

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRACY LYNN WOOD,

Defendant-Appellant.

UNPUBLISHED

January 24, 2006

No. 257598

St. Joseph Circuit Court

LC No. 99-009561-FC

Before: Zahra, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant pleaded nolo contendere to one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(c), for the horrific rape of an 80-year-old woman that occurred on June 30, 1996, and which took place from about 4:00 a.m. to about 4:20 a.m. in the victim's home. Defendant was sentenced to 25 to 50 years' imprisonment, an upward departure from the minimum sentence range of 2 to 8 years that was calculated under the judicial sentencing guidelines. Defendant now appeals the sentence by leave granted. We affirm, but remand for correction of defendant's presentence report.

Defendant argues that his sentence is disproportionate to his circumstances and those of the offense. This Court reviews sentences imposed by the trial court for an abuse of discretion. *People v Cain*, 238 Mich App 95, 130; 605 NW2d 28 (1999). Because the offense in this case occurred before January 1, 1999, the former judicial guidelines rather than the current statutory sentencing guidelines apply. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 254; 611 NW2d 316 (2000). A sentence may depart from or adhere to the recommended judicial guidelines range as long as it "reflects the seriousness of the matter." *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). "[A] given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

The trial court filed a Sentencing Information Report Departure Evaluation, which detailed its reasoning for imposing the sentence as follows:

Defendant pled no contest to criminal sexual conduct first degree on October 28, 2003, in connection with the June 30, 1996 break in of a 79 year old

woman's home at approximately 4:00 a.m. and the forceful attempt to rape her, both vaginally and anally. The victim suffered great shame, humiliation, and fear as a result of the attack, and died four months later. The guidelines only provided for a minimum sentence of 2 to 8 years. The guidelines were found to fail to adequately address the extreme psychological injury suffered by the victim and the fact that the assault occurred in her home. The guidelines did not take into account the defendant failed to appear for trial and jumped bond. The guidelines also failed to address the sentencing goals to address punishment and public protection. The court ordered a sentence of 25-50 years.

Defendant argues that his sentence is disproportionate for several reasons, including that his sentence, which exceeds the highest end of the guidelines by more than three times, does not leave room for the principle of proportionality to operate on other offenders, that the serious nature of the offense was reflected in his OV score and that his PRV score was zero points, that departure based upon psychological injury was inappropriate because points were scored for OV 13, that the trial court mischaracterized the seriousness of the offense, that he was initially exonerated of the assault by DNA analysis,¹ that the trial court improperly opined about defendant's psychological state and concluded that defendant had the capability to be a dangerous person, and that the trial court did not consider several mitigating factors.

In *People v Mitchell*, 454 Mich 145, 175; 560 NW2d 600 (1997), our Supreme Court noted that in *Milbourn*, *supra* at 656-657, the seminal case on assessing sentences imposed before the effective date of the legislative guidelines, it said that adherence to the judicial guidelines was not required because they do not have the force of law. The Court went on to state,

As emphasized in *Milbourn*, the guidelines are vehicles to assist the trial judge regarding where a given defendant falls on the sentence continuum recognized by *Milbourn*. Where the guidelines calculation differs from the trial court's intended sentence, the judge is alerted that the sentence falls outside a normative range and should be evaluated to assure that it is not unfairly disparate, has a rational basis, and is not disproportionate. On postsentence review, guidelines departure is relevant solely for its bearing on the *Milbourn* claim that the sentence is disproportionate. [*Mitchell*, *supra* at 177 (footnotes omitted).]

Further, in *People v Lemons*, 454 Mich 234, 258; 562 NW2d 447 (1997), our Supreme Court stated,

Our decision in [*People v Merriweather*, 447 Mich 799; 527 NW2d 460 (1994)] makes clear that where a sentence "falls within the permissible range of sentences for defendants convicted of [CSC I]," which is "for life or for any term of years,"

¹ We note that the record indicates that this assertion is inaccurate. DNA testing established defendant's culpability.

MCL 750.520b(2); MSA 28.788(2)(2), and is indeterminate, because the judge fixes both the minimum and the maximum, the sentence is lawful as long as it meets the requirements of proportionality under *Milbourn*.

