

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs

DENNIS MERVYN SARGENT,

Defendant-Appellant.

Supreme Court No. 133474
Court of Appeals No. 263392
Allegan Court No. 04-13744 FC

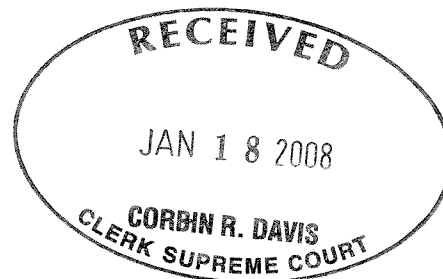
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DEFENDANT-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT NOT REQUESTED

PROOF OF SERVICE



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COURT'S JURISDICTION

Mr. Sargent was convicted after jury trial and a Judgment of Sentence was entered on May 20, 2005. Defendant filed a request for appointment of counsel with the Allegan County Circuit Court on May 20, 2005, within the 42-day period mandated by MCR 7.204. Appellate counsel was appointed on June 24, 2005.

On November 8, 2005, appellate counsel filed Mr. Sargent's Appeal of Right in the Court of Appeals. On February 9, 2006, appellate counsel filed Mr. Sargent's pro per Supplemental Brief on Appeal. On January 25, 2007, the Court of Appeals affirmed Mr. Sargent's convictions and sentence.

On March 21, 2007, Mr. Sargent filed a pro per Application for Leave to Appeal in this Court. On September 14, 2007, this Court Granted Mr. Sargent's Application as to the single issue of the analysis of legislative sentencing guidelines offense variable 9 (MCL 777.39) in contrast to the former offense variable 6 under the judicial sentencing guidelines. This Court also Ordered that appellate counsel be appointed for Mr. Sargent. On September 21, 2007, appellate counsel was appointed to represent Mr. Sargent in this Court.

The Due Process Clause of United States Constitution, Amendment XIV requires that a trial court impose a sentence based on accurate information. *Townsend v Burke*, 334 US 736; 68 S Ct 1252; 92 L Ed 1690 (1948). See also, Const 1963, art 1, Sec. 17. Mr. Sargent argues that the trial court erroneously scored Offense Variable 9 at 10 points, and the Court of Appeals erred in upholding that decision.

Offense Variable 9 should not have been scored. Accordingly, Mr. Sargent should be re-sentenced.

STATEMENT OF QUESTIONS PRESENTED

QUESTION I

IS MR. SARGENT ENTITLED TO RESENTENCING WHERE THE STATUTORY SENTENCING GUIDELINES WERE MISSCORED AS TO OFFENSE VARIABLE 9 AND THE SENTENCING COURT COULD NOT MAKE AN INFORMED SENTENCING DECISION BASED ON IMPROPERLY SCORED GUIDELINES?

The defendant would answer: Yes.

The trial court answered: No.

The Court of Appeals answered: No.

STATEMENT OF FACTS

Defendant-appellant Dennis Mervyn Sargent was charged with Count I, Criminal Sexual Conduct, 1st degree, and Count II, Criminal Sexual Conduct, 2nd degree for incidents alleged to have occurred with Kathleen Kizer in the County of Allegan. Mr. Sargent was also similarly charged with incidents alleged to have occurred with Kathleen's sister, Jachelle ("Jamie"), but those charges were subsequently dismissed. However, several pre-trial motions were heard regarding their admissibility under MRE 404(b).

On October 1, 2004, a Motion hearing was held regarding the prosecution's request to admit 404(b) evidence as to Kathleen and Jachelle Kizer if the cases were severed. The prosecutor based his argument on a common plan or scheme. The trial court ruled that under VanderVliet, the 404(b) evidence would be admissible. On January 21, 2005, a Motion hearing was held, and the trial court granted an additional 404(b) incident involving another party.

