STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LESTER LUMPKIN,

Defendant-Appellant.

UNPUBLISHED
July 16, 1996

No. 122032
LC No. 87-000211

Before: Wahls, P.J., and Murphy and C.D. Corwin,* JJ.

PER CURIAM.

Defendant was convicted by jury of one count of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and breaking and entering an occupied dwelling, MCL 750.110a; MSA 28.305. He was sentenced to concurrent sentences of sixty to ninety years in prison for first-degree criminal sexual conduct and ten to fifteen years in prison for breaking and entering. After this Court reversed defendant's sixty to ninety year sentence pursuant to *People v Moore*, 432 Mich 311 (1989), the trial court resentenced defendant to thirty to sixty years in prison for first-degree criminal sexual conduct.[1] Defendant now appeals as of right and we affirm.

On appeal, defendant argues that he is entitled to resentencing because the trial court relied upon erroneous information in the sentencing information report. In particular, defendant challenges the scoring of offense variable 12 and prior record variable 1. Appellate review of sentencing guidelines calculation is very limited. *People v Johnson*, 202 Mich App 281, 288; 508 NW2d 509 (1993). A sentencing judge has discretion in determining the number of points to be scored as long as evidence exists adequate to support a particular score. People v *Derbeck*, 202 Mich App 443, 449; 482 NW2d 176 (1993).

Although defendant was acquitted of Count II, sexual penetration involving fellatio, there was evidence on the record which supports the trial court's scoring of twenty-five points for offense variable 12. On direct examination, the complainant testified that defendant placed his penis in her mouth. A

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* Circuit judge, sitting on the Court of Appeals by assignment.

sentencing judge may consider criminal activity for which the defendant was acquitted. *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994). Even if the trial court did err in scoring the sentencing information report, defendant was not entitled to resentencing. On remand, the trial judge indicated that any error in scoring the guidelines would have no effect on his decision to sentence defendant to thirty to sixty years in prison. Accordingly, any error resulting from the scoring of offense variable 12 was harmless.

With regard to the scoring of prior record variable 1, defendant abandoned this issue by admitting on remand that he was convicted of breaking and entering.

Finally, defendant argues that he was denied due process and equal protection by virtue of the fact that an offender sentenced to life in prison may serve less time than an inmate sentenced to a term of years. We disagree. The due process clauses of the United States and Michigan Constitutions apply when state action deprives a person of a liberty or property interest. US Const, Am V; Const 1963, art 1, sec 17; *Edmond v Department of Corrections (On Remand)*, 143 Mich App 527, 533; 373 NW2d 168 (1985). To obtain a protectible right, there must be more than an abstract need, desire or unilateral expectation of the interest invoked. Rather, there must be a legitimate claim of entitlement to it. *Id.*

Because a possibility of parole is no more than a mere hope, *Canales v Gabry*, 844 FSupp 1167, 1170 (ED Mich, 1994), there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. *Greenholtz v Nebraska Penal & Correctional Complex Inmantes*, 442 US 1, 7; 99 S Ct 2100; 60 L Ed 2d 668 (1979). A state may create a protected entitlement or expectation of liberty, such as parole, by placing substantive limitations on official discretion. Such an interest, however, does not arise if the decision-maker can deny the requested relief for no reason. *People v Malmquist*, 155 Mich App 521, 524-525; 400 NW2d 317 (1986). Under Michigan law, the decision whether to grant parole is discretionary. See MCL 791.234(7); MSA 28.2304(7); MCL 791.235; MSA 28.2305. Therefore, defendant was not denied due process under the federal or state constitution.

Defendant's equal protection argument is also without merit. Equal protection of the law is guaranteed by both the federal and state constitutions. US Const, Am XIV; Const 1963, art 1, sec 2; *People v Martinez*, 211 Mich App 147, 150; 535 NW2d 236 (1995). The guarantee of equal protection requires that "all persons similarly situated shall be treated alike." *El Souri v Dep't of Social Services*, 429 Mich 203; 414 NW2d 679 (1987). Equal protection does not require that persons in different circumstances be treated the same. *Thompson v Merritt (Amended Opinion)*, 192 Mich App 412, 424; 481 NW2d 735 (1991).

By comparing offenders who have been sentenced to life in prison with inmates sentenced to a term of years, defendant is drawing too narrow a distinction. The policy of this state favors individualized sentencing for every convicted defendant. *People v Adams*, 430 Mich 679, 686; 425 NW2d 437 (1988). The sentence must be tailored to fit the particular circumstances of the offense and

the offender. *People v Downey*, 183 Mich App 405, 413, lv den 436 Mich 871; 454 NW2d 235 (1990). When a defendant has been convicted of an offense such as first-degree criminal sexual conduct, the trial court has the discretion to sentence the defendant to life or any indeterminate term of years. MCL 750.520b(2); MSA 28.788(2)(2). Thus, even if two inmates are convicted of the same offense, they are not similarly situated. Under these circumstances, all that is required is that inmates who are sentenced to a term of years are treated similarly with regard to parole eligibility.

Moreover, defendant's equal protection argument is based on the erroneous assumption that a parolable life sentence is less harsh than a lengthy term of years. See *People v Lino* (After Remand), 213 Mich App 89, 97; 539 NW2d 545 (1995).

Affirmed.

/s/ Myron H. Wahls
/s/ William B. Murphy
/s/ Charles D. Corwin

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[1] In *Moore, supra*, 432 Mich 329, the Supreme Court held that an indeterminate sentence must be one that the defendant has a reasonable prospect of actually serving. This Court, however, has recently ruled that the holding in Moore was overruled by *People v Merriweather*, 447 Mich 799; 527 NW2d 460 (1994). See *People v Kelly*, 213 Mich App 8, 13-15; 539 NW2d 538 (1995).