STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOB LYNN OLDENBURG,

Defendant-Appellant.

UNPUBLISHED
November 14, 1997

No. 161294
St. Joseph Circuit Court
LC No. 90-006490-FH

Before: Young, P.J., and Markman and Smolenski, JJ.

PER CURIAM.

Defendant pleaded guilty to first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and was sentenced to ten to twenty years in prison. Defendant appealed to this Court and upon our remand, the lower court ordered defendant to undergo a psychological evaluation and subsequently held a competency hearing to determine whether defendant was competent to enter a plea voluntarily. The lower court determined that defendant's plea was voluntarily and competently given. Defendant appeals this order by right. We affirm.

The conviction of an accused while incompetent to stand trial violates due process. *People v Hardesty*, 139 Mich App 124, 133; 362 NW2d 787 (1984). Michigan's incompetency statute provides the following:

> A defendant to a criminal charge shall be presumed competent to stand trial. He shall be determined incompetent to stand trial only if he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner. The court shall determine the capacity of a defendant to assist in his defense by his ability to perform the tasks reasonably necessary for him to perform in the preparation of his defense and during his trial. [MCL 330.2020(1); MSA 14.800(1020)(1). See also MCR 6.125.]

We have held that the test for competency to stand trial announced in *Dusky v United States*, 362 US 402; 80 S Ct 788; 4 L Ed 2d 824 (1960), is the appropriate interpretation of the incompetency statute. *People v Belanger*, 73 Mich App 438, 447; 252 NW2d 472 (1977). The test from *Dusky* is two-part: whether the defendant has "sufficient present ability to consult with his or her lawyer with a

reasonable degree of rational understanding -- and whether the defendant has a rational as well as factual understanding of the proceedings." *Dusky, supra* at 402. The same test also applies in cases such as this one, where the defendant is not seeking trial but pleading guilty. *Belanger, supra* at 446-447. In *United States v Glover*, 596 F 2d 857, 867 (CA 9, 1979), the court addressed the issue of limited capacity to independently understand the proceedings:

> The fact that a defendant might not understand the proceedings unless they are explained to him in simple language would put an additional burden upon counsel, but certainly does not establish that the defendant is incompetent to stand trial.

The *Glover* Court concluded that the trial court's conclusion that the defendant was competent was not clearly erroneous in light of that the defendant had a "good knowledge of the facts surrounding his arrest and had an understanding of the charge against him." *Id*.

The ultimate determination of whether a defendant is competent to enter a plea cannot rest merely on the conclusion reached by a forensic center psychiatrist; instead, the weight to be accorded to the findings made, and the legal effect of such findings, must be the subject of a judicial determination and order. *People v Chase*, 38 Mich App 417, 421; 196 NW2d 824 (1972). The determination of a defendant's competence is within the trial court's discretion. *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990). We accordingly review the trial court's determination for an abuse of discretion. *People v Garfield*, 166 Mich App 66, 73; 420 NW2d 124 (1988).

Here, two psychologists evaluated defendant and determined that he had an IQ of 53 and was mildly to moderately retarded. Both experts concluded that defendant was not competent at the time he entered his plea or at his sentencing.[1] However, the trial court concluded that he was competent. It relied on its own observations of defendant and information provided by the two experts. Despite his ultimate conclusion, Dr. Shazer testified to the following: that defendant was able to provide a detailed account of the incident at issue; that defendant sufficiently understood the nature and purpose of the proceedings and roles of the participants to assist his counsel; that his limitations posed special problems for his counsel but were not so severe as to render him unable to assist in his defense or to understand what was going on; and that defendant was able to act on his own as evidenced by choosing to reaffirm his plea after initially sending a letter (with the help of his cellmate) contesting the plea. A letter by Dr. Shazer, dated May 10, 1994, demonstrates defendant's understanding of the proceedings and of the quid pro quo involved in a plea bargain. In an October 17, 1994 letter, Dr. Shazer states that defendant's mental retardation did not render him unable to understand the proceedings or to effectively allocute (although he concludes that defendant neither "fully" understood the proceedings nor "effectively" exercised his right to allocute.) Dr. Abramsky, despite his ultimate conclusion, testified that defendant could understand the proceedings and cooperate with counsel to the extent that matters and choices could be made concrete, but lacked the ability to independently reason. At the hearing on remand, the trial judge pointed out at that arraignment was much longer than usual because he was seeking to determine defendant's level of understanding.

Defendant presents a reasonably close case regarding competence. At the hearing on remand, defendant's counsel (who is now defendant's appellate counsel) stated "I really think he falls just below

the threshold of what you need to understand for being prosecuted." In its opinion, the trial court similarly concluded that defendant's mental capacity was "marginal."

Under the competency statute, defendants are presumed to be competent. The psychiatrists' testimony indicates that defendant is capable of understanding the proceedings and assisting in his defense as long as things are explained to him "concretely". Our review of the plea and sentencing transcripts indicates that both the trial court and defense counsel made efforts to explain the proceedings and defendant's options in such concrete terms. Accordingly, we find no abuse of discretion in the trial court's determination that defendant was competent.

Defendant next claims that his counsel was ineffective at sentencing. Specifically he contends that counsel failed to request leniency, spoke negatively about defendant, and failed to properly explain sentencing matters in order to prepare defendant for allocution. In order to justify reversal of an otherwise valid conviction on the basis of ineffective assistance of counsel, "a defendant must show that a counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

"[T]he decision to address the court at sentencing is a tactical one." *People v Harris*, 185 Mich App 100, 105; 460 NW2d 239 (1990). Here, defendant's counsel made the tactical decision to assume that defendant would likely be incarcerated and to focus his argument on protective custody for defendant while incarcerated. Thus, this is not a case where defense counsel made no attempt to argue for mitigation of the sentence as in *Harris*, *supra* at 105. Regarding preparing defendant for allocution, the sentencing transcript indicates that defense counsel read the presentence report to defendant. In connection with the notice of right to appeal, the transcript demonstrates that in reviewing such documents with defendant, defendant's counsel was careful to explain items with which defendant might not be familiar. The record does not demonstrate that defendant's counsel failed to adequately prepare him for allocution. See *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). Accordingly, defendant fails to overcome the presumption that his counsel was effective at sentencing.

Defendant next claims that he was denied his right to a timely appeal. This Court remanded this case to the lower court on September 16, 1993. The lower court's opinion, which is now on appeal to this Court, was issued on April 30, 1997. Thus, the length of time of which defendant complains constitutes three and one-half years. However, defendant does not allege that the merits of the appeal itself have been affected by this delay, the requirement set forth by this Court in *People v Missouri*, 100 Mich App 310, 324-325; 299 NW2d 346 (1980). Delay in appellate review does not automatically entitle a defendant to a new trial. *Id*., at 325 (citing *People v Gorka*, 381 Mich 515, 520; 164 NW2d 30 (1969)). The remedy for dilatory review is review itself. *Id.* citing *Dowd v United States, ex rel Cook*, 340 US 206, 208 n 3; 71 S Ct 262; 95 L Ed 215 (1951). Because this Court's full consideration of the merits of defendant's appeal negates any claim of prejudice arising out of the delay in reaching this Court, defendant was not denied due process of law. Further, the period of time in question was not devoid of activity on defendant's case but was time during which defendant was examined three times by the two experts in this case. The lower court held four hearings on this case.

The actions causing delay in this case are, in part, ascribable to the schedules of defense counsel and defendant's expert, as defendant himself concedes. Finally, any actions of the lower court that caused delay are attributable, at least in part, to the trial judge's medical leave and effectively were outside of his control.

Finally, defendant claims that his sentence is disproportionate. This Court reviews sentences for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The principle of proportionality requires that sentences "be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id*. A minimum sentence within the guidelines' range is presumptively proportionate; a defendant must present "mitigating factors relating to his criminal history or the circumstances of [the offense at issue] to overcome this presumption." *People v Vettese*, 195 Mich App 235, 246-247; 489 NW2d 514 (1992).

Here, after defendant pleaded guilty to CSC-1, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), the lower court sentenced him to ten to twenty years' imprisonment. The statutory maximum for this conviction is life in prison. MCL 750.520b(2); MSA 28.788(2)(2). The guideline sentence range for the CSC conviction is five to ten years, which defendant conceded is accurate. Because defendant's minimum sentence was within the guidelines' range, his sentence is presumptively proportionate.

A defendant's lack of criminal history and minimum culpability are not unusual circumstances that overcome the presumption of proportionality. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Moreover, the reasons articulated on the record reveal that the sentencing court in this case considered and fairly balanced the items raised by defendant. For example, the trial judge's comments indicated that he had read the presentencing report, which detailed defendant's mental disability and emotional immaturity. Thus, the court was apprised of defendant's condition before sentencing. Indeed, the court noted that the prosecutor's opinion that defendant required intervention and treatment might well be accurate. In its sentence of defendant, the court included recommendations for protective custody, educational and vocational training, substance abuse counseling, and sexual offender counseling. In short, defendant's contrary conclusion about the evidence of his mental condition does not invalidate the lower court's sentence. See, e.g., *People v Wybrecht*, 222 Mich App 160, 173-174; 564 NW2d 903 (1997) (finding the defendant's sentence proportional, despite the parties' conflicting conclusions about the defendant's low IQ). Under these circumstances, defendant's sentence does not constitute an abuse of discretion because it is proportionate to the seriousness of the offense and the offender. *Milbourn, supra,* 435 Mich 636.

For these reasons, we affirm the order finding defendant competent.

/s/ Robert P. Young, Jr.
/s/ Stephen J. Markman
/s/ Michael R. Smolenski

[1] Apparently for strategic reasons, the challenge to defendant's competency was limited to his competency at the sentencing. Defendant withdrew his challenge to the plea and his counsel apparently did not want to risk the plea agreement in the event the court found that defendant was competent.