On April 1, 2005, a Motion hearing was held granting the prosecution's request to use a screen blocking Mr. Sargent during the testimony of a 404(b) witness that was not a complainant in the present case. The prosecution acknowledged that the witness was 16 years of age. Citing MRE 611, the trial court granted the request to use a screen during trial.

On April 4, 2005, jury trial commenced before the Honorable Harry A. Beach in the Circuit Court for the County of Allegan. Voir dire was conducted, a jury chosen and opening statements made by trial counsel.

Kathleen Kizer, the complainant in this case, testified that she was fifteen years old and lived with her mother and sisters. Kathleen stated that she helped Defendant deliver a local newspaper, the Flashes, once or twice a week for several hours. Mr. Sargent lived about five miles away and Kathleen had been to his house on several occasions. She also helped Mr. Sargent by cleaning up around his trailer.

Kathleen claimed that Defendant had shown her pictures of naked people on his computer. She also claimed that on that day, Mr. Sargent had told her to take her clothes off, she complied, and he put his finger in her vagina. On that same day, Mr. Sargent also allegedly pulled up her shirt and sucked her breasts. Kathleen further alleged that Mr. Sargent had grabbed her butt a “couple of times”. She could not recall actual dates of these last allegations.

Kathleen did not tell anyone about these alleged incidents until two to three weeks later when it came out “during therapy” to which she already attended weekly. She admitted that she was in therapy for depression and on medications. The reason Kathleen was seeing a therapist was for her admitted “constant lying” which she initially denied at trial until shown her preliminary examination transcript. Kathleen’s parents took her to the police station and a report was made. Kathleen testified that Mr. Sargent had purchased clothing for her and her sister, Jamie.

Prior to the testimony of Jachelle Kizer, the trial court informed the jury that a screen would be used so that Jachelle did not have to look at Mr. Sargent while testifying. Jachelle Kizer, also known as “Jamie”, testified that she was seventeen years old at the time of trial, and that she had worked with Mr. Sargent delivering the Flashes from October 2003 to April 2004. Kizer stated that her mom was the zone

coordinator for the Flashes and Mr. Sargent's boss. Jachelle also did house work with her sister for Mr. Sargent and spent time at his trailer. She indicated that Mr. Sargent bought clothing for her.

Jachelle claimed that Mr. Sargent had touched her under her clothing, including her breasts and vagina while they were playing on his computer. She alleged that Mr. Sargent had shown her pornography on his computer and told her that he wanted to "lick her". Jachelle did not tell anyone about this incident until she heard the claims made by her sister, Kathleen. Only then did Jachelle tell anyone about these allegations.

Shannon Kizer testified that she was the adoptive mother of Kathleen and Jachelle, and that she had known Mr. Sargent for 2 to 3 years as he delivered the Flashes newspaper for her. She acknowledged that Mr. Sargent had been a carrier for the Flashes for a long time and that the girls had helped him out delivering papers. At some point, Shannon discovered that Mr. Sargent had purchased clothing and jewelry for the girls.

While attending a therapy session, Kathleen told her and the therapist that Mr. Sargent had committed these allegations. Jachelle was also present, albeit in another room, and after Kathleen made these allegations, so too did Jachelle make her own allegations against Mr. Sargent. Shannon immediately took them to the police to make a report. She admitted that both girls were always in counseling for "special needs" and that "all kids like".

Bethany Pritchard testified that she was 18 years old and that she did not know the Kizer. She stated that she had met Mr. Sargent through her boyfriend's brother

and that she had helped him delivery newspapers in November and December 2004. Pritchard claimed that when they were alone, Mr. Sargent would talk about how young the girls were that he hung around with. She alleged that Mr. Sargent bought her a penis-shaped pacifier after finding out she collected pacifiers.

Pritchard testified that a female friend of Mr. Sargent's, Tasha, lived in his trailer with him and that she had met Tasha a couple of times. Pritchard stated that Mr. Sargent had never touched her inappropriately, shown her pornography or bought her clothing.

