

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDRIC LLOYD GNIDA,

Defendant-Appellant.

UNPUBLISHED

August 16, 2005

No. 253707

Wayne Circuit Court

LC No. 03-009450-01

Before: Whitbeck, C.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

After a bench trial, the trial court convicted defendant Fredric Gnida of second-degree criminal sexual conduct¹ and sentenced him to 3 to 15 years' imprisonment. He appeals as of right. We affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

Gnida's conviction arises from an incident in 2001 involving the then ten-year-old daughter of his former girlfriend. The complainant testified that, after falling asleep in the car on the way home from a fireworks show, Gnida carried her inside and placed her on the living room couch. She awoke to find Gnida placing his hand on her "privates."

II. New Trial

A. Standard Of Review

We review the trial court's decision to grant or deny a motion for new trial for an abuse of discretion.²

¹ MCL 750.520c(1)(a) (person under thirteen years old).

² *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

B. Newly Discovered Evidence

Gnida first contends that due process requires that he receive a new trial because of newly discovered evidence. He alleges that in September of 2004, the current guardian of the complainant's brother discovered a letter from the complainant stating, "Am sorry about all this I really did not know that we would be in deffrent [sic] homes. I was just tired of mom doing the same old mess." Gnida argues that the circumstances require that he receive a new trial to consider whether the complainant perjured herself at trial and fabricated the allegations against him to obtain a change in custody.

To obtain a new trial because of newly discovered evidence, a defendant must establish that:

- (1) "the evidence itself, not merely its materiality, was newly discovered;"
- (2) "the newly discovered evidence was not cumulative;" (3) "the party could not, using reasonable diligence, have discovered and produced the evidence at trial;"
- and (4) the new evidence makes a different result probable on retrial.³

The discovery that testimony introduced at trial was perjured may entitle a defendant to a new trial.⁴ However, newly discovered evidence does not provide grounds for a new trial where it would merely be used for impeachment purposes.⁵

In the instant case, the alleged newly discovered evidence would not make a different result probable on retrial. Defense counsel repeatedly attempted to impeach the complainant by asserting that she had a motive to fabricate her allegations against Gnida. On cross-examination, the complainant admitted she had been upset with her mother for "quite a period of time" and that she told several people that she wanted to get away from her mother. The complainant further agreed with defense counsel that fabricating allegations against Gnida would be one way to get herself out of her mother's home. The new evidence proffered by Gnida is merely cumulative to the testimony elicited from the complainant at trial and would not likely cause the trier of fact to reach a different conclusion.

Further, rather than expressly stating that the complainant perjured herself, the letter merely provides evidence of a possible motive for her to lie. Because the newly discovered evidence could only provide a means of impeaching the complainant, it does not provide grounds for a new trial.⁶ Consequently, we deny Gnida's request for a new trial and affirm his conviction.

³ *Cress, supra* at 692, quoting *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996).

⁴ See *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994).

⁵ See *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993).

⁶ See *Davis, supra* at 516.

III. Sentencing Challenge

A. Standard Of Review

We review de novo questions of law arising from issues relating to the legislative sentencing guidelines.⁷

B. *Blakely v Washington*

In the second issue raised on appeal, Gnida contends that the trial court violated his due process rights when determining his sentence. He asserts that, when scoring offense variables 3, 4, 10, and 13, the trial court considered facts that were neither proved beyond a reasonable doubt at trial nor admitted by Gnida. Gnida argues that because this increased the applicable range under the sentencing guidelines, his sentence violates the rule set forth in *Blakely v Washington*,⁸ and he is therefore entitled to resentencing.

In *Blakely*, the United States Supreme Court stated that a statutory maximum

is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment . . . and the judge exceeds his proper authority.⁹

But the Michigan Supreme Court subsequently noted that *Blakely* concerned the state of Washington's determinate sentencing scheme under which a trial court could increase a maximum sentence on the basis of judicial fact-finding.¹⁰ In contrast, Michigan has an indeterminate sentencing system in which the maximum sentence is set by law rather than being determined by the trial court.¹¹ The Court further noted that the majority in *Blakely* specifically stated that its holding does not apply to such indeterminate sentencing schemes.¹²

Gnida acknowledges that our Supreme Court made these comments concerning *Blakely*, but argues that they constitute obiter dictum and thus do not create a binding precedent.

⁷ *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

⁸ *Blakely v Washington*, 542 US 965; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

⁹ *Id.* at ___, 124 S Ct at 2537, citations omitted, emphasis in original.

¹⁰ See *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

¹¹ *Id.*, citing MCL 769.8.

¹² *Id.*, citing *Blakely*, *supra* at ___, 124 S Ct at 2540.

However, this Court has already rejected this argument.¹³ Therefore, we affirm Gnida's sentence.

Affirmed.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ E. Thomas Fitzgerald

¹³ See *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004). As Gnida pointed out in his supplemental authority brief, the Michigan Supreme Court has granted leave to appeal this Court's decision in *Drohan*. *People v Drohan*, 472 Mich 881; 693 NW2d 823 (2005). However, under MCR 7.215(C)(2), "a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals." *Straman v Lewis*, 220 Mich App 448, 451; 559 NW2d 405 (1996). Gnida's remaining supplemental authority, unlike the decision in *Drohan*, is not binding on this Court, and does not change our analysis.