STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 18, 1999
v	No. 209255 Eaton Circuit Court
CORNELIUS TERREL SHANNON, Defendant-Appellant.	LC No. 93-020297 FC

Before: Neff, P.J., and Hood and Murphy, JJ.

PER CURIAM.

In this first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(e); MSA 28.788(2)(1)(e) and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2) case, defendant appeals by right from the twenty-seven- to forty-five-year prison term the lower court imposed while resentencing defendant, a second habitual offender, under MCL 769.10; MSA 28.1082[1]. This Court remanded for the resentencing because the original sentencing court improperly considered the possible effect of disciplinary credits in sentencing defendant to thirty to fifty years in prison. *People v Shannon*, unpublished per curiam opinion of the Court of Appeals issued 11/22/96 (Docket No. 174662). Because at the time of resentencing, defendant had already served the mandatory two-year term for the felony-firearm conviction, at issue is only the CSC I sentence. We affirm defendant's convictions but remand for the correction of the judgment of sentence.

The jury found defendant guilty of forcing the complainant, at gunpoint, to perform oral sex. Defendant appeals only his resulting sentence, arguing that the twenty-seven- to forty-five-year prison term imposed is disproportionate. This Court applies an abuse of discretion standard in reviewing a sentence. *People v Albert*, 207 Mich App 73, 74; 523 NW2d 825 (1994). "[A] given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

The Legislature has established that individuals who have been convicted of a subsequent felony or attempted felony may be sentenced for the subsequent felony to life imprisonment or for a lesser term

when the subsequent felony is punishable upon a first conviction by life imprisonment. MCL 769.10; MSA 28.1082. The lower court resentenced defendant to twenty-seven to forty-five years in prison on the CSC I conviction, which is within the life term the habitual offender statute permits. MCL 750.520b(2); MSA 28.788(2)(2).

Defendant contends that his resentence is disproportionate based on the circumstances surrounding the offense and the offender. Defendant's prior record includes convictions for breaking and entering, attempted felonious assault with a dangerous weapon, and delivery of less than fifty grams of cocaine. Both the sentencing court and the presentence investigator involved with defendant's cocaine conviction noted the seriousness of defendant's previous crimes. See *People v Smith*, 437 Mich 293, 304; 470 NW2d 70 (1991) (considering the defendant's criminal history). Further, defendant committed both the instant offenses and the cocaine delivery offense while he was on probation, prompting the presentence investigator to comment that "[t]hree new felony offenses committed while on probation demonstrates a total disregard for the purpose and privilege of a community based sentence." See *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985) (considering the defendant's attitude toward his criminal behavior). Moreover, while incarcerated and awaiting resentencing, defendant has been convicted of thirteen major misconducts, including possession of alcohol, fighting, assault and battery, possession of dangerous contraband, insolence, disobeying direct orders, and gambling. See *People v Bryars*, 168 Mich App 523, 526-527; 425 NW2d 125 (1988) (considering the defendant's subsequent offenses). With regard to the nature of the offense committed, not only did defendant force the victim to perform oral sex on him, but he did so at gunpoint. See, e.g., *People v Hunter*, 176 Mich App 319, 321; 439 NW2d 334 (1989) (considering the nature of the crime); *Ross, supra* (considering the circumstances surrounding the criminal behavior).

Thus, given these aggravating factors regarding the offense and the offender, the lower court did not abuse its discretion when it resentenced defendant as a second habitual offender to a prison term of twenty-seven to forty-five years for the CSC I conviction. As our Supreme Court has said, where an habitual offender demonstrates that he cannot conform his conduct to the law, a sentence within the statutory limit is proportionate. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997).

Defendant also argues that the lower court erred by considering the sentencing guidelines in sentencing him because he was an habitual offender. While *this Court* may not consider the underlying guidelines in reviewing the proportionality of a defendant's habitual offender sentence, *People v Edgett*, 220 Mich App 686, 694; 560 NW2d 360 (1996), "nothing in the law would preclude a trial court from taking the sentencing guidelines into consideration in the course of determining a sentence for an habitual offender." *People v Haacke*, 217 Mich App 434, 438; 553 NW2d 15 (1996). Therefore, defendant's contention is without merit.

Defendant's convictions are affirmed. However, we remand for the ministerial task of correcting the judgment of sentence pursuant to the footnote to this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Harold Hood
/s/ William B. Murphy

[1] Defendant's judgment of sentence erroneously indicates that he pleaded guilty to being an habitual offender, third offense, MCL 769.11; MSA 28.1082. However, our review of guilty plea transcript reveals that defendant in fact pleaded guilty to being an habitual offender, second offense, MCL 769.10; MSA 28.1082. Accordingly, this case must be remanded for correction of the judgment of sentence. See *People v Avant*, __ Mich App __ ; __ NW2d __ (Docket No. 206321, issued 5/14/99).