

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

EDSEL FORD BENDER,

Petitioner,

v

File No. 02-22128-AH
HON. PHILIP E. RODGERS, JR.

RAY WOLFE, WARDEN,

Respondent.

/

Edsel Ford Bender #129017
Petitioner in Pro Per

Charles S. Sugierski, Jr. (P21129)
Assistant Attorney General
Attorney for Respondent

ORDER

In 1999, the Petitioner was charged with two counts of Criminal Sexual Conduct - Third Degree in violation of MCL 750.520d(a)(c) for having engaged in sexual contact with an incapacitated person. He was convicted upon his plea of guilty to attempted Criminal Sexual Conduct - Third Degree and sentenced to 40 to 60 months confinement in the Michigan Department of Corrections. The Petitioner did not appeal his conviction. He is currently confined at the Pugsley Correctional Facility.

On April 22, 2002, the Petitioner filed a Complaint for Writ of Habeas Corpus. On April 24, 2002, the Court issued a pre-hearing order giving the Respondent 21 days from the date of the order to file a response and giving the Petitioner 35 days from the date of the order to file a reply. The Respondent has filed a response. The Petitioner has filed a reply. The Court dispenses with oral argument pursuant to MCR 2.119(E)(3) and issues this written decision and order. Those time limits have now expired. The Court dispenses with oral argument pursuant to MCR 2.119(E)(3) and issues this written decision and order denying the Petitioner's requested relief.

The Petitioner claims that he is being unlawfully restrained because of a “radical jurisdictional defect” because he was charged with and plead guilty to a non-crime. More specifically, the Petitioner claims that he should be immediately released because his victim was not “an incapacitated person” and he could not, therefore, be guilty of violating MCL 750.520d(1)(c). The Respondent argues that a writ of habeas corpus may not be used to attack a criminal conviction. MCL 600.4310. While this is generally true, *Cross v Dept of Corrections*, 103 Mich App 409 (1981), it is not true where the defendant alleges a jurisdictional defect. *People v Carpentier*, 446 Mich 19, 521 NW2d 195 (1994), adopting the United States Supreme Court’s reasoning in *Custis v United States*, 511 US 485; 114 S Ct 1732; 128 L Ed2d 517 (1994). See also *People v Erwin*, 212 Mich App 55, 64-65; 536 NW2d 818 (1995); *People v Johnson*, 396 Mich 424, 442; 240 NW2d 729 (1976) (“Defendant may always challenge whether the state had a right to bring the prosecution in the first place”). The Petitioner’s Complaint for Writ of Habeas Corpus is the appropriate avenue for challenging his conviction on the basis of a jurisdictional defect.

Even though the Petitioner is correct in his assertion that he has the right to raise a jurisdictional defect by Complaint for Writ of Habeas Corpus, there is no jurisdictional defect in this case.

The Petitioner claims that his victim, Linda Dobler, “was not a person fitting the statutory definition of someone ‘mentally incapable’ to the extent that she did not understand what she was doing.” He admits that Ms. Dobler is developmentally disabled and mildly retarded. He argues, however, that whether she was “mentally incapable” for the purposes on MCL 750.520d(1)(c) must be determined under the Mental Health Code, MCL 330.1704, and that no such determination was validly made in this case.

The Petitioner’s argument and reliance on the Mental Health Code is misplaced. MCL 750.520d provides, in pertinent part, as follows:

(1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist:

(c) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

In this case, the applicable phrase is “mentally incapable” which is defined as “a person suffers from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.” MCL 750.520a(g). The rationale behind prohibiting sexual relations with a mentally incapable person is that such a person is presumed to be incapable of truly consenting to the sexual act. *People v Breck*, 230 Mich App 450; 584 NW2d 602 (1998).

A reasonable person standard is the appropriate standard for determining whether the defendant knew or had reason to know that his victim was mentally incapable. *People v Davis*, 102 Mich App 403; 301 NW2d 871 (1981); *People v Baker*, 157 Mich App 613; 403 NW2d 479 (1987). Thus, where an individual’s mental incapacity is apparent to a reasonable person, a defendant will be criminally liable if he engages in sexual conduct with that individual. “The statutory language is meant to encompass not only an understanding of the physical act but also an appreciation of the nonphysical factors, including the moral quality of the act, that accompany such an act.” *Breck, supra* at 455.

Linda Dobler appeared before the Court in this case at the hearing on the Defendant’s Motion to Withdraw his Plea. Her mental incapacity was abundantly obvious to a reasonable person.

For the reasons stated herein, the Court denies the Petitioner his requested relief. The Petitioner’s Complaint for Writ of Habeas Corpus should be and hereby is dismissed.

IT IS SO ORDERED.

This Order resolves the last pending claim and dismisses the case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____