

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

Sawyer, P.J., Neff and White, J.J.

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

vs

DENNIS MARVYN SARGENT,

Defendant-Appellant,

Supreme Court No.: 133474

Court of Appeals No.: 263392

Circuit Court No.: 04-13744-FC

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL
(Oral Argument Requested)

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STATEMENT OF JURISDICTION

On September 14, 2007, this Court granted Defendant's application for leave. The Plaintiff agrees that this Court has jurisdiction.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

WHERE TRIAL TESTIMONY ESTABLISHES THAT TWO YOUNG SISTERS WERE SEXUALLY EXPLOITED BY THE DEFENDANT, DOES THE LAW ALLOW THE TRIAL JUDGE TO ASSESS POINTS FOR TWO VICTIMS UNDER MCL 777.39, OV 9, EVEN THOUGH THE CONVICTIONS WERE TECHNICALLY FOR ONE OF THE VICTIMS?

Plaintiff-Appellee says: "Yes"
Defendant-Appellant says: "No"
Trial Court says: "Yes"

COUNTER-STATEMENT OF FACTS

On April 5, 2005, Defendant was convicted by a jury of Criminal Sexual Conduct First Degree, MCL 750.520b, and Criminal Sexual Conduct Second Degree, MCL 750.520c.

Trial. The victim testified that she was vaginally penetrated by the Defendant's finger. (B5) She testified Defendant also touched her buttocks and breasts. (B8-B9) At the time, she was under 13 years of age. (B2) She was assaulted during her employment, helping Defendant to deliver papers.

The victim's sister, also a young teenager, testified that she worked for Defendant, both prior to and at the same time as her younger sister. That was October 3, 2003 through April 2004. During that time, the sister was 15 and 16 years of age. (B46-B47)

Originally, this case involved three counts of Criminal Sexual Conduct, with the third count applying to the sister of the complainant. This third count covered that period of time that the sister was under age 16. This was another violation of MCL 750.520c, Second Degree Criminal Sexual Conduct. The Defendant moved for, and was granted severance of this charge from the first two. (B74-B80). On May 20, 2005, the third count was dismissed without prejudice because of the Defendant's sentencing on Count 1 and Count 2. (B81) The dismissed charge was not part of any agreement, it was for "judicial economy".

The trial judge allowed Plaintiff, to present evidence under MRE 404(b). The victim's sister said she was sexually assaulted when Defendant fondled her breasts and genitals. (B49) When the victim revealed the sexual assault against her, it upset her sister. Defendant told the sister that he did not like her younger sister in the same way that he liked her. (B51)

Another young female worked for Defendant too. (B63) Defendant told this woman that young girls changed their clothes in front of him. (B64)

Sentencing. Defendant objected to scoring of OV 9. Defense counsel argued that only one victim should be scored, since the charge regarding the sister was dismissed. (A7, page 3) Plaintiff argued OV 9 was properly scored, since the sisters were under the control of Defendant, and placed at greater risk. The trial judge ruled the scoring for OV 9 was correct. (A7, pages 3-4)

The minimum guideline ranges were 108 to 180 months on the Criminal Sexual Conduct, First Degree and 36 to 71 months on the Criminal Sexual Conduct, Second Degree. (A17, the second to the last page and last page) If OV 9 was scored as one victim, the range was lowered to 81 to 135 months and 29 to 57 months respectively.

Defendant received a prison term of 180 months to 44 years for the conviction of Criminal Sexual Conduct First Degree, and a sentence of 71 months to 15 years for the conviction of Criminal Sexual Conduct Second Degree.

ARGUMENT

WHERE TRIAL TESTIMONY ESTABLISHES THAT TWO YOUNG SISTERS WERE SEXAULLY EXPLOITED BY THE DEFENDANT, THE LAW ALLOWS THE TRIAL JUDGE TO ASSESS POINTS FOR TWO VICTIMS UNDER MCL 777.39, OV 9, EVEN THOUGH THE CONVICTIONS WERE TECHNICALLY FOR ONE OF THE VICTIMS.

Standard of Review

The interpretation of the sentencing guidelines is a legal question that is reviewed de novo.¹ In construing the statute, the reviewing court considers the intent of the Legislature.²

MCL 777.39; Current Statute

In passing sentence in this case, the trial judge was required to utilize the statutory guidelines.³ The scoring for the number of victims is found in MCL 777.39, which provides:

(1) Offense variable 9 is number of victims. Score offense variable 9 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

- (a) Multiple deaths occurred 100 points
- (b) There were 10 or more victims 25 points
- (c) There were 2 to 9 victims 10 points
- (d) There were fewer than 2 victims 0 points

(2) All of the following apply to scoring offense variable 9:

- (a) Count each person who was placed in danger of injury or loss of life as a victim
- (b) Score 100 points only in homicide cases.

