

S T A T E O F M I C H I G A N
I N T H E C O U R T O F A P P E A L S

PEOPLE OF THE STATE
OF MICHIGAN

Court of Appeals
No. 172928

Plaintiff-Appellee,

Circuit Court
No. 93-63014

-vs-

DANIEL ARTHUR E. TURNER

Defendant-Appellant.

-----/

PLAINTIFF-APPELLEE'S BRIEF
ORAL ARGUMENT REQUESTED

William A. Forsyth (P23770)
Kent County Prosecuting Attorney

Timothy K. McMorrow (P25386)
Chief Appellate Attorney

David M. LaGrand (P47106)
Assistant Prosecuting Attorney

Business Address:
416 Hall of Justice
333 Monroe NW
Grand Rapids MI 49503
(616) 774-3577

TABLE OF CONTENTS

TABLE OF CONTENTS i
INDEX OF AUTHORITIES ii
COUNTER-STATEMENT OF QUESTIONS PRESENTED iii
COUNTER-STATEMENT OF FACTS 1
RELIEF 7

INDEX OF AUTHORITIES

CASES

People v Conte,
152 Mich App 8; 391 NW2d 763 (1986) 4

People v Duncan,
402 Mich 1; 260 NW2d 58 (1977) 4

People v Guenther,
188 Mich App 174; 459 NW2d 59 (1991) 4

People v McKernan,
185 Mich App 780; 462 NW2d 843 (1990) 5

People v Milbourn,
435 Mich 630, 650; 461 NW2d 1 (1990) 5, 6

People v Stamper,
179 Mich App 432, 438-439; 446 NW2d 312 (1989) 3

People v Tommolino,
187 Mich App 14; 466 NW2d 315 (1991),
lv app den 439 Mich 897 (1991) 2

People v Warner,
198 Mich App 26; 475 NW2d 397 (1991) 5

Strickland v Washington,
466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984) 2

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

DID DEFENDANT FAIL TO ESTABLISH SURETY THAT
THE PERFORMANCE OF TRAIL COUNSEL WAS DEFICIENT
OR THAT DEFENDANT WAS PREJUDICED?

Trial court answered "Yes."

Defendant-Appellant answers "No."

Plaintiff-Appellee answers "Yes."

II.

THE PROSECUTOR DID NOT IMPROPERLY APPEAL TO
THE JURY'S SYMPATHY FOR THE VICTIM AT TRIAL

Trial court answered "Yes."

Defendant-Appellant answers "No."

Plaintiff-Appellee answers "Yes."

III.

WAS DEFENDANT'S SENTENCE WAS PROPORTIONAL TO
THE OFFENSE AND THE OFFENDER?

Trial court answered "Yes."

Defendant-Appellant answers "No."

Plaintiff-Appellee answers "Yes."

COUNTER-STATEMENT OF FACTS

Plaintiff accepts defendant's recitation of the facts of this case for purposes of appeal.

ARGUMENT

I

DEFENDANT HAS FAILED TO ESTABLISH EITHER THAT THE PERFORMANCE OF TRIAL COUNSEL WAS DEFICIENT OR THAT DEFENDANT WAS PREJUDICED.

Defendant claims on appeal that he was denied effective assistance of counsel because trial counsel did not pursue a defense of this matter, defendant has not shown either that the performance of defendant's trial counsel was deficient or that defendant was prejudiced by the conduct of his trial counsel.

Prior to 1991, there was a split of authority in the Court of Appeals as to the standard of review to be applied to ineffective assistance of counsel claims under the Michigan Constitution. However, that split was resolved in People v Tommolino, 187 Mich App 14; 456 NW2d 315 (1991), lv app den 439 Mich 897 (1991). The decision in Tommolino is binding on all panels of this Court under Administrative Order 1990-6.

The applicable standard of review under both state and federal constitutions is now the standard set forth by the United States Supreme Court in Strickland v Washington, 466 US 668; 104 S Ct 2052; 89 L Ed 2d 574 (1984). Tommolino, 187 Mich App at 17. In order to establish that trial counsel provided ineffective assistance, defendant must show that counsel made errors so egregious that he was not functioning as the attorney guaranteed by the Sixth Amendment. Counsel's performance must be evaluated under an objective standard of reasonableness, and the burden is on the defendant to rebut the presumption that counsel's actions

constituted sound trial strategy. Even if counsel's performance was deficient, the defendant must show that the deficiency resulted in prejudice to the defendant. An error which had no effect on the outcome does not warrant reversal of a conviction. Id at 17; People v Stammer, 179 Mich App 432, 438-439; 446 NW2d 312 (1989).

