STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TINAJO MAY McGRAW,

Defendant-Appellant.

UNPUBLISHED
August 9, 1996

No. 172419
LC No. 93-7367-FC

Before: Hoekstra, P.J., and Michael J. Kelly, and Graves,*JJ.

PER CURIAM.

Defendant, a juvenile, was convicted by a jury of one count of first-degree criminal sexual conduct [CSC I]. Following a waiver hearing, she was sentenced as an adult to twenty to thirty years' imprisonment. She appeals as of right. We affirm defendant's conviction and sentence, but remand to allow the trial court to comply with MCR 6.425(B).

Defendant's first claim of error is that the trial court erred by admitting her confession into evidence, asserting that the confession was obtained through coercion. We find no clear error in the trial court's finding that defendant's confession was given voluntarily. The record shows that defendant's mother was called to the police station and was present during the entire interview. Defendant was never locked up. Defendant and her mother both signed a form waiving defendant's *Miranda* rights. Further, they indicated to the detective who took the confession that they were waiving those rights, that they understood the consequences of doing so, and that they wished to talk with the detective. Defendant has failed to identify any instance in the record in which the police threatened her, promised her anything, or otherwise overbore her will. *People v Wright*, 441 Mich 140, 167; 490 NW2d 351 (1992). Consequently, defendant's claim of error is without merit.

Defendant next claims that the trial court erred when it denied her motion for a new juvenile waiver hearing. According to defendant, the court failed to fully consider each of the six statutory criteria under MCL 769.1(3); MSA 28.1072(3) for determining whether defendant should be sentenced as an adult. The trial court's findings were supported by substantial evidence, and it appears from the record

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

that the court made an attempt to weigh the relevant factors in a meaningful fashion. *People v Dunbar*, 423 Mich 380, 383; 377 NW2d 262 (1985); *People v Schumacher*, 75 Mich App 505, 512; 256 NW2d 39 (1977). The testimony at the sentencing hearing indicated that although defendant had significant rehabilitative potential, she would not have been subject to the juvenile system long enough to be rehabilitated had she been sentenced as a juvenile. Under the circumstances, we cannot say that the trial court abused its discretion in making the choice it made. *People v Black*, 203 Mich App 428, 431; 513 NW2d 152 (1994); *People v Passeno*, 195 Mich App 91, 103-104; 489 NW2d 152 (1992).

We need not address defendant's contention that she was denied effective assistance of counsel at the juvenile waiver hearing because defendant's brief on appeal did not include that issue in the statement of questions presented. MCR 7.212(5); *Nederlander v Nederlander*, 205 Mich App 123, 128 n 1; 517 NW2d 768 (1994). Regardless, defendant has failed to establish that she would have been sentenced as a juvenile if her counsel had presented information on the sex offender treatment programs; the decision to sentence her as an adult was based on the insufficient time for rehabilitation in the juvenile system.

Defendant also asserts that she is entitled to resentencing because the trial court failed to give counsel for defendant an opportunity to allocute at the waiver hearing prior to making its decision. Defendant has abandoned this issue on appeal by failing to cite any authority for the proposition that the right of allocution extends to waiver hearings. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995). Error, if any, however, was harmless because the court considered counsel's written statement, which provided information like that which would be presented during allocution.[i]

Defendant further contends that the trial court erred in calculating the sentencing guidelines because factor OV 12 was scored for multiple penetrations even though defendant had been acquitted of all but one penetration. This issue is not preserved for review because defense counsel failed to effectively challenge the calculations for factor OV 12 at sentencing or in the motion for resentencing. *People v Walker*, 428 Mich 261, 262; 407 NW2d 367 (1987); MCR 6.429(C). Moreover, even if the trial court had scored factor OV 12 as defendant claims it should have been, defendant's sentence would still be within the guidelines' recommended range. Thus, the court's error, if any, was harmless. *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993).

Nor did the trial court abuse its discretion by failing to take into consideration defendant's status as a victim of child abuse when imposing sentence. Abuse suffered in childhood does not constitute unusual circumstances justifying a lower sentence. *People v Badour*, 167 Mich App 186, 200; 421 NW2d 624 (1988), rev'd on other grounds, 434 Mich 691; 456 NW2d 391 (1990). For the same reason, defendant's lack of a criminal history is insufficient to overcome the presumption of validity that attaches to sentences within the guidelines range. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994).

Defendant also claims that the trial court erred by exempting the victim impact statement from disclosure, in violation of MCR 6.425(B). Because the trial court apparently considered the victim

impact statement in imposing sentence but failed to provide defendant and her attorney with an oral or written summary of the contents of the statement or to allow defendant and her attorney an opportunity to comment on it, defendant is entitled to remand to allow the court to comply with the disclosure requirements and to allow defendant and her attorney to respond. *People v Matzat*, 108 Mich App 327, 331; 310 NW2d 231 (1981).

Defendant's conviction and sentence are affirmed; however, we remand to allow the court to comply with the victim impact statement disclosure requirements of MCR 6.425(B).

/s/ Joel P. Hoekstra
/s/ Michael J. Kelly
/s/ James M. Graves, Jr.

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(1) Even though the caption of MCR 6.931 refers to the rule as a rule for a "Juvenile Sentencing Hearing", MCR 6.931 (E) (4), which requires the Court to make findings of fact and conclusions of law, clearly indicates that the hearing is an evidentiary hearing, and not the functional equivalent of a hearing at which sentence is pronounced.

(2) MCR 6.931 by its own terms has no allocution requirement.

(3) In **People v Berry**, 409 Mich 774, 781 (1980), the Court, in discussing allocution, indicated that a defendant's right of allocution occurs "before the sentence in imposed." The Court is not "imposing a sentence" when it conducts an MCR 6.931 hearing.

(4) Only MCR 6.425 (D) (2) (c) requires an opportunity for allocution, and this rule covers hearings distinct in **time** and **substance** from the hearings covered by MCR 6.931.