Here, the trial judge determined there were two victims, and assessed the ten points for OV 9.

¹ *People v Perkins*, 468 Mich 448, 452; 662 NW2d 727 (2003)

² *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999)

³ MCL 777.11 et seq

Prior to the statutory guidelines, sentencing guidelines were controlled by administrative order of this Court. In 1994, the scoring of multiple victims in Criminal Sexual Conduct cases was governed by OV 6. OV 6 assessed 100 points in homicide cases, ten points for two or more victims, and zero points in a single victim situation. Essentially, on its face, it appears to be a simpler version of the current OV 9.

In 1994, the Court of Appeals decided that a case that named only one victim could not be scored for multiple victims.⁴ *Chesebro* dealt with a defendant who disclosed to his probation officer that he had other uncharged sexual encounters with unnamed victims in the past.⁵ In reaching the *Chesebro* decision, the Court of Appeals looked at the instruction accompanying the sentencing guidelines. The Court found the definitions of offense variable were factors that primarily defined the seriousness of the offense. As a result, the Court of Appeals concluded the focus of the Court-mandated offense variables was to measure the offense and not the offender:

“We begin by looking at the definition of “offense variable” contained in the sentencing guidelines. The definitions section defines “offense variable” as being the factors “that are used to evaluate the seriousness of the offense.” Thus, the primary focus of the offense variable is not to measure the offender, but to measure the offense. (1) Indeed, in looking at the various offense variables, both for criminal sexual conduct and other crimes, it can be readily observed that the offense variables by and large speak to the circumstances of the particular offense for which the defendant is to be sentenced. For example, Offense Variable 1 addresses the use of a weapon in the course of the crime, Offense Variable 2 addresses a physical attack on the victim, Offense Variable 3 addresses the intent to kill or injury, Offense Variable 4 addresses aggravated physical abuse involved in an offense, and so on.” ...

(1) The nature of the offender is primarily measured by use of the prior record variables. This is not to say, of course, that the offense variables completely ignore the nature of the offender, only that their primary focus is on the nature of the offense. (*Original Footnote*).⁶

⁴ *People v Chesebro*, 206 Mich App 468; 552 NW2d 677 (1994)

⁵ 206 Mich App 469-470

⁶ 206 Mich App 470

Chesebro was followed in the Court of Appeals. A recent case, *People v Gullett*, was published by the Court of Appeals in November 2007.⁷ In *Gullett*, the Court of Appeals relied on *Chesebro*, and found OV 6 substantially corresponded to the current statutory OV 9. In *Gullett*, it appears the defendant entered into a plea bargain to one count that named one victim. Other charges involving other victims were dismissed. No testimony was taken from the complainant or from the other children that were allegedly victimized by the defendant.

In Defendant's case, facts are different. Both young girls testified. The sisters testified to the sexual assaults against them. Further, their testimony was corroborated by a third witness. Defendant was found guilty at trial. The verdicts were consistent with all this testimony. And in scoring OV 9, the trial judge relied on trial evidence, and not just a report mentioning unnamed victims.

There are differences in the law that applied to the old sentencing guidelines, and the new statutory guidelines. First, the statutory guidelines clearly define "victim". A "victim" is "a person who is placed in danger of physical injury or death."⁸

The definition of a "victim" has been considered by this Court.⁹ In *Morson*, the Court held that "pursuant to the plain language of the statute, the sentencing court is to count each person who is placed in danger of injury or loss of life" as a victim.¹⁰ In *Morson*, one person was robbed but other bystanders were placed in danger by the defendant's conduct. However, under

⁷ *People v Gullett*, 277 Mich App 214; ___ NW2d ___ (2007); On Remand 477 Mich 851; 720 NW2d 742 (2006)

⁸ MCL 777.39c; MCL 777.39(1)(c), MCL 777.39(2)(a)

⁹ *People v Morson*, 471 Mich 248; 685 NW2d 203 (2004).

¹⁰ 471 Mich 262

the literal reading of *Chesebro*, it appears that such scoring would not be allowed, since under the rationale of *Chesebro* only the actual named victim is allowed to be scored.