Chris Koster of the Allegan County Sheriff's Department testified that he went to Mr. Sargent's house on April 16, 2005 and executed a search warrant for his computer. Koster also interviewed both girls with a therapist present. Kost was also given items allegedly purchased for them by Mr. Sargent. Koster acknowledged that Jochelle said nothing happened to her until after Kathleen's allegations against Defendant.

Michael Brown of the Allegan County Sheriff's Department testified that he took the complaint from the Kosters on April 12, 2005. He received his initial information from Shannon then spoke with Kathleen and Jochelle, with their mother present. Brown admitted that Kathleen told him the incident happened on a Saturday, but she was back at Mr. Sargent's house the next day.

Carmen Kucinich testified that she was a therapist at Safe Harbor and was qualified as an expert in forensic interviewing and children's counseling. She interviewed Jochelle one time and never spoke with Kathleen. Kucinich then made

generalizations about disclosures by children. At the conclusion of Kucinich's testimony, the prosecution rested.

Natasha Fields testified that she had known Mr. Sargent for three years and lived with him for a time, but they had not dated. Fields stated that Defendant's mother helped him deliver papers until she could no longer do it and then Fields took over helping him. Fields indicated that Kathleen and Jochelle would stop by Mr. Sargent's house and get something to eat or just hang out.

Fields stated that she was home when Kathleen took off her pants and top then asked Mr. Sargent what she had to do to get nice things like he bought Jochelle. Fields testified that Kathleen did not know she was home when this took place, and that Mr. Sargent told her put her clothes back on. Fields stated that Defendant never touched Kathleen that day and never saw either girl at the home again.

Defendant-appellant Dennis Sargent testified that he had been delivering the Flashes for four years before Shannon Kizer was hired as zone manager. His mother helped him deliver the papers, then Natasha Fields. Fields also lived at his home from time to time. Shannon Kizer offered to let the girls help him deliver the papers, and Mr. Sargent began paying them to do so. Mr. Sargent admitted to buying Jochelle clothes, because all of the money she made delivering papers went into a savings account that she could not access. He testified that Jochelle picked out underwear for him to buy because she needed them.

Jochelle got another job, so Kathleen began delivering papers with Mr. Sargent. She delivered the Flashes four or five times before these allegations came out. Mr. Sargent testified that he never touched Kathleen inappropriately. He

admitted that on that one occasion, Kathleen had removed her top and pants while he was in the computer room. Mr. Sargent stated that he was shocked and told her to put her clothes back on.

Once the girls stopped helping him, Mr. Sargent placed an add in the local newspaper which was answered by Bethany Pritchard. Mr. Sargent testified that Bethany always had a pacifier on her, and that she found one in his truck, that Natasha Fields had purchased, that she presumed was for her. He had no idea anything was wrong until the police were at his door. Mr. Sargent testified that he never showed the girls pornography and denied ever touching, fondling, or penetrating them. At the conclusion of Mr. Sargent's testimony, the defense rested.

On April 5, 2005, jury trial continued with Donald Davis testifying that he knew Mr. Sargent and that he had met Jamie on several occasions at Defendant's house. She would be working or cleaning around Mr. Sargent's home and Davis noted he saw no inappropriate behavior. Davis stated that he also knew of Kathleen Kizer and that he knew Defendant had worked at her home and delivered papers for her.

At the conclusion of Davis' testimony, the defense rested. The prosecution presented no rebuttal witnesses. Closing arguments were made by trial counsel, the court instructed the jury and counsel indicated no objections to the instruction. The jury returned verdicts of guilty as to Count I, Criminal Sexual Conduct, 1st degree, and Count II, Criminal Sexual Conduct, 2nd degree.

