

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY JOHN LaVALLEY,

Defendant-Appellant.

UNPUBLISHED

February 28, 1997

No. 194831

Berrien Circuit Court

LC No. 95-001976-FC

Before: Murphy, P.J., and Markey and A.A. Monton,* JJ.

PER CURIAM.

Defendant pleaded guilty to second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), second offense, MCL 750.520f; MSA 28.788(6), and was sentenced to eight to fifteen years' imprisonment. He appeals as of right and we affirm.

At a motion for resentencing, the sentencing court admitted to a scoring error of offense variable twelve (OV 12), based on *People v Polus*, 197 Mich App 197; 495 NW2d 402 (1992), which changed the guidelines range from five to ten years to four to ten years. However, the sentencing court went on to state that, because the same sentence would have been imposed under the four to ten years guidelines range, resentencing was unnecessary. Defendant argues that a scoring error can never be regarded as harmless and that he should be resentenced. However, under *Polus*, the sentencing court's denial of resentencing was a proper exercise of discretion. *Id.* at 201-202. Recently, a conflict panel of this Court overruled *Polus* in regard to the scoring of OV 12. *People v Raby*, 218 Mich App 78; 554 NW2d 25 (1996). Under *Raby*, there was no scoring error in the original guidelines. Therefore, defendant was not sentenced under improperly scored guidelines and his claim that he should be resentenced is essentially moot. The sentencing court has clearly expressed its opinion that whether OV 12 is scored at zero or fifty, defendant's sentence should be eight to fifteen years. Defendant is not entitled to be resentenced.

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

Also, contrary to defendant's claim, we are of the opinion that based on the circumstances surrounding the offense and the offender, defendant's eight- to fifteen-year sentence is proportionate. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1980).

Affirmed.

/s/ William B. Murphy

/s/ Jane E. Markey

/s/ Anthony A. Monton