW2d 440 (1983). That standard requires us to determine whether the sentence is proportionate to the circumstances of the offense and the offender. *People v Milbourn*, 435 Mich

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

630; 461 NW2d 1 (1990). The probate court did not abuse its discretion when it ordered respondent to participate in a residential treatment program because the sentence was proportionate to the serious nature of the offense and the history of the offender.

Contrary to respondent's claim, the experts agreed that residential treatment would benefit him. Although certain experts testified that respondent was making some progress in the outpatient treatment program, other evidence suggested that his primary motivation for continued participation in treatment stemmed from the threat of residential placement and detention. Moreover, expert testimony suggested that residential placement would promote rehabilitation by reducing respondent's isolation and separating him from his mother, upon whom he was overly dependent.

Factors including respondent's recidivist, sexually abusive behavior given his youth and the family dynamics plainly justified his placement in a residential treatment facility. We cannot say that the probate court abused its discretion in choosing to confine respondent.

Next, respondent contends that he is entitled to a new dispositional hearing because the assigned social worker was biased against him. The only support for the allegation that the social worker was biased arose from a passing remark by the principal of respondent's school. No evidence whatsoever supports the claim that the social worker was "out to get" respondent. Our review of the record reflects that this assertion is without merit.

Further, respondent contends that the ex parte communication that occurred between the social worker and the probate judge regarding his case violated his right to counsel and to confront the witnesses against him. We disagree. This Court examines an ex parte communication to determine whether it caused sufficient prejudice to the defendant to warrant reversal. *People v France*, 436 Mich 138; 461 NW2d 621 (1990), *People v Timothy Smith*, 423 Mich 427; 378 NW2d 384 (1985). Respondent's counsel did not object to the communications after he learned of them; his failure to object is itself evidence of a lack of prejudice. *France, supra* at 143.

The court explained that its communications with the social worker concerned procedural and not substantive matters. Further, respondent was not prejudiced because the court revealed the substance of the communications on the record, thereby giving respondent an opportunity to answer. Moreover, the probate court did not rely on these communications to resolve the case. In *People v Smith, supra*, our Supreme Court acknowledged that ex parte communications between probation officers and judges, whether written or oral, may threaten counsel's ability effectively to challenge unreliable information. The Court established, however, that resentencing is only necessary when the sentencing judge obtains information about the defendant from the probation officer that is not included in the presentence report. In this case, the court did not obtain any new information that had not been discussed during prior hearings or that was not otherwise part of the record.

In *People v France, supra*, our Supreme Court also classified the communications between court officers and jury members as administrative, substantive, or housekeeping. It determined that communications of an “administrative nature” raise no presumption of prejudice. *Id.* at 143. Because the communications between the court and the social worker were not substantive, we do not presume prejudice. Respondent has not satisfied his burden of proof.

Affirmed.

/s/ Robert P. Young, Jr.

/s/ Maura D. Corrigan

/s/ Michael J. Callahan