STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTEO MORA,

Defendant-Appellant.

UNPUBLISHED
January 21, 1997

No. 184288
Kent Circuit Court
LC No. 91-056046-FH

Before: Neff, P.J., and Smolenski and D.A. Roberson,* JJ.

PER CURIAM.

Defendant appeals as of right his sentence of ten to fifteen years' imprisonment for a conviction of third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4). We affirm.

In exchange for the dismissal of other charges pursuant to a plea agreement, defendant pleaded guilty to third-degree criminal sexual conduct arising out of a sexual assault wherein defendant performed fellatio on a thirteen-year-old male friend of defendant's stepbrother. Defendant's sentencing information report specified a sentence guidelines range of four to ten years' imprisonment, based, in part, on a score of twenty-five points for offense variable twelve (criminal sexual penetrations) (OV 12) for, as stated in the presentence investigation report, defendant's conduct in also inserting the victim's penis into defendant's own rectum during defendant's sexual assault of the victim. At the sentencing hearing, defendant objected to the scoring of OV 12 on the ground that the anal penetration did not occur. The court determined that it did not need to resolve the factual dispute concerning the scoring of OV 12 where defendant had already admitted to one penetration, i.e., the act of fellatio. The court sentenced defendant to a term of ten to fifteen years' imprisonment.

Defendant appealed, and this Court, on its own motion, ordered that defendant's case be remanded to the trial court for resentencing. The basis for this Court's remand order was that error had occurred in using the penetration involving fellatio to score OV 12 where the instructions concerning OV

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* Recorder's Court judge, sitting on the Court of Appeals by assignment.

12 provide that "[i]n . . . CSC 3rd do not score the one penetration that forms the basis of the conviction offense."

At the resentencing hearing, the prosecution stated that it would not request an evidentiary hearing concerning the number of penetrations involved in defendant's sexual assault of the victim. With OV 12 thus scored zero, defendant's sentencing guidelines range was recalculated at three to eight years' imprisonment. The court again sentenced defendant to a term of ten to fifteen years' imprisonment. It is this sentence that defendant appeals as of right.

Defendant raises a number of grounds for his argument that he is entitled to another resentencing, this time before a different judge. Our review of sentencing is limited to determining whether the trial court abused its discretion. *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993).

Defendant argues that his ten- to fifteen-year sentence, which exceeds the corrected minimum guidelines range of three to eight years by two years, is disproportionate. We disagree. At the sentencing hearing, the sentencing court noted that when a resentencing is ordered a reduction in sentence is generally warranted where the defendant has sustained a good prison record, but stated that no such reduction was warranted in this case where defendant, as indicated in the updated presentence investigation report, had received major prison misconducts for possession of dangerous contraband, substance abuse, theft and sexual assault. A defendant's misbehavior after arrest, including prison misconduct, is a legitimate sentencing consideration. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995).

The sentencing court further concluded that a departure from the guidelines was warranted in this case where defendant's criminal history of three sexual assaults (his prison misconduct, a prior conviction for fourth-degree criminal sexual conduct, and his conviction in this case, of which the conduct that formed the basis for his conviction in this case occurred while he was on probation for his prior conviction of fourth-degree criminal sexual conduct) indicated that defendant was a sexual predator whose prognosis for the future was poor, thus requiring that the public be protected from defendant. A trial court's consideration of factors not adequately addressed in the guidelines (here, defendant's status as a repeat sexual offender) becomes more compelling in a plea-based sentencing when the plea was in exchange for dismissal of other charges (here, habitual offender and habitual sexual offender charges). *People v DuPrey*, 186 Mich App 313, 318; 463 NW2d 240 (1990). We have reviewed the record and conclude that defendant's sentence is proportionate to the offense and the offender. *People v Nantelle*, 215 Mich App 77, 83-84; 542 NW2d 667 (1996).

The sentencing court did not refuse to consider defendant's denial of his prison major misconduct for sexual assault. Rather, the court noted that defendant had proffered an explanation but stated that the fact remained that defendant had received a major prison misconduct for such an offense. Further, the court's comments did not evidence an intent to simply impose the maximum possible sentence on defendant or an intense hostility toward defendant. The language used by a court when

imposing sentence need not be tepid. *People v Antoine*, 194 Mich App 189, 191; 486 NW2d 92 (1993). Sentencing is the time for comments against felonious, antisocial behavior. *Id*.

Finally, defendant contends that the sentencing court erred in departing from the guidelines without completing the "departure reason section" in the sentencing information report. We agree. A sentencing court is required to articulate its reasons for departing from the guidelines not only on the record at sentencing but also on the departure reason section of the sentencing information report. *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987); Michigan Sentencing Guidelines (2d ed), p 7. However, defendant had notice of the sentencing court's reasons for departing from the guidelines by virtue of the court's enunciation of those reasons on the record at the sentencing proceeding. Likewise, our review of defendant's sentence was not hindered by the court's error in light of this record. Moreover, defendant fails to specify on appeal how he was prejudiced by the sentencing court's error. Thus, we conclude that the sentencing court's error in failing to complete the departure reason section of the sentencing information report was harmless. *Fleming*, *supra* at 419; *People v Kreger*, 214 Mich App 549, 554-555; 543 NW2d 55 (1995).

Affirmed.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Dalton A. Roberson