# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LINARD M. MALONE,

Defendant-Appellee.

UNPUBLISHED
September 4, 1998

No. 202554
Oakland Circuit Court
LC No. 96-146705 FH

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LINARD M. MALONE,

Defendant-Appellant.

No. 202647
Oakland Circuit Court
LC No. 96-146705 FH

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Before: Markman, P.J., and Saad and Hoekstra, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to rob unarmed, MCL 750.88; MSA 28.283, and he pleaded guilty to being a fourth habitual offender, MCL 769.12(1)(a); MSA 28.1084(1)(a). The court sentenced defendant to four to twenty years' imprisonment. The prosecutor appeals defendant's sentence in Docket 202554 and defendant appeals his conviction in Docket 202647. We vacate defendant's sentence and remand for resentencing in the former appeal and affirm defendant's conviction in the latter appeal.

In his appeal in Docket 202554, the prosecutor argues that, although defendant's minimum four-year sentence is within the sentencing guidelines, the sentence is disproportionately lenient. The prosecutor points to the violent nature of the offense, defendant's extensive criminal history, which

included eight prior armed robbery convictions, and the fact that defendant committed the instant offense while on parole. We agree. Because defendant was sentenced as

an habitual offender, the sentencing guidelines are inapplicable, *People v Cervantes*, 448 Mich 620, 625-626; 532 NW2d 831 (1995), and may not be considered on appeal in determining the appropriate sentence. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). However, defendant's sentence must nonetheless be proportionate to the offense and the offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990); *Gatewood, supra* at 560.

While we are fully appreciative of the substantial deference to be accorded the trial court's discretion in fashioning a sentence tailored to the circumstances of the offender and his criminal offense, *People v Van Etten*, 163 Mich App 593, 595-6; 415 NW2d 215 (1987), this Court too has a responsibility at the margins to review the propriety of a criminal sentence. *People v Catanzarite*, 211 Mich App 573, 585; 536 NW2d 570 (1995); *People v Lankey* (*After Remand*), 198 Mich App 187, 188; 497 NW2d 571 (1993). This may be particularly true where, as here, there are no applicable guidelines. We find that the following factors warrant our conclusion that the trial court abused its discretion in the instant case in imposing a disproportionately lenient sentence.

(1) Defendant committed the instant offense while on parole from an armed robbery conviction.

(2) The instant offense was committed under circumstances where defendant pretended to have a firearm in his possession and, in fact, caused the victim to fear for her life. See *People v Reeves*, 222 Mich App 32; 564 NW2d 476 (1997). Further, during an ensuing struggle, the complainant was assaulted and injured by defendant.

(3) Defendant was convicted not only as an habitual offender, but as an habitual offender, fourth offense. However, even this conviction understates the level and seriousness of defendant's criminal history. Defendant was convicted previously of eight prior armed robberies, and has been charged with at least three additional felonies, including a bank robbery charge (of uncertain disposition) in Florida.

(4) Although defendant was an habitual offender, he was sentenced at the lowest point of the four-year to ten-year guidelines applicable to a non-habitual offender.

(5) The guidelines in this case inadequately reflected defendant's conduct since the maximum number of Prior Record Variable (PRV) points that can be assessed is fifty and this maximum is triggered by only two prior serious felony convictions. Defendant has committed at least eight such prior offenses. We agree with the prosecutor that the guidelines "failed to reflect the full extent of defendant's criminal record." *People v Granderson*, 212 Mich App 673; 538 NW2d 471 (1995).

We are cognizant that the trial court placed considerable weight in fashioning its sentence on a letter from two members of the Sheriffs Department that defendant, while incarcerated, had "advised detectives" of contraband being brought into the jail and "assisted" them in stopping the contraband. While such assistance is a wholly appropriate factor to be taken into consideration by the trial court (although it would be entitled to far more weight if the prosecutor was in accord with the Sheriffs Department), *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995), we do not find such assistance here to mitigate the abuse of discretion that we otherwise find on the part of the trial court. The record is void of any detail concerning the significance of the contraband problem referenced in the

letter, the nature of defendant's assistance or the consequences of defendant's actions. In other words, it is not at all "objective and verifiable," MCL 333.7401(4); MSA 14.15(7401)(4), much less significant, in our judgment, when considered in the context of the other circumstances relevant to defendant and his criminal offense.

