

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYRONE DARNELL GASTON,

Defendant-Appellant.

UNPUBLISHED

September 16, 1997

No. 189617

Recorder's Court

LC No. 94-010490-FH

Before: Markey, P.J., and Neff and Smolenski, JJ.

MEMORANDUM.

Following a jury trial at which he was acquitted of second degree murder but convicted of the included offense of involuntary manslaughter, MCL 750.321; MSA 28.553, defendant was sentenced to seven to fifteen years' imprisonment. On this appeal of right, he contends that his sentence is disproportionate to the offense and the offender. We affirm.

The sentence is within the guideline range of three to eight years on the minimum sentence. The circumstances of the offense were commented upon by the trial judge at sentencing:

And you come here and you testify and you're so proud and wonderful. But you put your heel on a man and squashed him, squashed the life out of him. Little thin fellow, narcotics addict, with a little thin girlfriend right next to him. Helpless.

Defendant theorized that in the course of a mutual affray, which defendant acknowledged initiating, decedent died because he struck his head on something when he fell to the ground. The medical examiner found, however, that the cause of death was five blows to the head, not one. Moreover, there was every indication (because no other injuries were found on decedent) that these blows were administered while decedent was on the ground and helpless, being kicked by defendant and his codefendant. Defendant has failed to overcome the presumption that a sentence within the guideline range is proportionate to the offense and the offender. *People v Eberhardt*, 205 Mich App 587; 518 NW2d 511 (1994).

Affirmed.

/s/ Jane E. Markey

/s/ Janet T. Neff

/s/ Michael R. Smolenski