

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CIRO VILLA-CRUZ,

Defendant-Appellee.

UNPUBLISHED
November 5, 1999

No. 214250
Ottawa Circuit Court
LC No. 97-021298 FC

Before: Bandstra, C.J., and Markman and Meter, JJ.

PER CURIAM.

The prosecutor appeals as of right the trial court's order sentencing defendant pursuant to his conviction of aiding and abetting an armed robbery, MCL 750.529; MSA 28.797. After a jury found defendant guilty as charged, the trial court sentenced him to three to fifteen years' imprisonment. On appeal, the prosecutor argues that such sentence was disproportionately lenient in this case. We agree and, therefore, reverse.

This case arises out of a restaurant robbery and resultant shooting death of James Scott Anderson.¹ On September 17, 1997, defendant and three of his fellow "La Klika" gang members, Jose Ayala, Juan Nunez and Ramiro Zamudio, who had previously discussed and planned the robbery, carried out an armed robbery of the Pereddies Restaurant in Grand Haven. The kitchen manager, Anderson, was shot and killed during the robbery. Defendant and Ayala were restaurant employees who were working that evening and planned to allow Nunez and Zamudio to gain entry into the restaurant, and then act as if they too were victims in the robbery.

After the customers had left, defendant and Ayala met Nunez and Zamudio outside the restaurant as they emptied the trash and allowed them into the restaurant. They were wearing ski masks and carrying their weapons-- Nunez had a gun and Zamudio carried a knife. Once inside, Zamudio ordered Ayala, defendant, and another employee to lie on the floor. Nunez held a fourth employee, Lisa Richardson, at gunpoint and told her to get him the money from the office. As Richardson was complying, she heard Anderson, the kitchen manager, call her name. Apparently startled, Nunez turned and fired the gun at Anderson's head, killing him. Nunez then ordered Richardson into the bathroom with the other employees, and Nunez and Zamudio left the restaurant. After approximately twenty

minutes, the employees emerged from the bathroom and found Anderson dead on the floor of the kitchen. Ayala then placed napkins over the face of Anderson and defendant called 911 at the request of the other employees.

All of the co-participants were eventually arrested and convicted for their participation in the incident. Nunez, who was sixteen years old, was sentenced on a first-degree murder conviction to life in prison without parole. In addition, Nunez received twenty to forty years' imprisonment on his conviction for armed robbery. Seventeen-year-old Zamudio was convicted on a charge of assault with intent to rob while armed and sentenced to serve a term of twelve to thirty years' incarceration. Ayala, who was eighteen years old at the time of the robbery, was sentenced to serve 2½ to 5 years with the Michigan Department of Corrections after pleading guilty to being an accessory after the fact to a felony.

On appeal, the prosecutor raises the single issue of whether the trial judge abused his discretion by giving defendant a sentence that was too lenient. When reviewing challenges to a sentence, this Court is limited to determining whether the lower court abused its discretion. *People v Milbourn*, 435 Mich 630, 636, 654; 461 NW2d 1 (1990). “[A] given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences . . . to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.” *Id.* at 636.

Accordingly, a trial court must impose a sentence that is proportionate to the severity of the crime and the defendant's prior criminal activity. *Id.* at 636, 654. A sentence that is within the sentencing guidelines minimum range is presumptively proportionate, although it could be proven disproportionate. *Milbourn, supra* at 661; *People v Broden*, 428 Mich 343, 354-55; 408 NW2d 789 (1987). However, a trial court is not required to stay within the sentencing guidelines, and may depart where “in their judgment, the recommended range . . . is disproportionate, in either direction, to the seriousness of the crime.” *Milbourn, supra* at 657. Where a court departs, it must articulate its reasons on the record at sentencing and in the sentencing information report. *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987). “A departure from the recommended range in the absence of factors not adequately reflected in the guidelines should alert the appellate court to the possibility that the trial court has violated the principle of proportionality and thus abused its sentencing discretion.” *Milbourn, supra* at 660.

In this case, defendant was convicted of aiding and abetting an armed robbery. MCL 750.529; MSA 28.797.

Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense. [MCL 767.39; MSA 28.979.]

