

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERANCE CHARLES HICKS,

Defendant-Appellant.

UNPUBLISHED

June 25, 2009

No. 284462

Wayne Circuit Court

LC No. 05-007825-FC

Before: Jansen, P.J., and Hoekstra and Markey, JJ.

JANSEN, P.J. (*dissenting*).

Because I believe that the minimum 10-year sentence imposed in this case was proportionate, I respectfully dissent.

As a preliminary matter, I note that the trial court concluded that offense variable 10 (OV 10) did not adequately take into account defendant's exploitation of his daughter's vulnerabilities. This Court has already determined that this was a substantial and compelling justification for an upward departure from the legislative sentencing guidelines in this case. *People v Hicks*, unpublished opinion per curiam of the Court of Appeals, issued March 15, 2007 (Docket No. 266510). Accordingly, whether the trial court's reasoning in this regard was substantial and compelling is law of the case, and is not before us today. *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996).

Instead, the question now before us is whether the 10-year minimum sentence imposed by the trial court was proportionate to defendant's conduct. I conclude that it was. Defendant was charged with repeatedly sexually assaulting his own daughter. Although the jury ultimately convicted him of only one count of second-degree criminal sexual conduct, MCL 750.520c, the evidence showed that defendant preyed upon his daughter on multiple occasions. He took advantage of her unique vulnerabilities by violating the sacred parent-child relationship, and engaged in a continuous pattern of sexual abuse. Although a jury may conclude that certain facts were not proven beyond a reasonable doubt for purposes of conviction, "the same fact[s] may be found by a preponderance of the evidence for purposes of sentencing." *People v Ratkov (After Remand)*, 201 Mich App 123, 126; 505 NW2d 886 (1993). I cannot conclude that the minimum 10-year sentence imposed in this case was disproportionate to defendant's criminal conduct, see, e.g., *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008); *People v Babcock*, 469 Mich 247, 262-263; 666 NW2d 231 (2003), or that the extent of the departure constituted an abuse of discretion, *Smith*, 482 Mich at 300.

Accordingly, I would affirm.

/s/ Kathleen Jansen