

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 189020

Muskegon Circuit Court

BRENDA PEARSON, a/k/a BRENDA JOHNSON,

LC No. 95-038086-FH

Defendant-Appellant.

Before: Murphy, P.J., and Markey and A.A. Monton*, JJ.

MURPHY, P.J. (dissenting).

I agree with the majority that we cannot say that the trial court's denial of defendant's motion to withdraw her plea was a clear abuse of discretion that resulted in a miscarriage of justice. However, I respectfully dissent from the conclusion that defendant must be resentenced.

Defendant pleaded guilty to ten counts of delivering less than fifty grams of heroin, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and in return, plaintiff agreed not to bring an additional thirty-two counts of delivery that apparently could have been brought. The sentencing guidelines range was determined to be eighteen to sixty months. Defendant was sentenced to ten five-year sentences to be served consecutively.¹ The consecutive nature of the sentences, as well as a minimum sentence of one-year for each count, was established by the Legislature and is mandated by MCL 333.7401(3); MSA 14.15(7401)(3). The record indicates that each of these deliveries was assumed to be approximately 1.3 grams total weight of heroin. Further, postal records showed that defendant sent forty-two packages to the recipient in a one-year period of time and an examination of a confiscated package revealed thirty-nine separately wrapped packets of heroin.

A sentence must be proportionate to the seriousness of the matter, and take into account the nature of the offense and the background of the offender. *People v Milbourn*, 435 Mich 630, 651; 461 NW2d 1 (1990). The sentencing "guidelines reflect the relative seriousness of different combinations of offense and offender characteristics," *Id.* at 658, and a sentence within the guidelines range is presumptively proportionate, *People v Broden*, 428 Mich 343; 408 NW2d 789 (1987);

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

People v Spicer, 216 Mich App 270, 276; 548 NW2d 245 (1996). However, “[c]onceivably, even a sentence within the guidelines could be an abuse of discretion in unusual circumstances.” *Milbourn, supra*, at 661. Therefore, in the absence of “unusual circumstances,” a sentence within the guidelines range satisfies the principle of proportionality and is not an abuse of discretion. *People v Sharp*, 192 Mich App 501, 505; 481 NW2d 773 (1992); *People v Piotrowski*, 211 Mich App 527, 532’ 536 NW2d 293 (1995). The consecutive nature of the sentences has no effect on the principle of proportionality, each sentence must be considered individually to determine if it is proportionate. *People v Miles*, __ Mich __; __ NW2d __ (Docket No. 100683, issued March 6, 1997); *People v Kennebrew*, 220 Mich App 601, 609; __ NW2d __ (1996); *People v Hardy*, 212 Mich App 318, 320; 537 NW2d 267 (1995); *People v Warner*, 190 Mich App 734, 736; 476 NW2d 660 (1991).

In this case, each sentence is within the guidelines range, and is therefore presumptively proportionate. The majority cites the facts that defendant is educated, employed, has no prior criminal history, and that this offense was a “grossly misguided attempt to help a fellow heroin addict, for which she gained nothing,” as circumstances which make this sentence disproportionate. However, this Court has previously held that these are not “unusual” circumstances. In *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994), this Court stated that factors such as “employment, lack of a criminal history, and minimum culpability are not unusual circumstances that overcome [the presumption that a sentence within the guidelines is proportionate.]” Therefore I do not agree that the circumstances cited by the majority justify a conclusion that the sentence is not proportionate, and I have been unable to find any other factors which would. In fact, the record indicates that defendant has had a nearly twenty year involvement with heroin, and that the prosecution had evidence of forty-two separate deliveries of heroin to Brown within a one-year time frame, which means that although this is the first time defendant has been caught, it is not the first time she has violated the law. In addition, on the basis of the volume of heroin sent to Brown, it appears as if Brown used some of the heroin herself and sold the rest to support her habit; a fact of which defendant had to be aware. Also, the sentencing judge, in my opinion, was appropriately concerned about defendant introducing a very dangerous drug into the community.

In my opinion, the only “unusual circumstance” that makes defendant’s sentence appear to be disproportionately harsh is the fact that defendant has a cumulative, minimum total of fifty years of imprisonment, due to the consecutive nature of the sentences. No constitutional issue has been presented by defendant and, as previously indicated, case law does not allow us to consider the consecutive nature to the sentences when determining proportionality. *Miles, supra*; *Kennebrew, supra*; *Hardy, supra*; *Warner, supra*. Arguably, as the number of consecutive sentences increases, the viability of those holdings decreases. Moreover, if our goal is to satisfy the principle set forth in *Milbourn*, at some point it seems to me that the aggregate sentence needs to be considered. Nevertheless, case law precedent is clear and unless the Supreme Court elects to reexamine the issue, the effect of consecutive sentences and its ramification may need to be addressed in the legislative process. With that said, I cannot conclude that a five-year sentence for a delivery of 1.3 grams of heroin given to a defendant under these circumstances is disproportionate and an abuse of discretion, and since each of the ten counts is for deliveries of approximately the same size, this conclusion must apply to all ten of defendant’s sentences. Each sentence, in and of itself, is not disproportionate in light of the fact that it is within the guidelines and there are no unusual circumstances. In my opinion, to find

that this sentence is disproportionate is to disavow the precedent set by *Miles* and *Warner* under the guise of following *Milbourn*.

