

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ORMOND FRANCIS FISH,

Defendant-Appellant.

UNPUBLISHED

June 4, 2002

No. 232964

Houghton Circuit Court

LC No. 98-001614-FH

AFTER REMAND

Before: Griffin, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

Defendant appeals as of right his resentencing after remand from this Court. We affirm. Defendant was originally sentenced to consecutive terms of ten to twenty years' imprisonment for first-degree home invasion, MCL 750.110a(2), and two to fifteen years' imprisonment for second-degree criminal sexual conduct, MCL 750.520c(1)(f). In defendant's initial appeal, this Court affirmed defendant's convictions but set aside the home invasion sentence as disproportionate to the seriousness of the offense and the offender, and remanded for resentencing, holding in pertinent part that "[h]is conduct must be punished, he should seek help for his drinking problem, but it does not appear nor did the trial court find that this defendant has a history of endangering others or that he presents a danger to the community." *People v Ormond Francis Fish*, unpublished opinion per curiam of the Court of Appeals, issued 6/6/2000 (Docket No. 217713) (footnote omitted). On remand, the trial court resentenced defendant to a consecutive sentence of eight to twenty years' imprisonment for the home invasion conviction and two to fifteen years for the criminal sexual conduct conviction.

In this appeal, defendant again claims that his sentence is disproportionate to the circumstances in violation of *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Defendant argues that the mere two-year reduction in his home invasion sentence still does not reflect a proportionate sentence. We disagree.

As the previous panel of this Court noted in this matter, the judicial sentencing guidelines do not cover the crime of home invasion. Michigan Sentencing Guidelines (2d ed, 1988), 1; *People v Edgett*, 220 Mich App 686, 690; 560 NW2d 360 (1996). However, proportionality is

the standard for determining the validity of defendant's home invasion sentence. *Edgett, supra* at 696.¹

Defendant argues that his sentence is disproportionate because rather than individualizing the sentence to his particular circumstances, the trial court improperly noted that the father of the victimized children had moved to the area to avoid this type of crime. According to defendant, the sentence was a demonstration that the judge punished this type of crime more seriously than other courts in other communities throughout the state; therefore, his sentence was based on geographic location rather than the particular circumstances of the case. A sentence may constitute an abuse of discretion and violate the principles of proportionality if it is based on local sentencing policy rather than tailored to the individual defendant. *People v Catanzarite*, 211 Mich App 573, 583; 536 NW2d 570 (1995); *People v Schnepf*, 185 Mich App 767, 771; 463 NW2d 183 (1990). However, our review of the record indicates that the court made no explicit or implicit statement that it was sentencing defendant more harshly than he would have been sentenced in other communities. The trial court did note, in what it termed a digression, that the homeowner and his family "were newly moved to this area" and that "I'm not sure I would have blamed them if they would have picked up and moved lock, stock and barrel somewhere else." However, this lone comment certainly does not reflect that defendant was sentenced on the basis of improper considerations. Instead, it was a remark regarding the seriousness of defendant's crime, such that it would justify the victimized family's second move to another locale.

Defendant also contends that the prosecution's purported representation that defendant was not predatory demonstrates that defendant does not pose a danger to the community. However, the circumstances of the offense belie defendant's contention. At 1:30 a.m. on the night in question, defendant entered his neighbor's house through the unlocked back door. There were two teenage girls, a younger brother, and the babysitter present at that time. The babysitter heard defendant enter and when she went to investigate, she saw but did not recognize him. Defendant's pants were undone and his genitals exposed. The babysitter yelled at defendant, repeatedly telling him to leave. She testified that defendant shoved her against the wall, punched her in the head, and grabbed her breasts during this assault. The babysitter freed herself and struck defendant with a folding chair. At one point during the struggle, defendant was on top of the babysitter. She screamed in an effort to attract the attention of neighbors and awoke the children, who came downstairs and saw defendant choking the babysitter as he held her in a headlock. The oldest child found a golf club and began striking defendant in the back, eventually driving him out onto the front porch. Defendant fled and was found shortly thereafter, hiding behind the bushes at his father's residence across the street from the scene of the incident.

The trial court justifiably noted that "[t]his incident was a serious incident, it warrants a significant sentence," and, in sentencing defendant, properly rejected defendant's claim that he mistakenly entered the victims' home in an alcoholic blackout, thinking it was his own. Although defendant has no history of assaultive behavior, he is a self-admitted chronic alcoholic

¹ Because the offenses were committed before the January 1, 1999, effective date of the legislative sentencing guidelines, those guidelines do not apply to this case. MCL 769.34(2); *People v Babcock*, 244 Mich App 64, 72; 624 NW2d 479 (2000).

with four prior alcohol-related misdemeanor convictions and he also suffers from mental illness. The record indicates that defendant could not or would not address his alcohol and mental health problems; thus, the potential for rehabilitation was minimal. The trial court was particularly troubled by the continuing effect that defendant's conduct had on the victims almost two years after the incident. The updated presentence report indicated that the babysitter and the teenage girl who helped fend off defendant's attack were still haunted and severely traumatized by the home invasion and assault. "Permissible factors that may be considered by the court when imposing a sentence include the severity and nature of the crime, the circumstances surrounding the criminal behavior, the defendant's attitude toward his criminal behavior, the defendant's social and personal history, and the defendant's criminal history, including subsequent offenses." *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000). See also *People v St. John*, 230 Mich App 644, 650; 585 NW2d 849 (1998). The impact of the crime on its victims is also a permissible factor that a trial court may consider at sentencing. *People v Jones*, 179 Mich App 339, 342; 445 NW2d 518 (1989).

We agree with the trial court that defendant's conduct cannot be characterized as harmless to the community and conclude that the sentence is proportionate to the circumstances surrounding the offense and the offender. *Milbourn, supra*.

Affirmed.

/s/ Richard Allen Griffin

/s/ Harold Hood

/s/ David H. Sawyer