

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY PATTERSON,

Defendant-Appellant.

UNPUBLISHED

December 17, 1999

No. 199246

St. Clair Circuit Court

LC No. 96-001371 FC

AFTER REMAND

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUSTIN ROSE,

Defendant-Appellant.

No. 199250

St. Clair Circuit Court

LC No. 96-001372 FC

AFTER REMAND

Before: Corrigan, C.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

In these consolidated appeals, defendants Patterson and Rose, in docket nos. 199246 and 199250, respectively, were both convicted of six counts: assault with intent to commit murder, MCL 750.83; MSA 28.278, armed robbery, MCL 750.529; MSA 28.797, conspiracy to commit first-degree premeditated murder, MCL 750.157a; MSA 28.354(1), MCL 750.316; MSA 28.548, conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1), MCL 750.529; MSA 28.797, receiving and concealing stolen firearms, MCL 750.535; MSA 28.803, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendants appealed their convictions.

On September 18, 1998, this Court issued an opinion, affirming defendants' convictions, but vacating defendants' sentences and remanding to the trial court for a determination of whether defendants should be sentenced as juveniles or adults, and to resentence them. On remand, after a hearing, the trial court resentenced both defendants as adults and imposed the same sentences as previously given. Defendants again appeal. We affirm in both cases.

Docket No. 199246

Defendant Patterson first argues that the trial court abused its discretion in sentencing him as an adult, rather than a juvenile. Specifically, defendant asserts that the trial court's factual findings were inadequate and that the trial court failed to conduct a hearing as contemplated by MCL 769.1(3); MSA 28.1072 (3) and MCR 6.931(E)(3) because of a lack of evidence admitted at the hearing. We disagree.

We review the trial court's decision to sentence a minor as an adult under the abuse of discretion standard. *People v Brown*, 205 Mich App 503, 505; 517 NW2d 806 (1994). A trial court's factual findings are reviewed under the clearly erroneous standard. *Id.* at 504-505. The trial court's factual findings are clearly erroneous "if, after review of the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Id.* at 505.

At the resentencing hearing, representatives from the Family Independence Agency and the Department of Corrections were present to give their reports and recommendations regarding this matter. These updated presentence investigation reports were admitted into evidence and recommended that defendant be sentenced as an adult. The reports provided information that defendant had earned his GED while incarcerated, that he had received five misconducts during his incarceration, that there had been no change in his social history, that defendant's parents had moved out-of-state but that written contact had been maintained, and that defendant had received no counseling or therapy during his incarceration. The Department of Corrections' report stated that defendant had a history of substance abuse and that three of his misconducts involved alcohol abuse and a drug test refusal. The report submitted by the Family Independence Agency stated that defendant was not a good candidate for the Maxey Boy's Training School for juveniles because of defendant's violent crimes and that because of the short time span before defendant turned twenty-one years of age, there was insufficient time for defendant to become rehabilitated if sentenced as a juvenile. Thus, adequate evidence was presented at the hearing regarding this matter.

Further, contrary to defendant's assertion, the trial court's findings regarding each factor enumerated in MCL 769.1(3); MSA 28.1072(3) were not inadequate and were not clearly erroneous. Although the findings were brief, we do not conclude that they were inadequate. The record indicates that the trial court was aware of each of the statutory factors, addressed each factor as required, and based its findings on the evidence. The trial court recognized (1) the serious nature of defendant's crimes, which involved the shooting of another person, (2) the lack of rehabilitation if defendant was placed in the juvenile system considering the violent nature of the crimes committed by defendant and the short time span before defendant's twenty-first birthday, (3) that society needed to be protected considering the "hideousness" of defendant's crimes, and (4) that defendant's prior record and pattern

of living suggested that defendant was not amenable to treatment. Based on our review of the record, we conclude that the trial court did not clearly err in its factual findings with respect to the statutory criteria in that we are not “left with a definite and firm conviction that a mistake has been made,” nor did the trial court abuse its discretion in sentencing defendant as an adult. *Brown, supra*.

