

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CHRISTOPHER ALLEN DEAN,

Defendant-Appellee.

UNPUBLISHED

March 10, 2000

No. 214773

Recorder's Court

LC No. 97-004259

Before: Bandstra, C.J., and Holbrook, Jr. and Fitzgerald, JJ.

PER CURIAM.

Defendant Christopher Allen Dean was convicted pursuant to his guilty plea of carjacking, MCL 750.529a; MSA 28.797(a), and possession of a firearm during the commission of a felony, MCL 750.227a; MSA 28.424(2). The trial court assessed punishment at thirty days to five years' imprisonment on the carjacking conviction, and two years' imprisonment on the felony-firearm conviction. Plaintiff appeals by leave granted. We affirm.

The presentence investigation report (PSIR) contained a summary of the facts surrounding the offense in this case. Defendant, who was a month short of his seventeenth birthday, and a fourteen-year-old accomplice approached the victim as she was getting out of her car. Defendant produced a pistol and ordered her out of her car. After the victim got out of the car, defendant and his accomplice got into the car and drove off. Defendant later committed assault with the intent to commit great bodily harm, MCL 750.84; MSA 28.279, when he shot at another vehicle.¹

The PSIR indicated that defendant showed remorse for the crime. It summarized a long list of defendant's positive qualities, including a supportive family, lack of a criminal history, the fact that he did not belong to a gang, and that he was not a disciplinary problem at home. The list of negative qualities included defendant's poor choice in friends and his failure to continue his education. In the victim impact statement portion of the PSIR, the victim said that defendant had used only the amount of force necessary to take her car. She said that she did not want to see defendant incarcerated in an adult setting or for a lengthy term, adding that she wished there were an alternative. In addition to the presentence investigation report, a psychodiagnostic report was prepared for sentencing. This report suggested a need for psychiatric or psychological treatment.

At the sentencing hearing, the judge referred to the PSIR, noting that defendant appeared to “feel bad for the complainant.” She also referred to the psychodiagnostic report, saying that she considered the suggested course of treatment to be essential. She then added that due to the number of people in prison, defendant would not be provided the kind of treatment he needed. The judge noted that defendant could not be sentenced to probationary terms because of the felony-firearm conviction, saying that if defendant had not used a gun, she would have given him “an even bigger break.” She told defendant that he had placed himself in a situation where he had to go to prison, adding, “But I do believe that two years is enough, considering that you’ve never been in trouble before.” The judge assessed sentence, then said she was departing from the sentencing guidelines and gave her reasons: lack of a prior criminal record, the “special emotional and mental problems which need to be addressed,” and the two years imprisonment required on the felony-firearm charge.

Plaintiff contends that the trial court abused its discretion in assessing a disproportionately low sentence for the carjacking conviction. We disagree. We review a court’s sentencing decision for abuse of discretion. *People v Fetterley*, 229 Mich App 511, 525; 583 NW2d 199 (1998). A court abuses its discretion in assessing sentence when 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. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Plaintiff’s argument is in essence a claim that the trial court took into account a number of impermissible factors in assessing sentence. First, plaintiff argues that the trial court should not have taken into consideration the fact that defendant had no prior criminal record because lack of a criminal history is taken into consideration by the guidelines. However, at the time of the offense, there were no guidelines in effect for a violation of MCL 750.529a; MSA 28.797.² See *People v Edgett*, 220 Mich App 686, 689-690; 560 NW2d 360 (1996). We recognize that the judge gave reasons for departing from the guidelines. However, the court was mistaken in this regard; there were no guidelines and no reason for the court to explain its basis for departure from the guidelines. In addition, the defendant’s criminal history can be taken into account by the court in assessing sentence. *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985). There was no error in considering this factor.

Plaintiff next argues that by giving a comparatively light sentence on the carjacking offense, the trial court frustrated the legislative intent behind the mandatory two-year sentence for the felony-firearm conviction. Again, we disagree. In making this argument, plaintiff contends that the trial court could not take into account the fact that consecutive sentences were assessed. A court may take into account the consecutive nature of the sentences. *People v Thomas*, 223 Mich App 9, 16; 566 NW2d 13 (1997). However, the court is not required to do so. *People v Miles*, 454 Mich 90, 95; 559 NW2d 299 (1997). The court indicated that, but for the fact that defendant used a gun during the carjacking, the court would have given defendant a “bigger break.” It also noted that defendant had to go to prison for two years because of the felony-firearm conviction. It appears from the court’s statements that the court would have considered probation but for the felony-firearm conviction. Contrary to plaintiff’s argument, defendant clearly was punished for the felony-firearm conviction.

Plaintiff further contends that the trial court erred in failing to take into account the fact that two offenses with which defendant had been charged, one for armed robbery, MCL 750.529; MSA 28.797, and a second felony-firearm charge, had been dismissed. This Court has recognized that dismissed charges may be taken into account in departing upward from the sentencing guidelines. *People v Duprey*, 186 Mich App 313, 318; 463 NW2d 240 (1990). However, the trial court had no obligation to consider dismissed charges; the language in *Duprey* is permissive, not mandatory. We decline to impose upon the trial court a duty to consider dismissed charges.

The trial court also considered that the psychodiagnostic evaluation recommended a course of psychiatric or psychological treatment for defendant and that defendant would not be able to receive those services in prison. A defendant's potential for rehabilitation is one of the factors which may be taken into account at sentencing. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995). It is clear that the trial court considered counseling essential to defendant's rehabilitation. It was appropriate for the trial court to take into account the availability in prison of psychiatric or psychological services. Further, the trial court noted that defendant professed remorse for his conduct. A court may consider the defendant's attitude toward his criminal behavior. *Ross, supra* at 495. Given defendant's age and lack of criminal history, the victim's statement that she did not wish to see defendant imprisoned for a lengthy term, defendant's remorse for his actions, the unavailability of counseling services in prison, and the court's conclusion that the mandatory two-year sentence on the felony-firearm conviction was a sufficient term of imprisonment, we cannot conclude that the sentence assessed constituted an abuse of discretion.

We affirm.

/s/ Richard A. Bandstra
/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald

¹ Defendant received a sentence in the assault case equal to the sentence in the carjacking case. That sentence has not been appealed.

² Effective January 1, 1999, the sentencing guidelines provide for a 42 to 70 month minimum term of imprisonment for a case such as defendant's.