I have reviewed the cases cited by the majority, and none of those cases deal with the precise issue we are confronted with here -- whether in the absence of unusual circumstances, a sentence within the guidelines can be disproportionate. The cases cited deal with situations such as upwards departures from the guidelines range, see e.g., *Houston, supra*; *Antolovich, supra*, or cases where the guideline simply do not apply, see e.g., *Scott*.

I also think that the majority misapplies the language of *Milbourn* in support of their conclusion. The majority quotes the phrase in *Milbourn* that “[w]here a given case does not present a combination of circumstances placing the offender in either the most serious or least threatening class with respect to the particular crime, then the trial court is not justified in imposing the maximum or minimum penalty,” *Milbourn, supra* at 654, and then concludes that because defendant can not “be placed in the most serious class of drug offenders . . . defendant should not receive the five-year maximum sentence under the guidelines for each offense.” That quotation from *Milbourn* refers to imposing the maximum penalty under the *statute*, i.e., two-thirds of the statutory maximum, only in cases with the most serious combination of circumstances, and is not, as the majority states, referring to imposing the maximum minimum under the *guidelines*. See *Milbourn, supra* at 654 n 22. According to *Milbourn*, there is a continuum from the least to most serious combinations of offense and offender, and the sentencing guidelines “is the best ‘barometer’ of where on the continuum from the least to the most threatening circumstances a given case falls.” *Id.* at 656. In other words, for each particular crime, there is a continuum. At one end there are the cases which represent the least serious combinations of offense and offender, and those cases should receive the minimum sentence allowed by law. At the other end, there are the cases which represent the most serious combinations of offense and offender, and those cases receive the maximum possible sentence under the statute. What the guidelines do is place a given case, i.e., combination of offense and offender, on that continuum. Therefore, I believe it is only when the maximum minimum sentence under the guidelines is also the harshest possible sentence under the statute that a determination must be made as to whether that case represents the most serious combination of offense and offender before the maximum minimum sentence under the guidelines can be imposed. See *People v Moya*, 194 Mich App 373, 380; 487 NW2d 777 (1992) rev’d 441 Mich 864 (1992). Because defendant did not receive the maximum minimum sentence allowed under the statute, that language in *Milbourn* is inapplicable to the case at bar.

The majority holds that under the facts of this case, a sentence at the high end of the guidelines range is not justified, but a sentence at the low end of the range would be appropriate. I cannot agree with such a holding. While I concede that the ultimate test is whether the sentence is proportionate to the seriousness of the matter and not whether it adheres to the guidelines, in my opinion, in the absence of unusual circumstances, it would be an improper infringement on the discretion of the trial court for this Court to review a sentence that falls within the guidelines range to determine where within that range a given case should fall. This would essentially render the presumption of proportionality for sentences within the guidelines meaningless, and require this Court to compare all of the various combinations of offense and offender that lead to the guidelines range at issue and prioritize each combination, in effect,

creating a continuum within the guidelines range. I find no authority for and do not wish to require this Court to perform such an analysis.

In other words, the majority holds that the combination of offense and offender in the instant case is not as serious as other combinations of offense and offender that would lead to the 1½ to 5-year guidelines range for the crime of delivering less than fifty grams of heroin, and therefore, the highest minimum sentence in the range is not proper. However, I do not think we should make such a judgment. The guidelines range represents the actual sentencing practices of the judiciary, *Milbourn, supra* at 656, 657, and if two different combinations of circumstances lead to the same guidelines range, it is an indication that, while one particular judge may consider one combination to be more “serious” than the other, the general sentencing practices of the “great majority of our state’s sentencing judges,” *Id.* at 657, indicate that both combinations are equally serious and deserving of the same place on the *Milbourn* continuum, i.e., the same guidelines range. As far as where within the guidelines range a particular combination should fall, that decision should be left to the discretion of the trial court, and in the absence of unusual circumstances, the sentence is presumptively proportionate and we should not interfere.

In sum, the law states that a sentence within the guidelines is presumptively proportionate, and in the absence of unusual circumstances is not an abuse of discretion. *Sharp, supra*. In this case, the sentence is within the guidelines, and I do not find any unusual circumstances that can be appropriately considered. Therefore, since it is a valid sentence, I feel compelled to affirm the sentence imposed. See *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1997).

I would affirm.

/s/ William B. Murphy

¹ It is interesting to note that if defendant had pleaded guilty to or been convicted of all forty-two counts of delivery that the prosecution had evidence of, she would have faced a mandatory minimum sentence under MCL 333.7401(3); MSA 14.15(7401)(3) of forty-two years, a one-year minimum sentence being imposed for each conviction and the sentences to be served consecutively. It also appears that Ms. Brown, the individual to whom defendant mailed the heroin, cooperated with authorities and received a reduced sentence for her involvement in this criminal activity.