

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRUCE ALLEN ROPER,

Defendant-Appellant.

UNPUBLISHED
December 13, 2011

No. 300666
Ingham Circuit Court
LC No. 10-000493-FC

Before: WILDER, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Bruce Allen Roper pleaded guilty to two counts of first-degree criminal sexual conduct (CSC I)¹ and was sentenced under the judicial guidelines to two concurrent terms of 25 to 50 years in prison with 183 days credit. Roper now challenges his sentences asserting that the trial court improperly applied the legislative sentencing guidelines and that the upward departure in sentencing was disproportionate. We affirm.

Roper admitted to engaging in criminal sexual conduct with two girls, between five and seven years of age, between January 1, 1988, and December 31, 1990. Because the offenses were committed before January 1, 1999, the judicial guidelines were used to determine his sentence.² At the time Roper committed the offenses, CSC I was a felony punishable by life imprisonment or any term of years.³ The minimum sentence recommended by the judicial guidelines was 36 to 96 months.⁴ Following amendment of the statute in 2006, CSC I became punishable by “imprisonment for life or any term of years, but not less than 25 years” when committed by an individual 17 years or older against someone under 13 years of age.⁵

¹ MCL 750.520b(1)(a) [victim under 13 years old].

² MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000).

³ MCL 750.520b(2).

⁴ Michigan Sentencing Guidelines (1988), p 47.

⁵ MCL 750.520b(2)(b).

On appeal, Roper argues that the sentencing court violated his ex post facto and due process protections when it referenced the 2006 mandatory minimum sentence of 25 years when it decided to depart from the 1988 judicial guidelines. We disagree.

While Roper objected in the trial court to a departure from the 1988 sentencing guidelines, he did not contend that reference to the 2006 statutory minimum sentence of 25 years violated the ex post facto and due process clauses, so the issue is unpreserved.⁶ Unpreserved claims of constitutional error are reviewed for plain error affecting a defendant's substantial rights.⁷ "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings."⁸

The ex post facto clauses of both the state and federal constitutions prohibit inflicting a greater punishment for a crime committed before the law's effective date.⁹ In the instant case, Roper's sentencing did not violate the ex post facto or due process clauses because the amended statute was not applied retroactively. Rather, the sentencing court chose to use the amended statute as a frame of reference in its exercise of discretion in sentencing Roper. The court referenced the 25 year minimum sentence from the 2006 guidelines once during sentencing. Specifically, the court stated that had Roper pled guilty to one of the offenses today, his sentence "would be a minimum mandatory of 25 years in prison and lifetime GPS tether." The trial court acknowledged that based on the guidelines from 1988, the minimum sentence was "36- to 96-month[s]." The trial court then discussed Roper's admitted extensive history of sexually abusing children. There is no indication that the trial court acted on a mistaken belief that it had to impose the 25 year minimum sentence, or that it was making an injudicious attempt to evade ex post facto protections. Accordingly, the trial court did not err.

Roper also contends that the trial court's departure from the sentencing guidelines violates the principle of proportionality entitling him to resentencing. We disagree. It was not necessary that Roper "take any special steps to preserve the question of the proportionality" regarding the sentence imposed.¹⁰ The question of whether a trial court violated the principle of proportionality when imposing sentence is reviewed for an abuse of discretion.¹¹

"[T]he extent of the departure (rather than the fact of the departure itself) may embody a violation of the principle of proportionality."¹² A trial court, however, may depart from the

⁶ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

⁷ *Id.* at 763.

⁸ *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

⁹ *Id.* at 316-317.

¹⁰ *People v Cain*, 238 Mich App 95, 129; 605 NW2d 28 (1999).

¹¹ *People v Milbourn*, 435 Mich 630, 634-635; 461 NW2d 1 (1990).

¹² *Id.* at 660.

judicial guidelines when it concludes that the recommended range is disproportionate to the offense and the offender.¹³

A court upwardly departing from the sentencing guidelines must place its reasons for doing so on the record at the time of sentencing. The crucial test for proportionality is not whether the sentence departs from, or adheres to, the recommended range under the sentencing guidelines, but whether it reflects the seriousness of the matter.¹⁴

Roper argues that the upward departure was not proportionate because there were a number of mitigating factors, including: (1) his advanced age, (2) his attempts to reform and prevent himself from being placed in situations where he might reoffend, (3) the lack of evidence that he had molested since the early 1990's, (4) his remorse, (5) his cooperation with authorities, and (6) his own history of being sexually abused as a child.

The trial court characterized Roper as “a long-term predator” who was a “danger to the community.” The court stated that the guidelines “clearly [did not] reflect the severity of [Roper’s] offenses.” The court observed that Roper admittedly had a 30 to 40 year history of sexually abusing children, some as young as three or four years of age. The court also acknowledged that Roper admitted to molesting more than 100 children and to touching “a couple hundred” children while employed as a phlebotomist/technician at a local hospital. He even admitted to molesting his own son when the boy was four to six years old.

Because the recommended sentence range was disproportionate to the offenses and Roper’s admitted extensive history of sexually abusing children, the trial court did not abuse its discretion in determining that an upward departure from the judicial guidelines was appropriate and Roper is not entitled to resentencing.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Michael J. Talbot
/s/ Deborah A. Servitto

¹³ *Id.* at 657.

¹⁴ *People v Castillo*, 230 Mich App 442, 447-448; 584 NW2d 606 (1998).