In *Merriweather*, *supra* at 801-805, under the principle of proportionality, our Supreme Court upheld sentences of 60 to 120 years' imprisonment where the defendant tortured and sexually abused an eighty-four-year-old woman in her home during an attempted robbery. This Court had vacated the sentences imposed by the trial court as disproportionate under *Milbourn* because they "exceeded the guidelines' recommended range by forty years, and are three times the guidelines' recommendation." *Id.* at 804-805, quoting *People v Merriweather*, 201 Mich App 383, 385-386; 506 NW2d 888 (1993). However, in reversing this Court's decision, and in concluding that the defendant's sentences satisfied the legislative requirements, our Supreme Court held that the principle of proportionality does not require that a guidelines' departure be arithmetically measured to determine the propriety of a given sentence. *Id.* at 808-809.

We note that *Merriweather* is factually similar to the present case, as CSC I was committed against an elderly woman in her own home in both cases. These acts so terribly affected the victim in *Merriweather* that she suffered a heart attack, was moved to a nursing home, and was unable to speak at the time of the defendant's trial and sentencing, where she had to be wheeled into court in a wheelchair. *Id.* at 802 n 2. Similarly, in the present case, the trial court stated that a very strong case was made that the psychological injury to the victim shortened her life. She died of a heart attack approximately three months after the assault, and her grandson indicated that "[b]ecause of this crime she lived her last few months of life in fear" and "was not ever the same after she was victimized."

While both cases represent a horrific crime committed on an elderly victim, the lengthy description contained in *Merriweather*, detailing how defendant "terrorized, tortured, burned, and sodomized," his victim, is more egregious than defendant's conduct in the present case. *Id.* at 802-804. In *Merriweather*, our Supreme Court stated that "[t]he conduct involved in this case is the most egregious contemplated by the legislative scheme." *Id.* at 807. Defendant's argument that "the [c]ourt left no room for the principle of proportionality to operate on an offender with a much longer criminal history (or a criminal past for *any* type of offense) or whose criminal conduct is much more aggravated than Mr. Wood's," is without merit. The above comparison demonstrates the proportionality of defendant's sentence. In *Merriweather*, the defendant's sentence was 60 to 120 years, while in the present case defendant's sentence was less than half that—25 to 50 years. Considering that the present case is factually similar except for the more egregious treatment of the victim in *Merriweather*, a sentence that is less than half of the sentence that was deemed proportionate in *Merriweather* is proportionate in the present case.

In imposing defendant's sentence, the trial court clearly considered the severity and nature of the crime, the effect of the crime on the victim, punishment and protection of society, and defendant's substance abuse history. These considerations were all proper given the circumstances surrounding the present case, and we find that the trial court did not abuse its discretion in sentencing defendant to 25 to 50 years' imprisonment in light of these circumstances. Because defendant's sentence is proportional to the offense and the offender,

defendant's argument that his sentence constitutes cruel and unusual punishment under the United States and Michigan Constitutions fails. *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997).² Because defendant is not entitled to resentencing, we decline to address his argument for resentencing before a different judge.

Further, defendant is not entitled to resentencing pursuant to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *People v Claypool*, 470 Mich 715, 731 n 14; 684 NW2d 278 (2004), the lead opinion stated that "the Michigan [indeterminate statutory sentencing] system is unaffected by the holding in *Blakely* that was designed to protect the defendant from a higher sentence based on facts not found by a jury in violation of the Sixth Amendment." A majority of the Justices agreed with this assessment. This Court has rejected the argument that *Claypool* is not binding on this Court. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004)³. Although *Claypool* addresses the applicability of *Blakely* to the statutory sentencing guidelines, rather than the former judicial guidelines, the same result is proper because the judicial guidelines do not even have the force of law. *Mitchell, supra* at 175. Additionally, although defendant's sentence was rendered under the judicial guidelines, it is indeterminate in nature. We find *Blakely* to be inapplicable to the present case.

Defendant next argues that he is entitled to resentencing based on the specific performance of an implied bargain, because the trial court acknowledged at his plea hearing that he could rely on a sentencing guidelines range of 2 to 8 years' imprisonment at his sentencing. We disagree.

Although defendant concedes on appeal that "the plea bargain as articulated during the plea hearing did not specifically mention a sentence agreement," defendant argues that the statements made by the prosecutor, defense counsel, and the trial court, including the trial court's assurances that defendant could rely on defendant's guidelines score remaining the same at sentencing, constituted an implied promise to sentence defendant within the guidelines range of 2 to 8 years' imprisonment.

