

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

HERMAN JOHN VANDONKELAAR,

Defendant-Appellee.

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UNPUBLISHED

January 4, 2007

No. 265897

Muskegon Circuit Court

LC No. 87-028984-FH

Before: Meter, P.J., and O’Connell and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant’s application to set aside his conviction. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In 1987, defendant pleaded guilty of criminal sexual conduct in the fourth degree, MCL 750.520e. The victim was defendant’s girlfriend’s 14-year-old daughter. During the plea hearing, the prosecutor stated that he was not predisposed to oppose expungement of defendant’s conviction at an appropriate time. The plea agreement did not include any agreement regarding expungement. Defendant was sentenced to serve a term of three years’ probation, with six months in jail. Defendant was not required to register as a sex offender at that time. See MCL 28.724. In August 2005, defendant filed and properly served an application to set aside his conviction.<sup>1</sup> The Attorney General, the prosecutor, and the victim opposed the application.

A court may set aside a conviction on a showing that the circumstances and behavior of the applicant from the date of the conviction to the date of the filing of the application warrant the set aside, and that the set aside is consistent with the public welfare. The nature of the conviction offense alone does not preclude the setting aside of a conviction. The circumstances and behavior of the applicant must be weighed against the public welfare. MCL 780.621(9); *People v Rosen*, 201 Mich App 621, 623; 506 NW2d 609 (1993). The decision to grant or deny an application to set aside a conviction is within the discretion of the trial court. *People v Van Heck*, 252 Mich App 207, 210 n 3; 651 NW2d 174 (2002). The abuse of discretion standard

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<sup>1</sup> There is no dispute that defendant fully complied with all of the procedural requirements.

recognizes that a given situation may not mandate one right answer, so as long as the trial court's decision is within the range of principled and reasonable outcomes, the reviewing court must defer to that decision. *People v Babcock*, 469 Mich 247, 269-270; 666 NW2d 231 (2003); *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).<sup>2</sup>

At the hearing on defendant's application, defendant testified that he engaged in sexual contact with the victim on multiple occasions during a two and one-half year period. He initially maintained that he was intoxicated at the time, and he stated that he no longer drank except occasionally at social events. However, he admitted that he had not been intoxicated every time the contact occurred. Defendant stated that he had also completed court-ordered mental health counseling. Defendant admitted that his contact with the victim; which he described as touching the victim's back, buttocks, and breasts over her clothing; was "very wrong," although he also indicated that he did not believe that his conduct was sexual in nature. Defendant testified that he had not been convicted of a criminal offense since 1987, that he had not had a criminal record before the conviction at issue here, that he was married and had no children in his household, and that he was seeking to have his conviction set aside so that he could travel to Canada for employment purposes. He stated that he understood that the victim opposed his application to have his conviction set aside, but opined that the victim's opposition stemmed from difficulties she was having with an uncle.

The trial court granted defendant's application to set aside his conviction. The trial court stated that it "was prepared to frankly deny the application based on the statement I received here from the victim as well as the nature of the offense." However, the trial court observed that at the time of defendant's plea agreement, the prosecutor's office had not been predisposed to oppose future expungement, and it further concluded that nothing had "transpired since that time, that would cause anyone to be predisposed to oppose it." The trial court therefore concluded that it was "fair that the petition be granted."

We do not find the trial court's decision to be outside the range of principled and reasonable outcomes, nor do we agree with plaintiff's assertion that the trial court entirely failed to exercise its discretion. The trial court clearly recognized that it had a choice. The trial court apparently found significant the prosecutor's statement at the time of the plea agreement that it was not predisposed toward opposing future expungement. However, when weighing defendant's circumstances and behavior against the public welfare, it seems reasonable for the trial court to consider the prosecutor's opinion of the matter at the time of the original proceedings. Furthermore, the trial court explicitly recognized that the prosecutor's statement in 1987 was not a promise or a part of the plea negotiations. The trial court also recognized that the offense was a serious one and that the victim opposed expungement. Defendant appeared to diminish his responsibility for his actions, but his testimony fell short of an outright denial of responsibility. Defendant has not been convicted of any other offenses for nearly twenty years, he is employed and married, and he is not living in a situation where children are present. Although defendant did not partake of any more counseling than what was required by a court

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<sup>2</sup> Even if we disagree with the trial court's decision, it is not outside the range of principled outcome, and therefore, we are required to affirm it.

order, there was no evidence presented suggesting that defendant would be a danger to anyone if his conviction was set aside.

Ultimately, our role is not to second-guess the trial court unless the trial court's decision clearly defies reason. Although the evidence favoring expungement may have been less than overwhelming, it was not nonexistent. It appears that the trial court properly considered defendant's behavior and circumstances – both now and at the time of his plea – as well as the public welfare, and it concluded that on balance the set aside was appropriate. We cannot conclude that the trial court's decision fell outside the range of principled outcomes in this case.

Affirmed.

/s/ Peter D. O'Connell

/s/ Alton T. Davis