

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERALD LAWRENCE DUMAS,

Defendant-Appellant.

UNPUBLISHED

March 6, 1998

No. 198137

Otsego Circuit Court

LC No. 92-001736 FC

Before: Markey, P.J., and Doctoroff and Smolenski, JJ.

PER CURIAM.

On plea of guilty, defendant was convicted of one count of criminal sexual conduct in the first-degree, MCL 750.520b; MSA 28.788(2), involving his then five-year old daughter. As part of a plea bargain, additional counts involving the same victim were dismissed. Initially, defendant was sentenced to life imprisonment. On appeal of right from that sentence, docket number 162260, the case was remanded for resentencing based on an error in the scoring of the sentence guidelines. Again, defendant received a life sentence, but this time, this Court held that the sentence was disproportionate to the offense and the offender on appeal of right in docket number 175151. The present appeal of right results from defendant's new sentence, of thirty-seven to eighty years' imprisonment, imposed by a different judge. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

A great deal of argument at this latest resentencing was devoted to the subject of whether this Court's initial ruling concerning the scoring of the sentence guidelines, despite an intervening change in the law, bound the trial court under the law of the case doctrine. The trial court ultimately agreed with defendant that it did, but then found that material facts thus omitted from the scoring of the guideline range were relevant and material to the sentence to be imposed and justified a sentence outside the guideline range. This Court recently addressed the law of the case doctrine in this context, *People v Robinson*, ___ Mich App ___, ___ NW2d ___ (Docket Nos. 191237, 191238, 191766, issued 12/16/97). It may now be noted that this Court will in the future seldom have occasion to second-guess a trial court's scoring of the guideline range. *People v Mitchell*, 454 Mich 145, 175; 560 NW2d 600 (1997).

Before sentence was imposed, defendant challenged numerous portions of the presentence report, particularly assertions that the conviction offense represented only one of a series of sexual penetrations of both the individual victim and of her two younger siblings. There was also some question whether a description of defendant as having an antisocial personality disorder was correct. After conflicting evidence was introduced, the trial court found that defendant had on numerous occasions sexually penetrated both the individual victim and at least one of her sisters with a finger, his penis, or an object. In light of a police report in which the children's family doctor denied defendant's claim that he had been instructed to anally penetrate the children with his finger because of constipation, the court implicitly rejected defendant's contention that any such other incidents were at worst a misguided attempt at parental medical attention. The trial court also noted that defendant had accumulated a significant number of major misconduct adjudications while incarcerated, which reflected a poor prognosis for rehabilitation. The court further concluded that defendant's instruction to the victim not to tell anyone what he had done or "monsters" would "come and get her" inflicted psychological terrorism on the victim, for which the sentence guidelines did not account. The trial court further found that the victim suffers from emotional trauma years after the events, for which the guidelines give insufficient weight. The court also concluded that defendant has an antisocial personality disorder and that his continued mendacity concerning sexual abuse of his daughters reflects poorly on his prospects for rehabilitation.

Defendant contends that his sentence is disproportionate to the offense and the offender and is based on erroneous and unreliable information. We disagree. To the extent that the trial court made the findings of fact that the defense now contests, it had record support for each such finding, even though the defense introduced contrary evidence. This Court will not overturn a sentence on the basis of the trial court's determination of the credibility of a witness. *People v Lyons (After Remand)*, 222 Mich App 319, 323; 564 NW2d 114 (1997); *People v Hughes*, 217 Mich App 242, 248; 550 NW2d 871 (1996).

We think the trial court was amply justified in concluding that the sentence guidelines were simply not designed to provide useful guidance with respect to offenders of this ilk. *People v Merriweather*, 447 Mich 799, 807; 527 NW2d 460 (1994). Although the sentence is outside the guideline range, the key test of proportionality is not whether the sentence departs from or adheres to the recommended range, but whether it properly reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). The trial court had more than ample justification for the sentence imposed, including the repetitive nature of the conduct, defendant's refusal to accept responsibility, defendant's prison record, *People v Robinson, supra*, the aggravating characteristics of the offense, and the nature of the offense. The sentence imposed accordingly is proportionate to the perversity of the act of which defendant stands convicted and of other acts established by a preponderance of the evidence for sentencing purposes and is also proportionate to the offender notwithstanding his lack of a prior criminal record. *People v Lemons*, 454 Mich 234, 260; 562 NW2d 447 (1997).

Affirmed.

/s/ Jane E. Markey

/s/ Martin M. Doctoroff

/s/ Michael R. Smolenski