MCL 777.39 Requires Chesebro to be Abandoned

Chesebro does not address the full ramifications of a defendant's conduct. A defendant should be fully scored in the guidelines, for the consequences of his criminal behavior, especially when it is established by evidence at trial.

The language of the statutory sentencing guidelines differ from the judicial guidelines. In scoring the sentence range, MCL 777.21 directs the sentencing judge to score *all* conduct under the offense category. It provides in relevant part:

- (1) Except as otherwise provided in this section, for an offense enumerated in part 2 of this chapter, determine the recommended minimum sentence range as follows:
 - (a) Find the offense category for the offense from part 2 of this chapter. From section 22 of this chapter, determine the offense variables to be scored for the offense category and score only those offense variables for the offender as provided in part 4 of the chapter. Total those points to determine the offender's offense variable level.

The emphasis in the statutory guidelines is on scoring under the offense category.

In Defendant's case, scoring would include other contemporary and relevant criminal sexual conduct. Emphasis is placed on "behavior" under the category to be scored against the offender. What is being calculated by the language of MCL 777.21 is the "offender offense variable level". This is very different from the instruction in the *judicial* guidelines that the offense variables are used to determine the seriousness of the offense. Now, each offense is fully scored for *all* conduct under the category and by the terms of MCL 777.21 it is a score for the offender. It is personal to the defendant and not just to measure the offense.

In Defendant's case, MCL 777.39 requires any person who is placed in danger to be scored as a "victim". And MCL 777.21 emphasizes that a defendant should be scored for all offensive variables that occur under the category: a crime against a person and specifically criminal sexual conduct. The emphasis is on the offender, rather than the offense.

These differences in MCL 777.21, and its emphasis on the conduct of the offender, were not addressed in *Chesebro*. The Court of Appeals did not address these concerns because the definitional section it used for guidance did not include this language.

The Court of Appeals in *Gullett* failed to recognize the difference in the instruction applying to the old OV 6 and the current statutory OV 9. The interpretation of OV 9 should follow the current statutory directives, found in MCL 777.21 and MCL 777.39.

The statutes mandate that a trial court should look at the type of the offense, and also at the offender. This is a reasonable view. The *Chesebro* logic would never allow the scoring of two victims in closely-related cases to occur. For instance, even in this case if at a separate trial Defendant was convicted on the additional count of Criminal Sexual Conduct Second Degree, the scoring for that count under the logic of *Chesebro* would still just be one victim. Three counts, but always one victim, because only one victim is named in each count. And a sentence is calculated separately for each count.

Defendant's motion led to the separation of the charges in this case, but, the injury extends beyond the charged conduct. The impact on the older sister is beyond and without question. The pain of that victim remains. The assaults occurred. The disclosure by the young sister made the older sister feel the guilt and remorse. The second victim felt responsible for her younger sister's ordeal.

But, under the *Chesebro* rule, each count of Criminal Sexual Conduct could only have one named victim. It is very seldom that a criminal sexual conduct charge would ever have more than one named victim. After all, this violation is of a personal and private nature. But the effect on each victim is profound. The nature of the crime in *Morson*, an armed robbery, endangered other people, even though they were not named. The danger is obvious, due to the often public nature of robbery.

In Defendant's case, the danger is more subtle. A newspaper job was used as a lure. Since one sister was employed and the Defendant was familiar and safe, a second sister was employed. He reassured the first victim he had no sexual interest in the second. But, he lied, and sexually assaulted the second. Defendant should not benefit from this difference in circumstance. He should be fully responsible for his criminal conduct. The trial judge should be allowed to use the *trial* evidence.

Plaintiff urges this Court to score OV 9 for what Defendant did. Defendant is a man that used the lure of employment to victimize two young teenage sisters. OV 9 should be scored for ten points. The language of MCL 777.39 supports this conclusion. Simple logic supports this conclusion too: two victims.

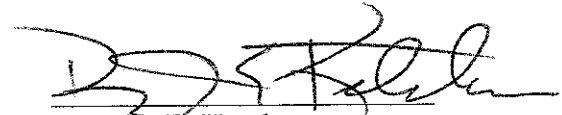
Plaintiff asks this Court to affirm the trial court's scoring of OV 9.

RELIEF REQUESTED

The Plaintiff respectfully requests this Honorable Court affirm the trial court's score for OV 9 in this case.

Dated: February 13, 2008

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. E. Ketchum", written over a horizontal line.

Douglas E. Ketchum
Assistant Prosecutor

DEK:plc