Defendant also argues that his sentences are disproportionate.¹ We disagree. This Court’s review of a defendant’s sentence is limited to whether the trial court abused its discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993). A sentence will constitute an abuse of discretion if it 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.” *Milbourn, supra*.

Although defendant asserts that his sentences are disproportionate because of his young age and the fact that he had no prior record, we conclude otherwise. Considering all the circumstances surrounding this offense and the offender, including, inter alia, the planned and violent assault upon the victim, the sentences imposed by the trial court are proportionate. To the extent that defendant points out that the victim did not die from his injuries, we agree with the prosecutor that the fact that the victim did not die is fortuitous. Defendant and his co-defendants shot the victim in the head at close range, and defendant should not benefit now from the fact that the victim did not die.

With respect to defendant’s argument that the trial court should have disqualified itself from the resentencing, we apply the following test:

(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or finding determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is admissible to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. [*People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986), quoting *United States v Sears, Roebuck & Co, Inc*, 785 F2d 777, 780 (CA 9, 1986).]

In the present case, after defendant requested that the trial court recuse itself because the court had “already demonstrated a predisposition to handle this sentencing in a particular manner,” the trial court denied the motion, stating that there was “absolutely no basis for disqualification” We have reviewed the record applying the test above, and conclude that defendant has failed to prove bias or prejudice on the part of the trial judge. *People v Houston*, 179 Mich App 753, 756; 446 NW2d 543 (1989). There is no indication, as defendant asserts, that the trial judge had substantial difficulty in putting out of his mind the previously expressed views from the first sentencing. *People v Page*, 83 Mich App 412, 419-420; 268 NW2d 666 (1978).

Docket No. 199250

Defendant Rose first argues that the trial court should have disqualified itself from the resentencing. For the same reasons just explained with regard to defendant Patterson, we disagree.

Defendant Rose next asserts that the trial court failed to conduct a hearing in accordance with MCL 769.1(3); MSA 28.1072(3) and MCR 6.931(E)(3) and that the trial court abused its discretion in sentencing him as an adult. We disagree. We review the trial court's decision to sentence a minor as an adult under the abuse of discretion standard. *Brown, supra* at 505. A trial court's factual findings are reviewed under the clearly erroneous standard. *Id.* at 504-505. The trial court's factual findings are clearly erroneous "if, after review of the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Id.* at 505.

At the resentencing hearing, representatives from the Family Independence Agency (FIA) and the Probation Department were present to give their reports and recommendations regarding this matter. FIA employee William Kearns stated that he was concerned about defendant being rehabilitated because defendant had failed to show remorse for his crimes. Probation officer George Wilson recommended that defendant be sentenced as an adult based on the seriousness of the offenses and Wilson's limited knowledge of the juvenile facilities. The hearing transcript reveals that, prior to the instant offenses, defendant had numerous contacts with the juvenile system and demonstrated a pattern of bad behavior, including theft and assaulting his mother. Despite his previous contacts with the juvenile system, he had failed to rehabilitate himself and his criminal behavior escalated into the instant heinous offenses. In addition, information was presented that defendant was not a good candidate for the Maxey Boys Training School for juveniles because of the seriousness of the instant offenses and the shortness of the time before defendant's twenty-first birthday.

Further, although defendant claims that he was prevented from participating in the hearing, the record shows that the court, on two separate occasions, gave defendant the opportunity to speak. In asserting that he should be sentenced as a juvenile, defendant emphasized at the hearing and now on appeal that he has received his GED while incarcerated, has been tutoring other inmates who are illiterate, has earned a maintenance certificate since his incarceration, and has received no misconducts. However, the trial court recognized and praised these accomplishments, but concluded that defendant should still be sentenced as an adult based on the entirety of the evidence.

Further, contrary to defendant's assertions, the trial court adequately addressed all the factors enumerated in MCL 769.1(3); MSA 28.1072(3) and MCR 6.931(3). As with defendant Patterson, although the factual findings were brief, we do not conclude that they were inadequate. The record indicates that the trial court was aware of each of the statutory factors, addressed each factor as required, and based its findings on the evidence. Based on our review of the record, we conclude that the trial court did not clearly err in its factual findings with respect to the statutory criteria in that we are not "left with a definite and firm conviction that a mistake has been made," nor did the trial court abuse its discretion in sentencing defendant as an adult. *Brown, supra*.