In addition, we respectfully disagree with the trial court concerning the relevance of, or the weight to be accorded, other factors considered in defendant's sentencing. First, we are not inclined to accord significant weight to the estimations of defendant by his supervisors (of six months) as a "good" and "caring" man in view of his criminal record and his commission of the instant crime while on parole and working under their supervision. Second, we find defendant's lack of a juvenile record to be utterly irrelevant in view of his more-than-compensating adult record. Third, while we recognize defendant's obvious intelligence, we fail to see how this serves to mitigate his offense or to justify a more lenient sentence; intelligence is not the equivalent of rehabilitability. Fourth, we see little tangible evidence for crediting defendant with "character and credibility" or a "reasonable potential for rehabilitation." Finally, we do not interpret defendant's allocution in the same way as the dissent, either in terms of defendant's "unconditional admission of culpability" or his "remorse for his crime." While it is impossible to enter the mind of another, we have reviewed defendant's allocution and believe that it is equally compatible with an interpretation of defendant as a self-absorbed and self-absolving individual.[1]

Again, while we are cognizant that ours is an extremely limited role in reviewing the trial court's exercise of sentencing discretion, a limited role is not the equivalent of no role at all. We are persuaded that this is the unusual case in which the trial court has abused its discretion.

In his appeal in Docket 202647, defendant argues that he was denied effective assistance of counsel because counsel effectively conceded his guilt to the charged offense. To establish ineffective assistance of counsel, a defendant must show that his trial counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant as to deprive him of a fair trial. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Because there was no evidentiary hearing on this issue below, our review is limited to errors apparent on the record. *Id.*

While the decision to wholly concede a defendant's guilt constitutes ineffective assistance of counsel, *People v Krysztopaniec*, 170 Mich App 588, 595-596; 429 NW2d 828 (1988), it is well established that a decision to concede a defendant's guilt on a lesser offense is accepted trial strategy, *People v Walker*, 167 Mich App 377, 382; 422 NW2d 8 (1988), overruled on other gds, *People v Mitchell*, 456 Mich 693; 575 NW2d 283 (1998). Here, counsel did not concede defendant's guilt to the assault with intent to rob unarmed offense for which defendant was convicted. Rather, counsel consistently advanced the theory that defendant was guilty only of the lesser offense, attempted unarmed robbery. Counsel's strategy, which could have reduced defendant's sentence by ten years, may have been the best defense available in light of the overwhelming testimony identifying defendant as the perpetrator of the offense. Accordingly, we hold that defendant has not sustained his burden of overcoming the presumption that counsel's actions constituted reasonable trial strategy.

Next, defendant argues that the trial court erred when it failed to instruct the jury on assault and battery, an alleged lesser included misdemeanor of attempted unarmed robbery. According to the record, defendant neither requested this instruction nor objected to the instructions as given. Therefore, our review of this issue is foreclosed unless manifest injustice would result to defendant. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

No manifest injustice will result to defendant, in our judgment, from our failure to review this issue. Beyond defendant's failure to make a proper request, the instruction was not supported by a rational view of the evidence. See *People v Corbiere*, 220 Mich App 260, 262-263; 559 NW2d 666 (1996) (citing five conditions that must be met for a court to instruct the jury on a less included misdemeanor). The proof of defendant's specific intent to rob and steal, which is the element differentiating the misdemeanor from the felony, was not sufficiently in dispute to allow the jury to rationally find defendant guilty of the misdemeanor offense. See *People v Steele*, 429 Mich 13, 18-22; 412 NW2d 206 (1987).

In Docket 202647, we affirm. In Docket 202554, the sentence is vacated and we remand for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ Stephen J. Markman
/s/ Henry William Saad

[1] Defendant's solicitude for the victim in this case consumes less than one short paragraph of an 18-page allocution, concluding that "[N]either of us will ever forget that day any time soon." Nothing at all is said about any of the other victims involved in defendant's many other armed robberies. Defendant proceeds to say that he is not the "scum of the earth," not an "animal," and not a "crazed, psychotic sociopath," with little apparent insight as to why some might have reached a contrary conclusion about him. Rather than truly accepting personal responsibility for his behavior, defendant instead blames his substance use, the fact that we are all "creatures of habit," the "'60's," his exposure to tragedies that have befallen co-workers, the inadequacy of the MDOC's drug treatment program, the attitude of the legal system toward drugs, insurance companies denying him medical coverage, and "compulsions." These are interspersed with occasional and, in our judgment, largely perfunctory statements that defendant, in fact, committed the crime for which he was being sentenced.