

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-v-

GORDON BENJAMIN WILDING,
Defendant-Appellant.

Supreme Court No. 147675
Court of Appeals No. 309245
Circuit Court No. 10-18981 FH

LIVINGSTON COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

JEANICE DAGHER-MARGOSIAN (P35933)
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147675
DFAT's Speed

SUPPLEMENTAL BRIEF

STATE APPELLATE DEFENDER OFFICE

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FILED
JAN 8 2014
LARRY S. ROYSTER
CLERK
MICHIGAN SUPREME COURT

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STATEMENT OF QUESTIONS PRESENTED

- I. DOES DEFENDANT CHALLENGE THE SCORING OF OV 3, 4, 8, & 10, BECAUSE THE SCORES ASSESSED DO NOT COMPORT WITH THE FACTS, APPLICABLE LAW, OR DUE PROCESS GUARANTEES?

Trial Court answers, "No".

Defendant-Appellant answers, "Yes".

Plaintiff-Appellee answered, "No".

Court of Appeals answered, "No".

STATEMENT OF FACTS

Defendant incorporates by reference his Statement of Facts from the application for leave previously filed in this Court.

ARGUMENT

- I. DEFENDANT CHALLENGES THE SCORING OF OV 3, 4, 8, & 10, BECAUSE THE SCORES ASSESSED DO NOT COMPORT WITH THE FACTS, APPLICABLE LAW, OR DUE PROCESS GUARANTEES.

Standard of Review. The standard regarding guidelines challenges, in addition to authority cited in the application for leave, is now unequivocally by a preponderance of record evidence. The standard is no longer "some evidence"; the preponderance test must be satisfied. *People v Hardy* and *People v Glenn*, 494 Mich 430 (2013). Mr. Wilding's challenges to OV's 3, 4, 8, and 10 must be evaluated under this standard, rather than earlier standards allowing for "some evidence."

Discussion. Defendant Wilding wishes to point out that his argument regarding OV 10 is further supported by *People v James Taylor*, 486 Mich 904 (2010). There, this Court held that even where there was an age difference in an assault case of 14 years (defendant was nearly 30 and victim was 16) there was an insufficient showing that there was an exploitation of the victim's vulnerability. Mr. Wilding has argued that the same is true in his case; exploitation cannot be assumed under OV 10. It must be established by a preponderance by the prosecution. Since that did not happen in the case at bar, the scoring under this variable is improper and requires a remand for resentencing.

Mr. Wilding also cites additional authority as to OV 8. In *People v Thompson*, 488 Mich 888 (2010), this Court considered whether moving a complainant from a common area to a bedroom to effectuate criminal sexual conduct crimes was a proper basis for scoring OV 8, Victim Asportation or Captivity. The Court held that it was not a proper basis, because the movement was merely incidental to the offense. This reasoning applies to the OV 8 claim here, as well. Where Mr. Wilding met the

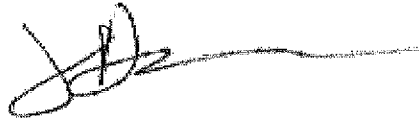
complainant at a high school dance, but eventually had sex with her outside in a van, this movement was not to place the victim in greater danger. Instead, it was incidental to, and for the purpose of, committing the crime for which he was convicted. It was not an aggravating factor, and it should not have been scored. This error requires a remand for resentencing.

SUMMARY AND RELIEF

Defendant refers to and incorporates his summary and relief as submitted in his application for leave.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE



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Dated: January 8, 2014

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CERTIFICATE OF SERVICE

Jean M. Downey says that on January 8, 2014, she mailed one copy of the following: SUPPLEMENTAL BRIEF and CERTIFICATE OF SERVICE to:

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Jean M. Downey

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