

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD MICHAEL PHILLIPS,

Defendant-Appellant.

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UNPUBLISHED

May 22, 2001

No. 221725

Macomb Circuit Court

LC No. 93-002237-FC

Before: White, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(b); MSA 28.788(2)(1)(b), and second-degree criminal sexual conduct, MCL 750.520c(1)(b); MSA 28.788(3)(1)(b). Defendant pleaded guilty to being a second habitual offender, MCL 769.10; MSA 28.1082. Defendant appealed his original sentence to this Court, and the case was remanded for resentencing before a different judge. *People v Phillips*, unpublished opinion per curiam of the Court of Appeals, issued January 10, 1997 (Docket No. 176569).<sup>1</sup> Defendant's subsequent application for leave to appeal to the Supreme Court was denied. *People v Phillips*, 456 Mich 949; 576 NW2d 169 (1998). Defendant then filed a motion seeking to quash his resentencing on grounds that the trial court had lost jurisdiction because it had been more than a year since the Supreme Court denied his application for leave to appeal. The trial court denied this motion. The trial court then sentenced defendant as an habitual offender to twenty-six to forty years in prison, to run concurrently with a ten to fifteen year sentence for the second-degree criminal sexual conduct conviction. Defendant appeals as of right. We affirm.

Defendant first argues that his sentence is not supported by the facts of the case. The basis of this argument is that, because defendant was sentenced as an habitual offender, he is ineligible for disciplinary credits and must serve his entire minimum sentence before becoming eligible for parole. However, a sentence of a term of years is not invalid simply because it is so

<sup>1</sup> The Court of Appeals affirmed defendant's convictions but remanded for resentencing before a different judge because of deterioration of the attorney-client relationship between defendant and defendant's trial counsel. This Court refrained from addressing defendant's claim that his sentence violated the principle of proportionality because the case was remanded for resentencing. *People v Phillips*, unpublished opinion per curiam of the Court of Appeals, issued January 10, 1997 (Docket No. 176569).

lengthy that parole eligibility is precluded and the sentence is effectively a life sentence without parole. *People v Merriweather*, 447 Mich 799, 808-809; 527 NW2d 460 (1994). The Supreme Court has held that a court may impose a sentence of imprisonment for a term of years that has the effect of avoiding eligibility for parole if it is appropriate to the offense and the offender. *People v Lemons*, 454 Mich 234; 562 NW2d 447 (1997). Specifically, the Court stated:

[W]e find no basis in *Milbourn* for a requirement that the trial judge tailor every defendant's sentence in relationship to the defendant's age. Persons who are sixty years old are just as capable of committing grievous crimes as persons who are twenty years old. We find no principled reason to *require* that a judge treat similar offenses that are committed by similarly depraved persons differently solely on the basis of the age of the defendant at sentencing where the Legislature has authorized the judge to impose life or *any* term of years. [*Id.* at 258-259.]

Based on *Merriweather* and *Lemons*, defendant's sentence is supported by the facts of the case and his age does not negate this.

Defendant next argues that his sentence violates the principle of proportionality, which requires that sentences be proportionate to the seriousness of the defendant's crime and take into account the nature of the offense and the background of the offender. *People v Milbourn*, 435 Mich 630, 651; 461 NW2d 1 (1990); *People v Mayfield*, 221 Mich App 656, 662; 562 NW2d 272 (1997). Sentencing guidelines do not apply to the sentencing of habitual offenders. *People v Sabin (On Second Remand)*, 242 Mich App 656, 661; 620 NW2d 19 (2000). Sentencing guidelines may not be considered on appeal in determining an appropriate sentence for an habitual offender. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). Defendant pleaded guilty as a second habitual offender, therefore, the sentencing guidelines do not apply to this case.

Because the sentencing guidelines do not apply, a review of the trial court's sentencing decision focuses on whether the trial court abused its discretion. *People v Alexander*, 234 Mich App 665, 679; 599 NW2d 749 (1999). A trial court does not abuse its discretion in imposing a sentence within the statutory limits when an habitual offender's underlying felony, in the context of his previous felonies, shows the defendant's inability to conform his conduct to the law. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997). MCL 750.520b(2); MSA 28.788(2)(2) provides: "[c]riminal sexual conduct in the first degree is a felony punishable by imprisonment in the state prison for life or for any term of years." MCL 769.10(1)(b); MSA 28.1082(1)(b) provides: "[i]f the subsequent felony is punishable upon a first conviction by imprisonment for life, the court, except as otherwise provided in this section or section 1 of chapter XI, may place the person on probation or sentence the person to imprisonment for life or for a lesser term." Based on these provisions, defendant's sentence is within the statutory limits.