Defendant asserts on appeal that his trial counsel should have pursued a defence of diminished capacity in his case. Defendant points to no record evidence of ineffectiveness on the part of his trial counsel, nor does he request on appeal that this case be remanded to develop such a record. Defendant merely asserts that a different trial strategy was possible and might have met with more success. In the face of a conviction, it is logically impossible to posit an alternative strategy would have met with less success for defendant, but that logic does not compel a conclusion that Defendant's trial counsel was ineffective. Nor has this court ever been tempted to adopt an outcome-driven analysis of counsel's effectiveness for obvious reasons. The only evidence that Defendant cites on appeal, a speech by Defendant at his sentencing, undermines defendant's assertion that his sexual orientation prevented his awareness of the wrong involved in his sexual assault on a child or his inability to prevent the assault, since Defendant claims that at the time of sentencing he had chosen to abstain from sex for a six year period indicating an impressive degree of self control. (ST 21).

ARGUMENT

II.

THE PROSECUTOR DID NOT IMPROPERLY APPEAL TO THE JURY'S SYMPATHY FOR THE VICTIM AT TRIAL

Defendant claims on appeal that at trial the prosecutor improperly appealed to juror's sympathy for victim. Defendant claims that in doing so the prosecutor deprived Defendant of a fair trial. Appellate review of the prosecutor's comments during closing argument is precluded absent a miscarriage of justice. People v Conte, 152 Mich App 6; 391 NW2d 763 (1986); People v Duncan, 402 Mich 1; 260 NW2d 58 (1977). If defendant objects to prosecutorial comments, the appropriate remedy is a curative instruction. People v Guenther, 183 Mich App 174; 469 NW2d 59 (1991). In this case, the jury had already been instructed at the outset of trial to base their verdict only on the basis of the evidence presented at trial. (TT I p12). The jury was similarly instructed at the close of argument. (TT III p209).

The jury was not asked by the prosecutor to decide this case based on improper considerations. Defendant complains on appeal that in his closing argument, the prosecutor quoted an unnamed poet expressing the sentiment that children are hope for the future. (TT 797). This statement was at most irrelevant, could certainly have been corrected by a curative instruction, and was even by the most extreme stretch of the imagination only harmless error.

ARGUMENT

III.

DEFENDANT'S SENTENCE WAS PROPORTIONAL TO THE OFFENSE AND THE OFFENDER.

Defendant's 30 to 50 year sentence was proportionate to the offense and the offender, in keeping with the mandate of People v Milbourn, 435 Mich 630, 650; 461 NW2d 1 (1990). When a court imposes a sentence, the court must respect the "principle of proportionality." Id. This means that in imposing a sentence, a court must "take into account the nature of the offense and the background of the offender." Milbourn 435 Mich at 651.

Sentences which fall within the range recommended in the Michigan Sentencing Guidelines are presumptively proportionate. People v Warner, 190 Mich App 26; 475 NW2d 397 (1991). Defendant was convicted of kidnapping and first degree criminal sexual conduct. Defendant acknowledges on appeal that the guidelines range for his minimum sentence was between 15 and 30 years. Accordingly, Defendant's 30 year minimum sentence was within the guidelines. Defendant mistakenly claims on appeal that the trial judge's assessment of the likelihood that Defendant would be a repeat offender was impermissible in setting Defendant's sentence. In People v McKernan, 185 Mich App 790; 462 NW2d 843 (1990) this court held that a trial court could not determine that a Defendant was at high risk of recidivism merely because of the Defendant's age. An assessment of the risk of recidivism is in itself entirely proper when determining a sentence, since the Supreme Court has mandated that sentences be proportionate to the

offender. Milbourne, 435 Mich 630. The trial court in this case determined that Defendant was a dangerous sexual predator, not that Defendant was old.

RELIEF

WHEREFORE, for the reasons stated herein, the People respectfully pray that the conviction and sentence entered in this cause by the Circuit Court for the County of Kent be AFFIRMED.

Respectfully submitted,

William A. Forsyth
Kent County Prosecuting Attorney

DATED: May 1, 1955

151
David H. LaGrande (P47106)
Assistant Prosecuting Attorney