

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID LEE SIPE,

Defendant-Appellant.

UNPUBLISHED

April 30, 1999

No. 206660

Antrim Circuit Court

LC No. 93-002753 FH

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

PER CURIAM.

Defendant pleaded guilty of embezzlement by an agent over \$100, MCL 705.174; MSA 28.371, and was sentenced to serve 80 to 120 months' in prison. We remanded to permit defendant to challenge the guidelines scoring and the constitutionality of certain prior convictions. *People v Sipe*, unpublished opinion per curiam of the Court of Appeals, decided May 28, 1996 (Docket No. 174386). On remand, the trial court resentenced defendant to 80 to 120 months' imprisonment. Defendant appeals as of right. We remand.

On remand, defendant challenged the constitutional validity of the following prior misdemeanor convictions: a 1984 conviction for minor in possession, and two 1984 convictions for disorderly conduct. Defendant failed to make a prima facie showing that the 1984 minor in possession was constitutionally invalid because he failed to demonstrate that defendant was actually subjected to incarceration by the conviction. *People v Justice*, 216 Mich App 633; 550 NW2d 562 (1996); *People v Richert (After Remand)*, 216 Mich App 186; 548 NW2d 924 (1996). The documentation attached to defendant's motion for resentencing and the information contained in the presentence investigation report established a prima facie showing, however, that the remaining two misdemeanor convictions were constitutionally invalid. *Justice, supra*; *Richert, supra*. The trial court refused to consider all three prior misdemeanor convictions for purposes of scoring the sentencing guidelines. It refused to strike the prior convictions from the report, however, because the prior convictions constituted "background information about this man's life." The court erred when it refused to strike the prior misdemeanor convictions from the report. *People v Martinez*, 193 Mich App 377, 386; 485 NW2d 124 (1992). It similarly erred when it refused to strike defendant's juvenile record from the

report after agreeing not to consider it for the purpose of scoring the guidelines in light of defendant's challenge to the constitutional validity of the record. *People v Daoust*, 228 Mich App 1, 17-19; 577 NW2d 179 (1998); *Martinez*, *supra*.

Additionally, in its explanation of the sentence imposed, the court made reference to defendant's "extensive" criminal background. We are unable to ascertain from the record whether the court included in defendant's "extensive" criminal background the juvenile adjudications, and the two disorderly conduct convictions. Accordingly, we remand to the trial court for a determination of whether it considered this information when imposing sentence. If the court determines that it did, then defendant is entitled to resentencing before a different judge. *Martinez*, 193 Mich App at 386. However, if the court determines that it did not consider the aforementioned information when sentencing defendant, then the court may enter an order affirming the sentence which we conclude does not violate the principle of proportionality, *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), does not violate the prohibition against cruel and unusual punishment, *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993), and was not based on improper considerations, in the latter regard particularly where the victim was identified as elderly and disabled at defendant's original sentencing.

Regardless of whether defendant is resentenced, the court shall strike defendant's juvenile and misdemeanor records from the presentence report and submit a corrected report to the Department of Corrections. *People v Martinez (After Remand)*, 210 Mich App 199, 202-203; 532 NW2d 863 (1996).

Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly

/s/ Janet T. Neff

/s/ Michael R. Smolenski