

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS LEE LEONARD, JR.,

Defendant-Appellant.

UNPUBLISHED
February 28, 1997

No. 177836
Allegan Circuit
LC No. 93-009338-FC

Before: D.F. Walsh,* P.J., and R.P. Griffin** and W.P. Cynar,* JJ.

MEMORANDUM.

Defendant pleaded guilty to second-degree murder, MCL 750.317; MSA 28.549, and was sentenced to twenty-five to fifty years' imprisonment. He appeals as of right. We affirm. This case has been decided without oral argument pursuant to MCR 7.214(E)(1)(b).

Defendant argues that the trial court erred in finding premeditation and assessing fifty points for Offense Variable 3 since he had pleaded guilty to second-degree murder. The instruction for OV 3 provides that the sentencing judge must score this variable consistent with a jury verdict unless the judge has information that was not presented to the jury. Here, defendant's conviction resulted from a plea, not a jury verdict and the record revealed evidence of premeditation. Accordingly, there was evidence to support the score and the court did not abuse its discretion. *People v Garner*, 215 Mich App 218, 219; 544 NW2d 478 (1996).

Defendant also argues that the court erred in concluding that it did not know who the shooter was based in large part on its own personal experiences with firearms. In support of his claim, defendant relies on *People v McKernan*, 185 Mich App 780; 462 NW2d 843 (1990). In that case,

*Former Court of Appeals judges, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.

**Former Supreme Court justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.

this Court held that scientific or psychological justification is necessary before a sentencing judge can make a scientific or psychological conclusion to justify a sentencing decision. The record in the present case reveals that the court did not make a scientific or psychological conclusion regarding the powder burns on the codefendant. Rather, the court simply noted its experience, admitted it was not an expert on the matter in issue and stated that it would need an expert to explain the significance of the powder burns. In any event, the comments were innocuous and harmless where the record reveals that the court did not rely on the matter in issue in sentencing defendant. *People v Hooper*, 50 Mich App 186, 203; 212 NW2d 786 (1973).

Defendant has failed to overcome the presumption that his sentence, which is within the recommended guidelines' range, is proportionate. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990); *People v Eloby (After Remand)*, 215 Mich App 472, 479-480; 547 NW2d 48 (1996). This is especially true where the factors mentioned by defendant were considered by the guidelines and where defendant's plea was tendered pursuant to a plea agreement whereby charges of open murder, MCL 750.316; MSA 28.548, conspiracy to commit open murder, MCL 750.157a; MSA 28.354(1), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), were dismissed.

Affirmed.

/s/ Daniel F. Walsh

/s/ Robert P. Griffin

/s/ Walter P. Cynar