

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN LEE MILLER,

Defendant-Appellant.

UNPUBLISHED

January 21, 1997

No. 195800

Ingham Circuit

LC No. 92-063784-FH

Before: Neff, P.J., and Smolenski and D. A. Roberson,* JJ.

PER CURIAM.

Defendant pleaded guilty to one count of larceny from a person, MCL 750.357; MSA 28.589, and was sentenced to 72 to 120 months' imprisonment. He appeals as of right, insisting that his sentence must be vacated because it exceeds the recommendation in the plea agreement. We remand for resentencing.

I

In exchange for defendant's plea of guilty, the prosecution agreed to dismiss a second count of larceny from a person and one count of possession of marijuana, MCL 333.7403(1), (2)(d); MSA 14.15(7403)(1), (2)(d), and further agreed to not file an allegation that defendant was an habitual offender (third), MCL 769.11; MSA 28.1083. The prosecution also agreed to recommend that defendant's minimum sentence not exceed the applicable sentencing guidelines range. The trial court accepted defendant's plea pursuant to this agreement.

Defendant did not appear at his sentencing hearing and he remained at large for 2 ½ years, until he was arrested for an unrelated offense. An updated presentence investigation report was prepared, and the sentencing guidelines range was calculated at 12 to 60 months. The trial judge did not refer to the plea agreement or the guidelines range when imposing a minimum sentence of 72 months.

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

II

Citing *People v Killebrew*, 416 Mich 189; 330 NW2d 834 (1982), defendant argues that his sentence must be vacated because it is outside the terms of the plea agreement. In *Killebrew*, our Supreme Court held that where a trial court plans to sentence a defendant in excess of a plea recommendation or agreement, he must give the defendant the opportunity to withdraw his plea. *Id.* at 209-210.

The right to withdraw a plea is not absolute, however. *People v Garvin*, 159 Mich App 38, 42-43; 406 NW2d 469 (1987). Here, defendant violated the plea agreement by failing to appear for the scheduled sentencing hearing and remaining at large for 2 ½ years. *Id.* at 43. Therefore, he has both waived his right to withdraw his guilty plea and provided a justification for a longer sentence than originally recommended. *Id.*; see *People v Kean*, 204 Mich App 533, 536; 516 NW2d 128 (1994) (where the defendant failed to comply with agreed-upon conditions during the period between guilty plea hearing and sentencing hearing and also failed to appear for sentencing, the defendant “was not entitled to the benefits of the bargain”). We thus conclude that defendant is not entitled to have his sentence vacated and be resentenced in accordance with the plea agreement.

Because the plea agreement was no longer binding on the parties or the trial judge, defendant could have received a sentence of up to ten years for larceny from a person, MCL 750.357; MSA 28.589, limited only by the doctrine of proportionality. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Although a sentence is presumptively proportional where it falls within the sentencing guidelines, *People v Cotton*, 209 Mich App 82, 85; 530 NW2d 495 (1995), sentences which exceed the sentencing guidelines may also be proportionate. See, e.g., *People v Cade*, 201 Mich App 459; 506 NW2d 586 (1993) (sentence of ten to fifteen years, “a significant departure” from recommended guidelines range of three to five years, held proportional). Here, the guidelines do not take into account defendant’s blatant disregard for the plea agreement and the criminal justice system. *Kean*, *supra* at 537. In light of this and defendant’s lengthy criminal history, which includes five prior felony convictions, defendant’s seventy-two month minimum sentence does not appear to violate the doctrine of proportionality.

However, when a trial court departs from the guidelines’ recommended range, it must articulate his reasons for doing so both on the record and the SIR. *People v Barclay*, 208 Mich App 670, 676-677; 528 NW2d 842 (1995). At defendant’s sentencing hearing, the trial court neither mentioned the guidelines range nor stated clearly on the record its reasons for departure. Therefore, this case must be remanded for resentencing, with instructions that if the trial court again imposes a sentence outside the guidelines, it must articulate both on the record and on the SIR its reasons for doing so.

III

In a related argument, defendant insists that defense counsel’s failure to object to the imposition of a sentence outside the plea agreement or to move to withdraw the plea constitutes ineffective

assistance of counsel. In light of our discussion above, defendant's claim must fail. See *People v Gist*, 188 Mich App 610, 618; 470 NW2d 475 (1991) (counsel not ineffective for failing to make frivolous or meritless motions).

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ Michael R. Smolenski

/s/ Dalton A. Roberson