

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT WINBURN, a/k/a SCOTT LIBBY,

Defendant-Appellant.

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UNPUBLISHED

July 8, 1997

No. 192394

Recorder's Court

LC No. 91-007478

Before: Cavanagh, P.J., and Doctoroff and D.A. Teeple\*, JJ.

MEMORANDUM.

Defendant appeals by right his judgment of sentence, after resentencing, following remand by the Michigan Supreme Court and the prosecutor's election to proceed with resentencing on a reduced conviction of second degree murder as to the principal offense. Separate convictions for assault with intent to murder and felony firearm were previously affirmed by this Court on appeal of right and that aspect of the case was left undisturbed by the Supreme Court's order of remand. This case is being decided without oral argument pursuant to MCR 7.214(E).

The Supreme Court's order of remand was based on instructional error as to felony murder. Hence, the trial court's comments concerning the facts of the case as strongly suggesting first degree murder are in no way inconsistent with the Supreme Court's decision, and having sat through the trial, the trial judge at resentencing was uniquely well positioned to impose an individualized sentence based on the particular facts of the case. *People v Shavers*, 448 Mich 389, 393-394; 531 NW2d 165 (1995). No basis for resentencing before a different judge has been established on this record.

Defendant's challenge to the trial court's scoring of the sentence guidelines is not cognizable on appeal; no claim of egregious factual error rising to the level of a due process violation has been established. *People v Mitchell*, 454 Mich 145; \_\_\_ NW2d \_\_\_ (1997). As defendant's 25 to 50 year sentence is within the guideline range, it is presumptively proportionate, and defendant has failed to overcome that presumption. *People v Eberhardt*, 205 Mich App 587; 518 NW2d 511 (1994). Nor is defendant entitled to appellate relief because the trial court initially misspoke itself in imposing a

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

maximum sentence of 40 years imprisonment, which was immediately corrected to 50 years. The sentencing proceeding had not terminated and the trial court therefore possessed full authority to impose the sentence intended, notwithstanding an initial misstatement. See *People v Meserve*, 76 Mich 223, 226; 42 NW 1133 (1889); *People v Dotson*, 417 Mich 940; 331 NW2d 477 (1983).

The issues separately raised by defendant are effectively identical to those presented by his appointed counsel and do not require further discussion, with the exception of his fourth issue, that the trial court should have resentenced him on the assault with intent to murder charge. The Supreme Court included no such requirement or suggestion in its order of remand, and hence this issue is outside the proper scope of the appeal of right following remand. *People v Pickett*, 391 Mich 305; 215 NW2d 695 (1974). Furthermore, there is no legal or factual basis to justify resentencing as to that offense.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Martin M. Doctoroff  
/s/ Donald A. Teeple