

**STATE OF MICHIGAN  
IN THE LENAWEЕ COUNTY DISTRICT COURT**

**THE PEOPLE OF THE STATE OF  
MICHIGAN,**

Plaintiff,

vs.

████████████████████,

Defendant.

)  
) SENTENCING MEMORANDUM  
)  
)  
) File No. ██████████  
)  
) Hon. Timothy P. Pickard  
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**SENTENCING MEMORANDUM**

Now Comes the People of the State of Michigan, by and through its prosecuting official,  
and says as follows:

1. Defendant ██████████ plead no contest to third-degree criminal sexual conduct, MCL 750.520d(1)(b). This Court sentenced defendant to a term of 60 to 180 months. Defendant appealed.
2. On June 30, 2009, the Michigan Court of Appeals issued an unpublished opinion remanding defendant's case to this Court for re-sentencing.
3. The People assert that Offense Variable 10 (OV10) should be scored at 15 points because the defendant's actions were directed at vulnerable victims and involved predatory conduct.

4. Defendant exploited the victims' vulnerability by persuading them to perform sexual acts upon the defendant and then persuading the victims to allow defendant to perform sexual acts upon them. MCL 777. 40(3)(c). Defendant's actions make it clear that he exploited the victims for his own selfish and unethical purposes, namely his own sexual gratification. MCL 777.40(3)(b).
5. A trial court may assess a defendant 15 points for predatory conduct under Offense Variable 10 if the court finds the following: (1) the offender engaged in conduct before the commission of the offense; (2) the conduct was directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation; and (3) victimization was the offender's primary purpose for engaging in the preoffense conduct. *People v Cannon*, 481 Mich 152,162-163, 749 NW2d 257 (2008).
6. In *People v Witherspoon*, the court found evidence of pre-offense predatory conduct where the defendant timed the sexual assault so no other persons were present and used isolated and secluded location in the victim's home to commit the assault. *People v Witherspoon*, 257 Mich App 329, 336-337, 670 NW2d 434 (2003). Based on this conduct, the court also found it reasonable to infer that the defendant had watched the victim and waited for an opportunity to perpetrate the assault. *Id.* The court held this evidence was sufficient to elevate the defendant's OV10 score to 15 points. *Id.*
7. In *People v Drohan*, the court found predatory conduct sufficient to raise defendant's OV10 score to 15 points where a defendant's actions of victim began with fondling the victims, escalated to exposing himself to the victims, and then escalated to forced oral sex. *People v Drohan*, 264 Mich App 77, 90, 689 NW2d 750 (2004).
8. In the present case, the defendant approached the victims while they were alone playing in the backyard area of their home. The area where the assault occurred was at the victims' backyard fence near the defendant's tool shed. This area was hidden from view of roadway

and not directly viewable from the back of the victims' home. As in *Witherspoon*, no other persons, other than the victims' themselves were present at the time of the assault. The area where the assault occurred was also staged in such a way so that the defendant was able to stand on a six-inch stack of shingles, placed on his side of the fence, and insert his penis through the holes in the fence so it reached the victims. Additionally, two small tires were placed on the victims' side of the fence. The victims indicated that they stood on these tires to reach the defendant. Under these circumstances, it is clear that the defendant picked this location for the assaults due to its isolation and seclusion. Further, the defendant staged the area so that he would be able to physically accomplish the sexual assault. The act of staging the area in order to accomplish the sexual assault and grooming the victims to abide by his instructions are clearly pre-offense conduct for the purpose of victimizing the victim.

9. Further, much like *Drohan*, the defendant began by first fondling the victims. However, in the present case, the defendant fondled each of the victims while the other victims watched. The defendant then escalated his behavior by unzipping his pants, placing his penis through the holes on the fence, and coercing the victims to touch his penis. Finally, the defendant coerced one of the victims to put the defendant's penis in the victim's mouth. These actions show that the defendant's pre-offense conduct was directed at the victims primarily for the purpose of victimization. MCL 777.403(3)(a).
10. Under *People v Cannon*, youth of the offender is one of the factors considered when assessing the "vulnerable" status of the victim. *People v Cannon*, 481 Mich 152, 157, 749 NW2d 257 (2008). The defendant's three victims were ages 6 and 4 at the time of the incident.
11. The defendant's primary purpose for engaging in the pre-offense conduct was the victimization of the victims. The defendant's actions were taken in a deliberate manner and

were designed to make the victims prey to the defendant's own selfish and unethical purposes, namely his sexual gratification. MCL 777.40(3)(b).

12. The People assert that Offense Variable 12 (OV12) should be scored at 25 points because defendant committed three or more contemporaneous felonious acts against a person, namely the four additional second-degree criminal sexual conduct charges that defendant was originally charged with.
13. A "contemporaneous felonious criminal act" is defined as (1) a criminal act that occurred within 24 hours of the sentencing offense and (2) the criminal act has not and will not result in a separate conviction. See MCL 777.42(2)(a)(i) and (ii).
14. A court can properly score a defendant for "three or more contemporaneous felonious criminal acts involving crimes against a person" even if the defendant only pleads guilty to a single count. In *People v Billings*, a defendant was properly scored 25 points for OV12 where defendant plead guilty to a single count of criminal enterprise while the other charges against him for uttering and publishing were dismissed. *People v Billings*, 283 Mich App 538, 553, 770 NW2d 893 (2009). Although the uttering and publishing charges were dismissed, the court held these charges still met the statutory requirement of acts that "ha[ve] not and will not result in a separate conviction." *Id.* Further, because the uttering and publishing occurred on the same date as criminal enterprise, the charges "occurred within 24 hours of the sentencing offense" – the criminal enterprise charge. *Id.*
15. In the present case, the defendant plead no contest to a charge of to third-degree criminal sexual conduct. This charge was the only sentencing offense. However, the defendant was also charged with four additional counts of second-degree criminal sexual conduct. These charges were subsequently dismissed as a result of defendant's plea bargain. The defendant neither plead nor was sentenced on these additional charges, and thus, these are fit the statutory requirement of criminal acts that "have and will not result in a separate conviction."

*See* MCL 777.42(2)(a)(ii). Further, because these four additional acts of criminal sexual conduct occurred on the same date as the sentencing offense (i.e. the third-degree criminal sexual conduct charge), these criminal acts fit the statutory requirement of occurring within “24 hours of the sentencing offense.” *See* MCL 777.42(2)(a)(i).

16. For these reasons, the People say the defendant’s Offense Variable scoring total should be 75 points. Therefore, the People say the defendant should be sentenced to a term of prison incarceration for 60 – 180 months.

Dated: February 1, 2010

Respectfully submitted,

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