Therefore, although the sentencing guidelines do not explicitly list aiding and abetting as a crime, this is because such reference is unnecessary and the guidelines do, in fact, apply to aiding and abetting crimes

as if the defendant had committed the underlying crime itself. *People v Spicer*, 216 Mich App 270, 274-75; 548 NW2d 245 (1996). In this case, the guidelines range for the minimum sentence for defendant's aiding and abetting an armed robbery conviction was calculated by the trial court to be 60 to 180 months' (or five to fifteen years') imprisonment. Defendant was sentenced to 36 months' (or three years') imprisonment minimum to 180 month's (or fifteen years') imprisonment maximum. Therefore, the trial court departed below the guidelines' presumptively proportionate range by two years.

The trial court in this case did not give any significant explanation why it departed below the guidelines. The trial court did not even mention that the sentence was a departure from the guidelines, let alone cite reasons for such departure. The trial court stated:

Mr. Villa-Cruz, you have a juvenile record. It's not extensive, but it's nothing to be proud of. The most serious offense is the unlawful use of an automobile. As a juvenile, you had not reached your 17th birthday at the time of the commission of this offense.

There is no doubt in my mind and there was not a reasonable doubt in the jury's mind as to your guilt and participation in this crime. I am convinced that you did not anticipate the results that occurred as a result of your activity; you did not look forward to that. On the other hand, the betrayal, as spoken of by Ms. Richardson, of your employers, your acquaintances, your friends, for a few dollars that you might have received as a result of this offense is, at best, perplexing, I guess.

I am a bit impressed by the way you have conducted yourself while in the youth home. You have scored well and taken advantage of the time that you have spent there. That is to your credit.

I think an appropriate sentence in this case is that you be transferred to the Michigan Department of Corrections for a period of not less than 36 nor more than 180 months, and that is your sentence, and you have 313 days credit. \$60 will be paid to the State Crime Victims' Rights Fund.

Thus, it appears that the court may have given defendant a less rigorous sentence because of his young age and good conduct after the crime, but we cannot know for certain from the very little that the court said at the time of sentencing. Further, there is no explanation why defendant individually should merit such a departure, since many defendants are young and behave relatively well after they are arrested and held in detention. Therefore, this Court is left with very little, if any, information from the trial court upon which to base our abuse of discretion determination.

Accordingly, we review several factors in defendant's particular circumstances to determine if this sentence is proportionate to the circumstances of the case and the defendant. First, although defendant was charged and convicted of aiding and abetting an armed robbery-- a serious crime in itself-- an innocent man was also *killed* during the commission of defendant's crime. On the spectrum

of armed robberies, this clearly qualifies as among the most serious. Not only were several employees of the restaurant held at gun and knife-point in fear for their lives, but Anderson was actually killed in front of one of the other victims.

Second, although the trial court found that defendant did not anticipate the killing, that he had *only* planned on the robbery, another codefendant who also did not plan or commit the killing received a much higher sentence. Consideration of the sentence of a codefendant is permitted, although a sentencing court is not required to consider such information. See *In re Jenkins*, 438 Mich 364, 376; 475 NW2d 279 (1991); *People v Weathington*, 183 Mich App 360, 364; 454 NW2d 215 (1990). Zamudio received the same sentencing guidelines score as defendant, was less than one year older than defendant and had no significant prior criminal history. Yet a sentence minimum of twelve years' imprisonment was imposed upon Zamudio. This information, standing alone, may not persuade this Court that the trial court abused its discretion in sentencing defendant differently. However, it is instructive in showing that non-anticipation of a killing was not a mitigating enough factor to warrant a sentence anywhere near the lower end of the guidelines range in Zamudio's case.

Third, even if defendant did not anticipate any killing during the commission of the crime he planned, he did know that there were dangerous weapons involved. Defendant confessed to helping plan the crime, at which time he knew that a knife would be involved. He also met the two masked codefendants outside the restaurant and allowed them to follow him into the restaurant in order to commit the robbery as they carried a knife and a gun in plain sight. Thus, he was clearly aware of the potential for serious bodily harm and even death with these two deadly weapons. This fact reduces any mitigating effect that his non-anticipation of the killing may have otherwise had.

