

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL B. WILLMOT,

Defendant-Appellant.

UNPUBLISHED
October 10, 1997

No. 197486
Oakland Circuit Court
LC No. 91-111494 FC

Before: Doctoroff, P.J., and Cavanagh and Saad, J.J.

MEMORANDUM.

On prior appeal of right, No. 157189, defendant's conviction of first degree criminal sexual conduct was affirmed. This Court also conditionally affirmed a 12 to 40 year enhanced sentence, provided that defendant was properly adjudged a second offender. On remand, the trial court concluded that defendant had not been properly proceeded against as a recidivist, and a resentencing was granted, in which defendant received 8 to 20 years' imprisonment. Defendant was assessed a Crime Victim's Fund fee pursuant to MCL 780.905; MSA 28.1287 (905); while the trial judge spoke of also requiring defendant to pay \$150 for HIV testing, the judgment of sentence does not reflect such an imposition of costs. Defendant contends that his new sentence is disproportionate to the offense and the offender, and that imposition of a Crime Victim's Fund fee or HIV testing fee represents a violation of ex post facto principles, U.S. Const, Art I, §9, Clause 3. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At sentencing, defendant did not object to the imposition of either assessment, nor did he file a post-sentencing motion addressed to this subject. Accordingly, his ex post facto claims are waived. *United States v Smitherman*, 956 F2d 1131 (CA Fed, 1992). In any event, the issue is without merit. The HIV testing fee for sex offenders is both a public health measure and may contribute to creation of a DNA data bank to assist in the identification, arrest, and prosecution of future offenders. Accordingly, it does not punish convicted offenders and therefore does not violate the prohibition against ex post facto punishment. *Rise v State of Oregon*, 59 F3d 1556, 1562 (CA 9, 1995), cert den ___ US ___; 116 S Ct 1554; 134 L Ed 2d 656. Similarly, the Crime Victim's Fund fee is a fractional reimbursement to the State for the costs engendered in providing services to crime victims, not

necessarily to the victim of the particular crime and more likely to the victims of future crimes. It is less a punishment than a tax on offenders whose wrongful conduct engenders extensive outlays not only for crime victims' services, but for police, prosecutors, and the judiciary, none of which defendant has been asked to defray. This is likewise not punishment. *People v Matthews*, 202 Mich App 175; 508 NW2d 173 (1993).

Defendant's 8 to 20 year sentence is within the guideline range, and presumptively proportionate to the offense and the offender, even though it represents, on the minimum, the maximum permitted by the guideline range. *People v Vettese*, 195 Mich App 235, 247; 489 NW2d 514 (1992). Here, the circumstances of the offense reflect defendant sexually abusing his daughter when she was 9 years old or younger, and the presentence report, the accuracy of which was unchallenged, reflects sexual abuse of defendant's son as well. On prior appeal of right, this Court affirmed the trial court's determination that defendant had displayed a lack of remorse which was properly taken into account at sentencing. Defendant's institutional adjustment is similarly less than exemplary. Defendant has not overcome the presumption.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Mark J. Cavanagh

/s/ Henry W. Saad