

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRELL LEE FADER,

Defendant-Appellant.

UNPUBLISHED

June 25, 1999

No. 209823

Ogemaw Circuit Court

LC No. 97-001230 FH

Before: Markey, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Defendant pleaded nolo contendere to two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a) and was sentenced to two concurrent terms of ten to fifteen years' imprisonment. Defendant appeals by right the sentences imposed. We affirm.

Defendant first argues that the trial court relied on inaccurate information in imposing sentence. Defendant contends that his sentence was based on inaccurate information as a result of the victim's testimony that he had suffered sexual penetration several times per week over the same period in which the charged offenses occurred. According to defendant, the victim later recanted this testimony during a deposition taken in a subsequent civil action.

A claim that a sentence is based on inaccurate information is a due process claim. See *People v Mitchell*, 454 Mich 145, 173-174; 560 NW2d 600 (1997); *People v Eason*, 435 Mich 233-234; 458 NW2d 17 (1990). A defendant is entitled to be sentenced on accurate information. *People v Smith*, 423 Mich 427, 448; 378 NW2d 384 (1985). However, appellate review of challenges to the sentencing guidelines is very limited. *Mitchell, supra* at 175-178. Application of the sentencing guidelines states a cognizable claim only where a factual predicate is wholly unsupported, a factual predicate is materially false, and the sentence is disproportionate. *Id.* at 176-177.

Although during his deposition, the victim appeared to clarify the number of times defendant engaged in sexual penetration, the same transcript demonstrated that there was significant sexual abuse on a regular basis from the time the victim was nine or ten years old until he reached the age of eighteen. This testimony of abuse was consistent with the victim's testimony at the preliminary examination. The

factual predicate on which the trial court fashioned defendant's sentence was neither wholly unsupported nor materially false.

Defendant next argues that his sentence was disproportionate. We review a trial court's imposition of sentence for an abuse of discretion. *People v Castillo*, 230 Mich App 442, 447; 584 NW2d 606 (1998). Sentences falling within the recommended range are presumptively neither excessively severe nor unfairly disparate because they fall within the sentencing norm for that class of offender. *People v Broden*, 428 Mich 343, 354; 408 NW2d 789 (1987). However, a sentence must be proportionate. *People v Milbourne*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). The "key test" of proportionality is not whether the sentence departs from or adheres to the recommended ranges, but whether it reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). The trial court's discretion in imposing sentence is broad in order to tailor each sentence to the circumstances of the offense and the offender. *Milbourn*, *supra* at 635-636.

We conclude that the trial court did not abuse its discretion in sentencing defendant to the high end of the four- to ten-year guidelines range for a minimum sentence. Defendant had been abusing the victim for an extended period of time involving both sexual contact and penetration. Moreover, defendant had a prior conviction for gross indecency involving a seventeen-year-old male. Further, defendant's offenses have had a devastating effect on the victim and his family. Defendant's sentence was proportionate to the seriousness of the circumstances relating to defendant and the offenses he committed.

We affirm.

/s/ Jane E. Markey

/s/ Gary R. McDonald

/s/ E. Thomas Fitzgerald