

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES LEE MAYS,

Defendant-Appellant.

UNPUBLISHED

September 28, 2006

No. 262307

Washtenaw Circuit Court

LC No. 04-001445-FC

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his sentence of 81 to 126 months in prison for his conviction of criminal sexual conduct in the first degree (CSC I), MCL 750.520b(1)(e). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was convicted by a jury of CSC I and felonious assault, MCL 750.82, as a lesser included offense of assault with intent to commit murder, MCL 750.83. The statutory sentencing guidelines recommended a minimum term range of 51 to 85 months for CSC I. The trial court sentenced defendant to concurrent terms of 81 to 126 months and 24 to 48 months for CSC I and felonious assault, respectively, with credit for 195 days served.

Defendant argues that his sentence was improperly based on facts found by the trial judge rather than the jury, in that the court's assessment of offense-variable scores affected the sentencing range per Michigan's sentencing guidelines. This issue was not raised in the trial court; we review an unpreserved issue for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant relies on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) for the argument that *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000) requires a jury to find, beyond a reasonable doubt, all facts underlying sentencing. However, in *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006), the Michigan Supreme Court considered the applicability of *Blakely, supra*, to the scoring of the sentencing guidelines to determine minimum sentences, and held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. The *Drohan* Court found that the maximum sentence under Michigan's sentencing scheme is that set by statute. MCL 769.8(1). A trial court's discretion in scoring the sentencing guidelines determines the minimum sentence, which, by definition, is within the range authorized by the jury's verdict. The indeterminate sentencing scheme therefore

does not violate the Sixth Amendment. *Drohan, supra* at 160-162. We are bound to affirm defendant's sentence.

Defendant next argues that his counsel was ineffective for failing to argue at sentencing that the trial court was required to adhere to *Blakely, supra*, when scoring the guidelines. This argument presents a constitutional question, which we review de novo. *People v Dunbar*, 463 Mich 606, 615; 625 NW2d 1 (2001).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice; to demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.* at 600.

Trial counsel did not render ineffective assistance by failing to argue that the trial court was required to adhere to *Blakely, supra*, when scoring the guidelines. Trial counsel is not required to make a meritless request. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper