

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHANNES PAUL DISCHER,

Defendant-Appellant.

UNPUBLISHED

July 29, 2003

No. 239482

Kalamazoo Circuit Court

LC No. 00-000802-FH

Before: Zahra, P.J., and Talbot and Owens, JJ.

MEMORANDUM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d. The trial court sentenced defendant to seventeen months' to fifteen years' imprisonment. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant argues that the court failed to articulate a substantial and compelling for imposing a prison sentence where the sentencing guidelines range of 0 to 17 months provides for the imposition of an intermediate sanction. Defendant also asserts that the court failed to consider mitigating factors.

MCL 769.34(4)(a) requires a court to impose an intermediate sanction if the recommended minimum sentence range is eighteen months or less, unless the court finds a substantial and compelling reason to impose a prison term. See also *People v Stauffer*, 465 Mich 633, 635-636; 640 NW2d 869 (2002). A substantial and compelling reason is required even if the minimum length of the sentence does not exceed the guidelines range. *Id.* at 636.

“The court may depart from the statutory sentencing guidelines where there are legitimate factors not considered by the guidelines or where factors considered by the guidelines have been given inadequate or disproportionate weight.” *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001). The factors relied on by a court in determining whether there are substantial and compelling reasons must be objective and verifiable. *People v Abramski*, ___ Mich App ___; ___ NW2d ___ (Docket No. 237810, issued 6/10/2003), slip op p 2.

In its written explanation for the departure, the court noted that defendant needed a sex offender therapy program, which could only be required in prison because probation was not an

available option for a third-degree CSC conviction. The court also found that the guideline scoring was inadequate to assess the level of trauma experienced by the victim.

The availability of required sex offender therapy is an objective and verifiable factor. Such therapy is available in prisons. Because third-degree CSC is not a probationable offense, MCL 771.1, the court could not require defendant to obtain therapy as an enforceable condition of probation.

The harm suffered by the victim is also objective and verifiable. Complainant testified that after the assault she began seeing a therapist, began failing courses, and experienced nightmares. Her impact statement indicated that she suffered from post-traumatic stress syndrome, and she documented her treatment. The trial court relied on information that was provided in the record. Further, we note that the court adequately reviewed defendant's positive attributes in sentencing. Thus, the court did not abuse its discretion in finding substantial and compelling reasons for departing upward from the guidelines. *Abramski, supra*, slip op p 2.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Donald S. Owens