STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 19, 2009
v	No. 287232 Newaygo Circuit Court
BRIAN EDWARD HORTON, Defendant-Appellant.	LC No. 07-008970-FC

Before: Talbot, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of four counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c, and was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 8 years and 11 months to 22 years and 6 months. Defendant appeals by leave granted. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with sexually assaulting the victim over the course of several years. The victim testified at length, delving into specific instances where defendant inappropriately touched her. Throughout the proceedings, defendant maintained his innocence. Defendant contended that the victim fabricated the stories of sexual abuse and that, on a few specific occasions, the victim was the actual aggressor. Defendant continued to maintain his innocence at sentencing, where he protested his habitual offender charge in the pre-sentence investigation report and further stated that he was "not guilty of any of this." The trial court told defendant that it would not entertain "arguing with the conclusion," but it otherwise invited defendant to advise the court of anything else it should be aware of before pronouncing a sentence.

Defendant declined several such invitations. In fact, defendant also declined the invitation to respond to the prosecution's recommended sentence of 6 years and 3 months, as well as the invitation to explain his statement that "it's non-negotiable," which the trial court indicated it did not understand. The court then told defendant, "You don't give me much to work with." At this point, defendant began to criticize his counsel, stating that "[t]hey never set [sic] there and talked to me about anything. No, I was never represented fairly." The exchange continued.

THE COURT: Well, the point is that you were convicted by a jury and I heard the trial based upon the testimony of a witness who was sixteen years old who said that you assaulted her on a number of occasions.

THE DEFENDANT: There was also a lot of testimony that said, I don't remember, I don't recall. There's also indescrepancies [sic] in the testimony.

THE COURT: The maximum I can give you under the Guidelines is eight years and eleven months.

Given your prior record, it's the sentence of the Court that you serve not less than 8 years and 11 months to 22-1/2 years.

Given your circumstances, I consider you a danger to this community. *You are not willing recognize that anything that you've done has been wrong.* You've criticized everything about this particular process. I consider you a threat to this community. *And for that reason I'm giving you the maximum sentence allowable by law in this circumstance.*

Now you're 47 years old. I can tell you this. You can max out this sentence.

THE DEFENDANT: Yes, Your Honor.

THE COURT: You can do the next 22-1/2 years by maintaining this attitude. The idea behind indeterminate sentencing is that this Court only has the authority to set minimum sentences. The maximum is set by law which is 22-1/2 years. Now the theory is that you have to serve at least 8 years and 11 months of this sentence the minimum, but the Department of Corrections has the authority to keep you for the whole 22-1/2 years or until you're rehabilitated.

THE DEFENDANT: *I'm not going to give into something I didn't do. That's all there is to it.*

THE COURT: *Well, let's see. You're 47 years old now, so you'll be 70 years old when you're released with that attitude.* That's if you want to spend the rest of your natural life in the State Prison System, that's your privilege.

THE DEFENDANT: I'd rather spend life in prison an innocent man than plead guilty to something I didn't do. [Emphasis added.]

The court further elaborated, "Now you've talked yourself into a good long sentence. I hope you have some change of heart when you get down there after maybe five or ten years."

Defendant's lone argument on appeal is that the trial court improperly increased his sentences in violation of his constitutional right against self-incrimination when he refused to admit his guilt. We disagree.

When a sentence is found to be within the proper guidelines sentence range, as is defendant's sentence here, we generally cannot remand the case for resentencing. MCL 769.34(10). However, the statute is inapplicable when claims of constitutional infirmity persist. See *People v Conley*, 270 Mich App 301, 316-317; 715 NW2d 377 (2006). Because this alleged constitutional error was not preserved for appeal below, we review the issue for "plain error affecting substantial rights." *People v Pipes*, 475 Mich 267, 269; 715 NW2d 290, 296-297 (2006). Three conditions must be satisfied conjunctively for an issue to avoid forfeiture under the plain error doctrine: "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, and 3) the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, the plain error doctrine only authorizes a reversal when 1) an innocent defendant is erroneously convicted or 2) the plain error "seriously undermined the fairness, integrity, or public reputation of the trial." *Pipes*, *supra* at 274.

The Fifth Amendment of the United States Constitution provides that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." US Const, Am V. Michigan's Constitution is in agreement that no defendant in a criminal case shall be coerced into providing inculpating evidence as it relates to his prosecution. Const 1963, art 1, § 17; *People v Geno*, 261 Mich App 624, 628; 683 NW2d 687 (2004). The privilege against self-incrimination extends through the sentencing phase of trial until a sentence has been ordered and the judgment of conviction is found. *Mitchell v United States*, 526 US 314, 326; 119 S Ct 1307; 143 L Ed 2d 424 (1999). A defendant "is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.'" *Estelle v Smith*, 451 US 454, 468; 101 S Ct 1866; 686 L Ed 2d 359 (1981), quoting *Malloy v Hogan*, 378 US 1, 8; 84 S Ct 1489; 12 L Ed 2d 653 (1964). Thus, a court cannot base any part of a defendant's sentence on the defendant's refutation of guilt, although a court *may* increase a sentence due to a defendant's lack of remorse and inability to be rehabilitated. *People v Jackson*, 474 Mich 996, 996; 707 NW2d 597 (2006); *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995); *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985).

When a court indicates that an admission of guilt may reduce a defendant's sentence, the sentence is inappropriately influenced. *People v Wesley*, 428 Mich 708, 716; 411 NW2d 159 (1987). A sentencing error may only be found if the court based a defendant's sentence upon his refusal to admit guilt, as indicated by 1) asking the defendant for an admission of guilt or 2) offering an abbreviated sentence in exchange for an admission of guilt. *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003). Such an error may be found even if the court's request or offer is only implied. See *Conley*, *supra* at 314-315.

However, our reading of the transcript does not show that the trial court was attempting to elicit any confession of guilt from defendant, let alone an offer to reduce his sentence in exchange therefor. Rather, it is clear that the trial court found that defendant had been convicted by a jury and that defendant was sufficiently dangerous to justify the prosecutor's suggested sentence; and it was seeking from defendant *any* reason why the prosecutor's suggested sentence should not be imposed. While the trial court obviously would have accepted some showing of remorse or potential for rehabilitation, neither is *per se* unconstitutional. Although we recognize that maintaining innocence is not logically compatible with expressing remorse, the trial court simply was not interested in entertaining an argument that the jury's verdict was wrong.

Furthermore, the trial court's admonition that defendant would spend the rest of his life in prison "with that attitude" clearly refers to defendant's refusal to work with the system rather than a refusal to admit guilt.

We do not find that defendant has shown plain error that affected his substantial rights. *Carines*, *supra* at 763. We therefore affirm.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Alton T. Davis