On May 20, 2005, Defendant was sentenced by the Honorable Harry A. Beach (Appendix A). The court indicated that Defendant's guidelines were 108 to 180

months as to Criminal Sexual Conduct, 1st degree; and 36 to 71 months as to Criminal Sexual Conduct, 2nd degree (Appendix B). Defense counsel argued that Offense Variable 3 (hereinafter “OV”) should not have been scored 5 points for bodily injury. Counsel also argued that OV 8 should not have been scored 15 points for asportation as these alleged events took place in Defendant’s home.

Lastly, counsel argued that OV 9 should not have been scored 10 points as there was only one complainant because the other case had been dismissed prior to trial (Appendix A, pg. 3). The trial court summarily denied all three requests without stating its reasons on the record (Appendix A, pg. 4). The court then sentenced Mr. Sargent as to Count I, Criminal Sexual Conduct, 1st to 180 months to 44 years, and Count II, Criminal Sexual Conduct, 2nd to 71 months to 15 years (Appendix A, pg. 6).

ARGUMENT I

MR. SARGENT IS ENTITLED TO RESENTENCING WHERE THE STATUTORY SENTENCING GUIDELINES WERE MISSCORED AS TO OFFENSE VARIABLE 9 AND THE SENTENCING COURT COULD NOT MAKE AN INFORMED SENTENCING DECISION BASED ON IMPROPERLY SCORED GUIDELINES.

STANDARD OF REVIEW: The interpretation and application of the statutory sentencing guidelines is a question of law, which is reviewed de novo. People v Morson, 471 Mich 248, 255; 685 NW2d 203 (2004).

PRESERVATION OF ISSUE: This issue challenging the scoring of the sentencing guidelines was preserved by objecting to the scoring at the sentencing hearing (Appendix 9-11). MCL 769.34 (10); MCR 6.429 (C) (as amended); People v Kimble, 470 Mich 305 (2004).

ARGUMENT: In August of 1998, 1998 PA 317 was signed into law providing statutory Sentencing Guidelines for virtually all felony offenses committed on or after January 1, 1999. Criminal Sexual Conduct, 1st degree, contrary to MCL 750.520B, is included in the statutory Sentencing Guidelines and is a Person Offense and a Class A felony. Criminal Sexual Conduct, 2nd degree, contrary to MCL 750.520C, is also included in the statutory Sentencing Guidelines and is a Person Offense and a Class C felony. Unlike the judicial Sentencing Guidelines that were

mere recommendations, the statutory Sentencing Guidelines have the effect of law. People v Hegwood, 465 Mich 432 (2001). MCL 769.34 (2) requires that a minimum sentence imposed by a court for an enumerated felony committed on or after January 1, 1999 "shall be within the appropriate sentence range", absent a departure for substantial and compelling reasons as allowed by MCL 769.34 (3).

The sentencing guidelines range scored by the court in this case was 108 to 180 months and 36 to 71 months. (Appendix 17-18). The court imposed a sentence at the maximum of this range (180 and 71 months respectively on the minimum sentences). This erroneous scoring was based in part upon findings of fact by the trial court for facts not proven at trial or for offenses that were dismissed prior to trial.

Mr. Sargent was assessed 10 points for Offense Variable 9 (hereinafter 'OV'). OV 9 is "number of victims," and requires the court to "count each person who was placed in danger of injury or loss of life as a victim" as a result of Mr. Sargent's offense. (Appendix 10); MCL 777.39 (2)(a). OV 9 is similar to OV 6 in the old judicial guidelines.¹ Ten points are to be scored where there are 2 to 9 victims. The

¹ Under the former judicial guidelines, OV 6 provided as follows:

Multiple Victims

- 100 Multiple deaths**
- 10 2 or more victims**
- 0 Not a multiple victim situation**

The instructions for the variable state: "Count each person who was placed in danger of injury or loss of life as a victim."

instructions require that each person who was placed in danger of injury or loss of life as a victim should be counted.

