

## COA Opinion: Life sentence for CSC-1 is not cruel and unusual punishment

24. October 2011 By Nicole Mazzocco

In *People v. Brown*, No. 297728, the Michigan Court of Appeals affirmed the defendant's conviction of one count of criminal sexual conduct in the first degree ("CSC-I") and the attendant life sentence. The defendant challenged his conviction and sentence on a variety of grounds, including prosecutorial misconduct, admissibility of evidence, ineffective assistance of counsel, right to trial, cruel and unusual punishment, and improper departure from sentencing guidelines. The Court rejected all of the defendant's arguments.

The victim, M.O., was a female under 13 years old. She told a friend that her mother's boyfriend, Bryan Christopher Brown, made her "suck his wiener every night" and that he "videotapes them, like, doing it." M.O.'s friend told his mother, and the mother called the police. Two officers went to Brown's residence and found M.O. sleeping in Brown's bed wearing only underpants. The officers also detected the odor of marijuana and saw drug paraphernalia. Brown was arrested for possession of narcotics and paraphernalia. Robert Krist, a detective with the Warren Police Department, was assigned to the case and investigated Brown's background. Krist learned that Brown had been convicted in Illinois of charges related to sexual conduct involving minors. Krist worked with Donald Raymo, a federal agent with the Department of Homeland Security in the cybercrimes division, to investigate the child pornography allegations.

At trial, M.O. testified that Brown put his private parts in hers, but M.O. could not recall seeing Brown with a camera. The prosecution introduced Brown's Illinois convictions for sexual misconduct involving minors, and the prosecution introduced the testimony of K.D., who had been coached by Brown as a gymnastics student in 1997 when she was approximately five years old. K.D. testified that Brown would grab her and pull her close, and put his hand underneath her leotard and touch her vaginal area on the outside. After the trial, Brown was convicted of CSC-I.

First, Brown claimed that the prosecutor engaged in prosecutorial misconduct. The Court initially noted that Brown had not preserved this issue for appeal because Brown did not object at trial to Krist's or Raymo's testimony related to the federal investigation; the testimony related to Brown's arrest for possession of child pornography; or argument characterizing him as a pedophile. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights, and the Court held that Brown could not meet this standard.

The Court addressed each of Brown's prosecutorial misconduct arguments individually. First, the Court held that even though evidence that Brown was the subject of a federal child-pornography investigation was irrelevant to whether he had committed the charged, a prosecutor's good-faith effort to admit evidence does not constitute misconduct. Even if the evidence was irrelevant, Brown had not established bad faith. Second, the Court rejected Brown's argument that the prosecutor engaged in misconduct by referencing Brown's arrest for possession of marijuana and drug paraphernalia. The Court found this argument unpersuasive, and held that Brown had not shown that the prosecutor was motivated by bad faith. Third, the Court rejected Brown's argument that he was denied a fair trial when

the prosecutor argued Brown was a pedophile. However, the record demonstrated that the prosecutor never referred to Brown as a “pedophile.”

Second, Brown argued that the trial court denied him a fair trial by failing to exercise its duty to ensure that the challenged evidence was not more prejudicial than probative. The Court disagreed and held that the trial court appropriately allowed in testimony from Brown’s former gymnastics student and the jury was properly informed that Brown had pleaded guilty to four counts of sexually abusive activity involving minors in the past. This evidence was introduced under MRE 404(b) and MCL 768.27a. Brown argued that the trial court “abdicated” its duty to evaluate and balance the probative value of the proposed evidence against its prejudicial effect, but the record does not reflect this. Additionally, MCL 768.27a has no temporal limitation so the remoteness of Brown’s conduct towards K.D. did not affect its admissibility.

Third, Brown raised an ineffective assistance of counsel claim arguing that the prosecutor engaged in misconduct to which his counsel failed to raise an objection. The Court rejected this argument because even if the Court were to agree that trial counsel should have objected to any of the alleged instances of prosecutorial misconduct, Brown was not entitled to a new trial because he could not demonstrate that the allegedly deficient performance affected the trial’s outcome. In light of the evidence of guilt, Brown’s claim failed.

Fourth, Brown argued the trial court punished him for exercising his right to trial, but the Court disagreed. The trial court was required by statute to impose the sentence Brown received, so the sentence was not punishment for Brown’s decision to proceed to trial, but rather, it was the risk Brown took by not accepting a plea deal.

Fifth, Brown claimed his life sentence without the possibility of parole constituted cruel and unusual punishment, or in the alternative, that his sentence constituted an impermissible departure from the sentencing guidelines. The Court rejected both arguments. Brown’s sentence was imposed pursuant to MCL 750.520b(2)(c), which mandates the life imprisonment without the possibility of parole for a defendant over the age of 17 who commits CSC-I involving a victim less than 13 years of age where the defendant was previously convicted of a similar sex crime with a victim less than 13 years of age. The Court noted that legislatively mandated sentences are presumptively valid, and Brown had failed to overcome this presumption.

Sixth, the Court rejected Brown’s claim that his sentence constituted a departure from the sentencing guidelines because imposition of a mandated sentence does not constitute a departure from the guidelines.