Fourth, defendant did not offer or attempt to offer any aid to the victim. He only called 911 after his co-participants in the robbery left the building. Apparently, defendant even had to be directed by two of the true employee victims of the robbery to call 911 after the "danger" was gone. Defendant knew the gunman, knew that a killing was not planned, and presumably could have safely attempted to help the gunshot victim since defendant was not an actual hostage, yet defendant did nothing. We can only assume that the robbery and the plan to pretend to be a victim was more important to defendant than even the life of a coworker and friend.

Fifth, defendant evidenced no contrition or remorse for the horrific killing of his coworker or for his part in it. Although Zamudio publicly apologized for his action by writing a letter to the local newspaper, we have no evidence that defendant did anything that could be construed as apologetic or remorseful. Codefendants Zamudio and Ayala also pleaded guilty, explicitly admitting their guilt and submitting to punishment for their actions. The United States Supreme Court recognized that a guilty plea may justify leniency and that a plea bargain may be partly responsible for a lenient sentence after a guilty plea. *Alabama v Smith*, 490 US 794, 802; 109 S Ct 2201; 104 L Ed 2d 865 (1989). Although defendant was fully within his rights to demand a trial by jury and require the state to prove him guilty beyond a reasonable doubt, he nonetheless failed to evidence even the possible acceptance and remorse that a guilty plea can evince.

Sixth, defendant was experienced with the criminal justice system and presumably knew the

result of criminal choices. Defendant had a juvenile record-- by the age of sixteen, he had been convicted of resisting and obstructing a police officer, unauthorized use of an automobile and possession of stolen property over \$100. In fact, he was on juvenile court probation for these crimes at the time that he committed the instant offense. Further, he had been expelled from school for carrying a concealed weapon prior to completing tenth grade, and the charge was pending at the time of his sentencing. This information shows that defendant was quickly becoming an experienced criminal and indeed appeared to be escalating his crimes.

Seventh, this crime was clearly gang related. Defendant admitted during the presentence investigation that he joined the "La Klika" gang when they formed about two years before the robbery. He planned and executed the instant armed robbery with three fellow members of the gang. Although he claimed after the robbery that he now had no gang affiliation and no contact with the other members, he also relayed that most of the other members were currently in prison. This is a further aggravating factor in this case.

Finally, the departure below the guidelines here was not just a slight departure. Rather, a departure of two years from the minimum guidelines sentence of five years is a departure of substantial magnitude. Two years is a departure of forty percent from the guidelines minimum sentence of five years. The Supreme Court stated that "[e]ven where some departure appears to be appropriate, the extent of the departure (rather than the fact of the departure itself) may embody a violation of the principle of proportionality." *Milbourn, supra* at 660. Here, we have no reason at all to depart below the guidelines, let alone by this magnitude.

In this case, we start our review of the sentence departure without adequate articulation by the trial court of the reasons for the departure below the guidelines. Looking to further factors regarding defendant and the crime defendant committed, we find several aggravating factors, yet no mitigating factors. A "primary consideration in sentencing . . . is whether the sentence imposed is proportional to the seriousness of the offense when considered in conjunction with the particular defendant." *People v Granderson*, 212 Mich App 673, 681; 538 NW2d 471 (1995). For the reasons here set forth, we believe that the trial court clearly abused its discretion in departing from the guidelines in sentencing defendant on his aiding and abetting an armed robbery conviction.

In addition, the prosecutor requests that we remand to a different judge for resentencing. Resentencing before a different judge may be appropriate if "warranted by the circumstances," as determined under a three-part test laid out in *People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986). Although we believe that the instant sentence is substantially disproportionate, we find no reason to believe that the trial court in this case would be unable to consider the factors that we have laid out, in addition to any others that it feels are important, and sentence defendant to an adequate period within the guidelines. Thus, we remand to the same judge.

Reversed and remanded for resentencing. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Stephen J. Markman
/s/ Patrick M. Meter

¹. Due to the limited nature of this appeal, this Court permitted the parties to forego the filing of a trial transcript. Thus, in reviewing this matter, we rely on the transcript of the sentencing proceedings and other materials found in the lower court record.