

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DUANE LEE JANES,

Defendant-Appellant.

UNPUBLISHED

June 21, 2005

No. 253610

Oakland Circuit Court

LC Nos. 2003-189249-FH

2003-189250-FC

Before: Gage, P.J., and Whitbeck, C.J., and Saad, J.

PER CURIAM.

Defendant Duane Janes appeals as of right from his jury trial convictions of three counts of first-degree criminal sexual conduct (CSC I),¹ one count of second-degree criminal sexual conduct (CSC II),² and one count of fourth-degree child abuse.³ This case arose when Janes's adopted daughters alleged that Janes had abused and molested them. The trial court originally sentenced Janes as a second habitual offender, MCL 769.10, to concurrent prison terms of 35 to 45 years for the conviction on three counts of CSC I, to 14½ to 22 years for the CSC II conviction, and to forty-five days for the fourth-degree child abuse conviction. On January 6, 2004, the trial court resentenced Janes to prison terms of 35 to 53 years for the three CSC I convictions. We affirm Janes's convictions, but remand for reinstatement of his original CSC I sentences.

I. Basic Facts And Procedural History

The complainants in this case are Janes's adopted daughters. The younger complainant testified that Janes, who had adopted her when she was seven years old, began assaulting her by putting his hands up her shirt and down her pants when she would travel in his car. She further testified that Janes had sexual intercourse with her on several occasions, beginning when she was twelve years old. She testified that on Labor Day, 2002, Janes hit the older complainant in the face following an argument, causing bruises on her face and a swollen lip. The older

¹ MCL 750.520b(1)(b).

² MCL 750.520c(1)(b).

³ MCL 750.136b(6).

complainant confirmed that Janes had hit her with an open hand, and that she had told her teacher the next day.

The jury convicted Janes of CSC I, CSC II, and child abuse.

II. Sentencing

A. Standard Of Review

We review de novo questions of law arising from issues relating to the legislative sentencing guidelines.⁴

B. *Blakely* Challenge

Citing *Blakely v Washington*,⁵ Janes first argues that the lower court committed error requiring reversal when it enhanced Janes's sentence using evidence not found by the jury. However, *Blakely* specifically limited its holding to determinate sentencing schemes.⁶ In *People v Claypool*,⁷ a majority of the Michigan Supreme Court noted that under Michigan's indeterminate sentencing scheme, a judge only sets the minimum sentence based on factors not found by a jury, while the maximum sentence is set by law. *Claypool* concluded that *Blakely* was inapplicable to Michigan's sentencing scheme because in Michigan a judge cannot sentence someone, based on facts not found by a jury, to a term of imprisonment that exceeds the statutory maximum.⁸ Therefore, Janes's argument is without merit.⁹

C. The "Two-Thirds" Rule

Janes next argues that the trial court erred by resentencing Janes according to the "two-thirds" rule of *People v Tanner*.¹⁰ *Tanner's* "two-thirds" rule, which provides that a "court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence," has been codified in MCL 769.34(2)(b).¹¹ The Michigan Supreme Court

⁴ *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

⁵ *Blakely v Washington*, 542 US ___; 124 S Ct 2531, 2536; 159 L Ed 2d 403 (2004).

⁶ *Blakely*, *supra* at 2540.

⁷ *People v Claypool*, 470 Mich 715, 730-731 n 14, 684 NW2d 278 (2004).

⁸ *Id.*

⁹ See also *United States v Booker*, ___ US __; 125 S Ct 738; ___ L Ed 2d ___ (2005). We note that the Michigan Supreme Court has recently granted leave in *People v Drohan*, 264 Mich App 77; 689 NW2d 750 (2004), limited to the issue of the applicability of *Blakely* and *Booker* to Michigan's sentencing scheme. *People v Drohan*, 472 Mich 881; 693 NW2d 823 (2005).

¹⁰ *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972).

¹¹ See *People v Garza*, 469 Mich 431, 435; 670 NW2d 662 (2003) (observing that one of the purposes behind enacting the legislative sentencing guidelines was legislative acceptance of the *Tanner* rule).

has held that a violation of MCL 769.34(2)(b) does not occur where, as here, the statutory maximum for the crime is life imprisonment.¹² As the prosecutor concedes, the trial court committed error requiring reversal when it resentenced Janes on his CSC I convictions. Therefore, we remand for reinstatement of Janes's original CSC I sentences.¹³

III. Ineffective Assistance Of Counsel

A. Standard Of Review

Whether a defendant was denied effective assistance of counsel presents a mixed question of fact and constitutional law.¹⁴ This determination requires a judge first to find the facts, then determine "whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel."¹⁵ We review the trial court's factual findings for clear error and review de novo its constitutional determination.¹⁶ Because no evidentiary hearing was conducted, our review is limited to mistakes apparent on the record.¹⁷

B. Abandonment Of The Issue

Janes argues in propria persona that he was denied effective assistance of counsel. For Janes to prevail on this claim, he must show that (1) counsel's performance was below an objective standard of reasonableness and (2) a reasonable probability that the outcome of the proceeding would have been different but for trial counsel's errors.¹⁸

Janes has raised numerous allegation of ineffective assistance on the part of trial counsel. However, his argument is entirely conclusory and not support by relevant authority. Further, the accuracy of many of the allegations is suspect. Specifically, many of passages Janes cites in the lower court record do not support or relate to the allegations at issue, and other allegations are not supported by any citation to the record whatsoever.

Janes's claim that prejudice is established by the fact that counsel failed to provide "another theory for why these claims were being made" is also unpersuasive. Our review of the record indicates that counsel did pursue an alternative theory of defense. Specifically, he argued to the jury that the girls' stories were internally inconsistent, that the evidence was otherwise

¹² *People v Powe*, 469 Mich 1032, 1032; 679 NW2d 67 (2004).

¹³ While defendant's question presented references alleged ineffectiveness on the part of trial counsel for agreeing to the resentencing, defendant has not provided any argument in support of this assertion. In light of our conclusion that resentencing was improper and that remand is required, the merits of this issue need not be addressed.

¹⁴ *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

¹⁵ *Id.* at 579.

¹⁶ *Id.*

¹⁷ *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003).

¹⁸ *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

inconsistent and implausible, and that there were difficulties in the home that could account for the complainants' allegations and even some of their injuries. The fact that counsel's chosen strategy was unsuccessful does not make assistance of counsel ineffective.¹⁹

In sum, Janes's failure to properly address the merits of his assertion of error constitutes abandonment of the issue.²⁰

We affirm Janes's convictions but remand for reinstatement of Janes's original sentences of thirty-five to forty-five years' imprisonment on each CSC I conviction. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ William C. Whitbeck
/s/ Henry William Saad

¹⁹ See *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001); *People v Rice*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

²⁰ *People v Harris*, 261 Mich App 44, 50; 68 NW2d 17 (2004).