Where a defendant's plea is induced by an unkept promise, in choosing the appropriate remedy, this Court has discretion to choose between vacating the plea or ordering specific performance of the plea agreement. *People v Peters*, 128 Mich App 292, 295-296; 340 NW2d 317 (1983). The defendant's choice of remedy is accorded considerable weight. *Id.*

² We also reject defendant's argument that he was denied due process because the court had no basis for predicting defendant's future dangerousness, where there was no psychological evaluation. Defendant's history of drinking problems, as reflected in misdemeanor convictions, and the horrific circumstances of the crime, prior to which he had been at a bar, lend sufficient support to a finding that defendant is and will continue to be dangerous.

³ We note that on March 31, 2005, our Supreme Court granted leave to appeal in *Drohan*, limiting its review to whether *Blakely* and *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), apply to Michigan's sentencing scheme. See 472 Mich 881 (2005).

There was no promise regarding defendant's sentencing that entitles him to specific performance. At defendant's plea hearing, the prosecutor indicated that in exchange for defendant's plea to CSC I, the prosecutor would dismiss the count of first-degree home invasion and the count of absconding on bond. Additionally, the prosecutor stated that the plea agreement did not include a sentencing agreement, defendant acknowledged that he was not promised anything more than the terms of the agreement that were placed on the record, and defense counsel stated that there was no promise made regarding defendant's sentencing.

Further, the trial court's statement at the plea hearing that it was fair for defendant to expect the already-scored guidelines to be the guidelines in his PSIR, and defense counsel's statement that defendant's viewing of the guidelines influenced his decision to enter into the plea agreement, was not indicative of a promise that defendant would be sentenced within those guidelines. The trial court repeatedly told defendant that it had the discretion to sentence defendant within the guidelines, or outside of them if it found a substantial and compelling reason to do so. Defendant acknowledged his understanding of the plea agreement and sentencing process, and with regard to his sentencing, stated, "I understand you have the final word." The record indicates that defendant entered into the plea agreement with the knowledge that the trial court was the final arbiter in rendering his sentence. We cannot conclude that defendant was induced to enter into a plea agreement based on a promise of a sentence within the guidelines. Reversal on this issue is unwarranted.

Finally, defendant argues that the PSIR forwarded to the Department of Corrections contains several errors. We agree. "A presentence report is presumed to be accurate and may be relied on by the trial court unless effectively challenged by the defendant." *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). If the challenged information did not affect the sentencing decision, resentencing is not required. *People v Thompson*, 189 Mich App 85, 88; 472 NW2d 11 (1991).

The sentencing court must respond to challenges to the accuracy of information in a presentence report. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). The court may determine whether the information is accurate, accept the defendant's version, or disregard the challenged information. *Id.* Should the court choose to disregard the information, it must clearly indicate that it did not consider the information in determining the sentence. *People v Brooks*, 169 Mich App 360, 365; 425 NW2d 555 (1988). If the court finds the challenged information inaccurate or irrelevant, it must make that finding on the record, and it must be corrected or stricken from the PSIR before sending the report to the Department of Corrections. MCL 771.14(6); MCR 6.425(D)(3); *Spanke, supra* at 649; *People v Hoyt*, 185 Mich App 531, 535; 462 NW2d 793 (1990).

Defendant argues that he is incorrectly listed as a high school dropout, that the names of his daughter and his former spouse are misspelled, and that the ages of his five children were omitted. The record indicates that although defendant raised these errors at his sentencing hearing, they were not omitted from his PSIR. The trial court verbally approved the requested corrections and the information clearly had no impact on the court's sentencing decision; however, the PSIR continues to contain the inaccurate information and to lack the omitted information. While resentencing is not required, defendant is entitled to have the corrections

made and an accurate PSIR forwarded to the Department of Corrections. MCL 771.14(6); MCR 6.425(D)(3); *Spanke, supra* at 650, citing *People v Harmon*, 248 Mich App 522, 533-534; 640 NW2d 314 (2001).

Affirmed, but remanded to the trial court for the limited purpose of correcting defendant's PSIR consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra

/s/ William B. Murphy

/s/ Janet T. Neff