Defendant Rose also raises several arguments regarding the validity of his sentences. First, defendant complains that the trial court failed to articulate sufficient reasons for the sentences imposed. We disagree. To facilitate appellate review, the sentencing court must articulate on the record the

criteria considered and the reasons for the sentence imposed. *People v Pena*, 224 Mich App 650, 661; 569 NW2d 871 (1997), modified in part on other grds 457 Mich 885; 586 NW2d 925 (1998). Contrary to defendant's argument, the trial court articulated such reasons as defendant's prior contacts with the juvenile system, the seriousness and senselessness of the instant crimes which indicated that a long incarceration was needed to protect society, and that defendant had shown no remorse and had not accepted responsibility for his crimes. The reasons stated by the trial court are permissible considerations. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995) (the defendant's lack of remorse is a valid consideration); *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999) (severity of the crime, punishment of the offender, and protection of society are proper considerations); *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985) (the defendant's prior criminal history and attitude toward the crime are permissible considerations). Thus, defendant's argument is without merit.

Defendant also argues that his sentences are disproportionate and not individualized. We disagree. This Court's review of a defendant's sentence is limited to whether the trial court abused its discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993). A sentence will constitute an abuse of discretion if it 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." *Milbourn, supra*.

In the present case, the record reveals that the trial court examined defendant's individual circumstances, including his prior criminal history and his accomplishments while in prison, as well as the seriousness of the instant crimes in which defendant was involved. Considering all the circumstances surrounding this offense and the offender, including, inter alia, the planned, senseless, and violent assault upon the victim, the sentences imposed by the trial court were individualized and are proportionate.

In addition, defendant claims that the trial court either misspoke or abused its discretion in imposing an increased sentence for the armed robbery conviction. It appears that the trial court misspoke during the resentencing when it sentenced defendant to thirty to "sixty-five" years' imprisonment for the armed robbery conviction. The judgment of sentence indicates that defendant was actually sentenced to thirty to "sixty" years in prison for the armed robbery conviction. Thus, an increased sentence for this conviction was not imposed. Therefore, contrary to defendant's assertion, a remand to the trial court to correct the judgment of sentence is unnecessary.

Next, defendant argues that the trial court erred in ordering restitution. Defendant has waived any argument regarding the order of restitution because he failed to object at the initial sentencing when restitution was first ordered. See *People v Gahan*, 456 Mich 264, 276 n 17; 571 NW2d 503 (1997); *People v Grant*, 455 Mich 221, 224 n 4, 242-243; 565 NW2d 389 (1997); *People v Ho*, 231 Mich App 178, 192; 585 NW2d 357 (1998). At the original sentencing held in November 1996, defendant Rose was ordered to pay restitution in the amount of \$39,155.03. No objection was made at the initial sentencing regarding the restitution, including defendant's inability to pay. This issue was not raised in defendant's initial appeal to this Court. It was only after we remanded this case on other grounds (i.e., for a hearing to determine whether defendant should be sentenced as an adult or a juvenile) that

defendant raised this issue at his resentencing hearing. We conclude that defendant has waived any claim of error because he failed to raise this issue in a timely manner below. *Ho, supra* at 193.

Summary

In docket no. 199246, we affirm.

In docket no. 199250, we affirm.

/s/ Mark J. Cavanagh

/s/ Richard A. Bandstra

Judge Corrigan did not participate.

¹ In his appellant brief, defendant Patterson states that he was sentenced to nonparolable life for the conspiracy to commit first degree murder conviction. However, the judgment of sentence and the resentencing hearing transcript indicate that the trial court sentenced defendant to parolable life for this conviction. See, generally, *People v Jahner*, 433 Mich 490, 493; 446 NW2d 151 (1989) (a defendant who is sentenced to life imprisonment for conspiracy to commit first degree murder is eligible for parole consideration).