Defendant's underlying felony, in the context of his previous felonies, evidences his inability to conform his conduct to the law. *Hansford, supra*. According to the presentence investigation report, defendant has an extensive criminal record, including counts of larceny, receiving and concealing stolen property, possession of stolen property, attempted uttering and publishing, and impaired driving. The underlying felony, in context of defendant's previous

felonies, evidences defendant's inability to conform his conduct to the law. Additionally, defendant's underlying felony is particularly egregious in light of defendant's relationship with the victim, which serves as an aggravating factor. Consequently, the trial court's sentencing decision was not an abuse its discretion.

Defendant's next argument is that the trial court did not have jurisdiction to resentence defendant. Whether the trial court lacked jurisdiction to resentence a defendant is reviewed de novo because a question of law is involved. *People v Harris*, 224 Mich App 597, 599; 569 NW2d 525 (1997).

MCL 771.1; MSA 28.1131(1) provides:

(1) In all prosecutions for felonies or misdemeanors other than murder, treason, *criminal sexual conduct in the first or third degree*, armed robbery, and major controlled substance offenses not described in subsection (4), if the defendant has been found guilty upon verdict or plea and the court determines that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law, the court may place the defendant on probation under the charge and supervision of a probation officer.

(2) Except as provided in subsection (4), in an action in which the court *may place the defendant on probation*, the court may delay sentencing the defendant for not more than one year to give the defendant an opportunity to prove to the court his or her eligibility for probation or other leniency compatible with the ends of justice and the defendant's rehabilitation. When sentencing is delayed, the court shall enter an order stating the reason for the delay upon the court's records. The delay in passing sentence does not deprive the court of jurisdiction to sentence the defendant at any time during the period of delay. [Emphasis added.]

This statute does not apply to defendant's case because criminal sexual conduct in the first degree is not an offense for which a defendant may be placed on probation. See *People v Stokes*, 422 Mich 863; 365 NW2d 753 (1985). Additionally, the court is not deprived of jurisdiction if there is a showing of good cause for delay. *People v Dubis*, 158 Mich App 504, 506; 405 NW2d 181 (1987). In *People v Bracey*, 124 Mich App 401; 335 NW2d 49 (1983), this Court held that the probation statute "does not forbid postponing sentencing for nonprobationable crimes." *Id.* at 407. It also held that a court has power to defer sentence for a reasonable period for any proper purpose. *Id.* at 409.

Even if MCL 771.1; MSA 28.1131(1) did apply in this case, there were circumstances justifying the delay, and the delay was not lengthy. From the time leave was denied by the Supreme Court, sentencing was delayed for approximately one year and four months. Circumstances justified this delay. Defendant filed a motion to quash resentencing that caused resentencing to be adjourned. After the motion was heard and denied, sentencing took place within thirty days.

Defendant finally argues that he was denied his right to a speedy trial because he was not promptly resentenced. The Michigan Supreme Court has held that sentencing is included within the state's speedy trial guarantee. *People v Garvin*, 159 Mich App 38, 46; 406 NW2d 469 (1987). Constitutional issues are reviewed de novo on appeal. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). In determining whether a defendant has been denied his constitutional right to a speedy trial, the court must balance: (1) the length of the delay, (2) the reason for the delay, (3) defendant's assertion of the right to a speedy trial, and (4) any prejudice to the defendant. *Id.*

Defendant was not denied his right to a speedy trial because the delay in sentencing was not lengthy, circumstances justified the delay, and the delay did not cause defendant prejudice. There is no indication that defendant asserted his right to a speedy trial prior to filing his motion to quash sentencing. Further, there is no indication that this delay caused defendant any prejudice. Defendant was destined to spend several years incarcerated because his offense was nonprobationable. The sentence imposed on defendant on resentencing was not as severe as his original sentence. Defendant was also given credit for the time he spent incarcerated awaiting resentencing. Therefore, the trial court had jurisdiction to resentence defendant and defendant was not denied his right to a speedy trial.

Affirmed.

/s/ Helene N. White  
/s/ Mark J. Cavanagh  
/s/ Michael J. Talbot