STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LEONARD RICHARD OLEAR,

Defendant-Appellee.

UNPUBLISHED
February 12, 2013

No. 307577
Macomb Circuit Court
LC No. 2009-001960-FH

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and BOONSTRA, JJ.

PER CURIAM.

The prosecution appeals as of right the order sentencing defendant to 12 to 180 months imprisonment for his jury trial conviction of third-degree criminal sexual conduct involving an incapacitated victim, MCL 750.520d(1)(c). This sentence was a downward departure from the sentencing guidelines range, which called for a minimum sentence range of 21 to 35 months. We vacate the sentence and remand for resentencing.

This is the second time this case has been to our Court. The prosecution originally appealed the sentence imposed by the trial court, taking issue with the reasons why the trial court downwardly departed from the sentencing guidelines range. *People v Olear*, unpublished opinion per curiam of the Court of Appeals, issued April 21, 2011 (Docket No. 297155), unpub op at 1. The prosecution argued that the "the trial court erred in using a downward departure from the applicable minimum guidelines range and sentencing [defendant] to three years' probation with the first 12 months served in jail." *Id*. at 1. This Court held, based on the language of the statute, that probation is not available for third-degree criminal sexual conduct. *Id.* at 2. This Court noted, however, that the trial court may again consider a downward departure. *Id.* This Court stated:

> [T]he trial court indicated as the premise for its downward departure the receipt of multiple letters reflecting family and community support of Olear, his age and lack of a criminal record. The trial court also indicated that this conviction has effectively precluded Olear from maintaining a career in law enforcement, his previous receipt of several awards, the necessity of his registering as a sex offender and his cooperation with police as supporting a downward departure. *Id*.

This Court then held:

> At the outset, we note that Olear's lack of a previous criminal record should not be considered as this is already a factor addressed in the scoring of the sentencing guidelines. Even if we were to conclude that the remaining factors cited by the trial court to support its downward departure were objective and verifiable, we caution the trial court that we do not find them to be substantial and compelling. Specifically, the fact that this conviction cost Olear his career in law enforcement, required him to register as a sex offender, and impacted where he will be able to live are simply the natural consequences of the conviction and do not "keenly" grab our attention. Similarly, we do not find the number and content of letters submitted from family, friends and others in the community asserting their support for Olear and his receipt of awards during his relatively short career in law enforcement to comprise substantial and compelling reasons for a downward departure, nor do we find this to comprise an "exceptional case." *Id*. at 3.

This Court then remanded this case back to the trial court "for resentencing in accordance with this opinion." *Id*. at 6.

Judge Murray concurred in part and dissented in part, disagreeing "with the majority's conclusion that defendant's age, prior record, work history, and family and community support could not constitute substantial and compelling reasons for a departure . . . ". *People v Olear*, unpublished opinion per curiam of the Court of Appeals, issued April 21, 2011 (Docket No. 297155) (Murray, J., concurring in part, dissenting in part). Judge Murray indicated that even if these factors were already taken into account under the offense variables, "the trial court could still conclude that there was inadequate or disproportionate weight given to those factors." *Id.*

On June 2, 2011, following this Court's decision, defendant filed an application for leave to appeal to the Michigan Supreme Court. In a September 30, 2011 order, the Michigan Supreme Court denied defendant's application for leave to appeal. *People v Olear*, 490 Mich 880; 803 NW2d 695 (2011). However, Justice Kelly wrote a concurring opinion in which she agreed with Judge Murray, stating, "[T]he majority's comments regarding the trial court's bases for imposing a downward departure sentence are dicta. Moreover, they are inaccurate . . . [S]ome of the factors that the majority finds inappropriate are appropriate considerations for the trial court." *Id.* (Kelly, J. concurring).

The prosecution argues on this second appeal that the factors relied on by the trial court are not substantial and compelling and, thus, do not justify this downward departure. We are unable to take a position on this as the law of the case applies. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 209-10; 568 NW2d 378, 381 (1997).

The trial court stated at the remanded sentencing that:

> I do concur to this extent, that Mr. Olear must be resentenced because probation is not available for this offense, and I do remain free at this resentencing to depart downward or upward from the sentencing guidelines because what was stated by Judges Talbot and Fort Hood are here dicta, they are not the ruling of the Court. The ruling of the Court was that this Court erred in granting Mr. Olear probation.

> And this Court's position is supported by Judge Murray and Justice Kelly of the Supreme Court.

This is simply not true. Once this Court acts and remands for resentencing "in accordance with this opinion", that means that the trial court must follow that opinion. It is not dicta, but rather, the law of the case. It is of no matter if we agree with the previous opinion. It is the law of the case. *Id*. The trial court is not free to rely on a minority opinion nor a concurring opinion from the Michigan Supreme Court.

We remand to the trial court to follow the previous opinion and order of this Court. It is not feasible for us to decide this case until that has occurred. We do not hold that the trial court is precluded from departing downward from the sentencing guidelines, but if it does so, it may not base any such departure on factors that this Court has previously ruled should not be considered.

The sentence is vacated and this case is remanded for resentencing in accordance with this opinion and the previous opinion from this court. We retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Mark J. Cavanagh
/s/ Mark T. Boonstra

Court of Appeals, State of Michigan

ORDER

People of MI v Leonard Richard Olear

Docket No. 307577

LC No. 2009-001960-FH

Amy Ronayne Krause
Presiding Judge

Mark J. Cavanagh

Mark T. Boonstra
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 28 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, this case is remanded to the trial court to follow the previous opinion and order of this Court in docket no. 297155. The proceedings on remand are limited to this issue.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.

A true copy entered and certified by Larry S. Royster, Chief Clerk, on

FEB 12 2013
Date

Chief Clerk