In *People v Chesebro*, 206 Mich App 468; 522 NW2d 677 (1994), the Court of Appeals held that the trial court erred when it scored OV 6 (the judicial guidelines equivalent of the new OV 9) for multiple victims because that variable is limited to victims of the conviction offense, and cannot be scored on the basis of conduct with other victims. Also, in *People v Dove*, unpublished opinion per curiam of the Court of Appeals, decided July 7, 1994 (Docket No. 157941), the Court of Appeals came to a similar conclusion. It held that OV 6 (multiple victims) was misscored where there was only one victim involved in the incident underlying the criminal sexual conduct conviction.

In this case, Mr. Sargent was convicted of two counts of criminal sexual conduct, both involving Kathleen Kizer. There was nothing on the record indicating that during either of the occurrences, another victim was present and in danger of harm. Any testimony of an uncharged or dismissed offense regarding Jachelle Kizer was separate and unrelated to the offenses for which Mr. Sargent was convicted. OV 9 cannot be scored on the basis of separate victims involved in separate instances who were not placed in danger of injury or loss of life in the charged offense. MCL 777.39 (2)(a). Mr. Sargent should have been properly scored zero points for OV 9.

Further, Defendant submits that as a matter of statutory interpretation of the statutory Guidelines there was only one victim of these offenses. MCL 777.21(2); MSA 28.1274(31)(2) directs that "if the defendant was convicted of multiple offenses,

score each offense as provided in this part". For the present offenses, there was only one victim and Defendant should have been assessed 0 points for OV 9.

But for the error, Defendant would have received a sentence within the appropriate sentencing guidelines range of 81 to 135 months. A reduction of a single point in Mr. Sargent's OV scoring would have placed him in this guidelines range, and even if the court gave him another maximum-minimum sentence, would have reduced his minimum sentence by 45 months. Consequently Defendant's sentence in excess of that range is a departure from the constitutionally permissible range of punishments. Even a minimal amount of additional prison time constitutes prejudice. See United States v Glover, 531 US 198; 121 S Ct 696; 148 L Ed 2d 604 (2001) (construing prejudice standard for ineffective assistance of counsel).

A sentence is, thus, invalid not only when a judge departs from a legislative guidelines range, but also when the judge sentences a defendant within a range that was determined by facts neither admitted nor found by a jury beyond a reasonable doubt. In either case, the judge has impermissibly exceeded legislatively prescribed range of punishment (i.e., that described by the lowest sentencing grid which can be constructed from the facts necessarily found by the jury or admitted). Scoring legislative sentencing guidelines to increase the range of punishment is constitutionally indistinguishable from departing from the correct range, and is only proper if the facts which justify that increase have been found by a jury beyond a reasonable doubt or admitted.

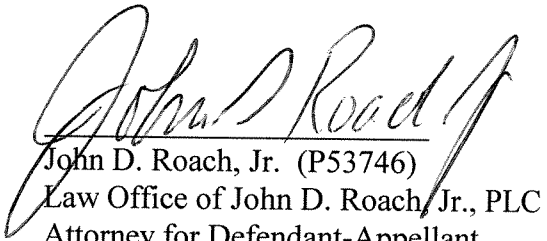
The proper remedy in this case is a resentencing to a minimum term within the appropriate guideline range as properly scored consistent with statutory requirements.

Where a sentencing court imposes sentence under a misapprehension of the applicable law, here an incorrect statutory Sentencing Guidelines range, resentencing is in order. See *People v Whalen*, 412 Mich 166, 170; 312 NW2d 638 (1981) (holding that a sentence is invalid if the sentencing judge "is laboring under a misconception of the law"). Thus, the only proper resolution is to resentence Defendant within the lowest grid supported by the facts admitted at trial. Thus, the proper guideline range is 81 to 135 months and Defendant must be resentedenced to a term of incarceration within that range.

SUMMARY AND RELIEF REQUESTED

WHEREFORE, the Defendant-Appellant, Dennis Sargent, respectfully requests that this Honorable Court vacate his sentence and remand this matter for re-sentencing under properly scored legislative guidelines.

Respectfully submitted,



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