

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD L. REDDING,

Defendant-Appellant.

UNPUBLISHED

April 28, 2000

No. 204923

Wayne Circuit Court

LC No. 96-501566

Before: Zahra, P.J., and Saad and Gage, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of unarmed robbery, MCL 750.530; MSA 28.798. The trial court sentenced defendant to forty to sixty years' imprisonment as a fourth habitual offender, MCL 769.12; MSA 28.1084, to be served consecutively to a sentence on unrelated charges that defendant was already serving. Defendant appeals as of right. We affirm.

Defendant first contends that his forty to sixty year sentence reflects the trial court's imposition of a penalty for defendant's withdrawal of his guilty plea and exercise of his right to a jury trial. We review de novo defendant's contention that the trial court's imposition of sentence violated his due process rights. *People v Cain*, 238 Mich App 95, 108; ___ NW2d ___ (1999).

When a sentence imposed after a defendant's trial is greater than that previously imposed after a prior, invalid guilty plea, there is a presumption that the increased sentence is not "attributable to [] vindictiveness on the part of the sentencing judge." *Alabama v Smith*, 490 US 794, 801; 109 S Ct 2201; 104 L Ed 2d 865 (1989). "Even when the same judge imposes both sentences, the relevant sentencing information available to the judge after the plea will usually be considerably less than that available after a trial, such that "after trial, the factors that may have indicated leniency as consideration for the guilty plea are no longer present." *Id.* A judge's candid statement of how a case appears at an early stage of the proceedings does not prevent the judge from deciding the case in a fair and evenhanded manner later, when additional facts become known during later proceedings, from the presentencing report, through the prosecutor's or the victim's allocution, or from other sources. *People v Cobbs*, 443 Mich 276, 283, 505 NW2d 208 (1993).

In the instant case, absolutely no evidence supports defendant's suggestion that the trial court sentenced defendant to a term of forty to sixty years because it wished to punish him for withdrawing his earlier guilty plea. To the contrary, the court set forth numerous legitimate bases for its imposition of sentence, including defendant's prior record, its concern for the safety of the community in light of defendant's instant and previous assaultive convictions, and defendant's failed rehabilitation. *People v Rice (On Remand)*, 235 Mich App 429, 445-446; 597 NW2d 843 (1999); *People v Ross*, 145 Mich App 483, 495-496; 378 NW2d 517 (1985). Because defendant failed to point to any evidence that would overcome the presumption that no vindictiveness was involved in the sentence imposed by the trial court, we conclude that defendant suffered no deprivation of his due process rights. *Alabama, supra*.

Defendant also argues that the trial court's sentencing decision violates the principle of proportionality. We review a sentence imposed by the trial court for an abuse of discretion, which occurs when the sentence is not proportionate to the seriousness of the crime and the defendant's prior record. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

While defendant contrasts the sentence he received with the sentencing guidelines calculated with respect to his unarmed robbery conviction, we observe that the guidelines do not apply to defendants sentenced as habitual offenders. *People v Cervantes*, 448 Mich 620, 622, 625-626 (Riley, J.), 630 (Cavanagh, J.); 532 NW2d 831 (1995). Given defendant's fourth habitual offender status, the trial court possessed discretion to sentence defendant to life or any lesser term. MCL 769.12(1)(a), 750.530; MSA 28.1084(1)(a), 28.798. As mentioned above, in imposing defendant's forty to sixty year sentence, the trial court noted its consideration of the violent nature of the instant offense, the danger defendant posed to society, and defendant's failed rehabilitation.¹ The trial court also indicated that it had read the presentence report, which enumerated defendant's extensive criminal history, including six felony charges and convictions, one misdemeanor conviction, and another charged but not yet disposed of unarmed robbery that occurred only two days prior to the instant unarmed robbery. In light of "the serious nature of [defendant's] crime, defendant's extensive criminal history, and his clear inability to reform," we cannot conclude that the trial court abused its discretion in imposing a term within the statutory limits established by the Legislature. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997).²

Defendant further asserts that his trial attorney did not provide effective assistance of counsel. To find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Because defendant failed to preserve this issue for appellate review by moving for a new trial or evidentiary hearing in the trial court, our review of this issue is limited to the facts contained in the existing record. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989).

Defendant claims that trial counsel failed to adequately investigate the "alibi, reasonable doubt/mistaken identification" defense he presented at trial. Defendant specifically argues that his trial counsel refused to identify, locate and present witnesses whose testimony could have exonerated him.

Defendant also suggests that defense counsel could have sought a store surveillance videotape of the parking lot in which the crime occurred. Nothing in the trial record, however, indicates beyond defendant's speculation the existence of any witnesses whose testimony could have provided defendant with a substantial defense, or any other evidence that would have tended to exonerate him. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Moreover, in light of the evidence of defendant's guilt presented at trial, including the testimony of the victim and an eyewitness, we cannot conclude that any allegedly undiscovered witness testimony would have made a difference in the outcome of defendant's trial. *Pickens, supra* at 303, 312; *Daniel, supra*.

Defendant also asserts that defense counsel improperly failed to object to the admissibility of and testimony regarding a necklace, which the victim averred defendant ripped from her neck during the crime. Without fully analyzing the merits of the necklace's admissibility, we note that in addition to the victim's identification of the necklace as the item of hers that defendant stole from her neck, a pawn shop employee identified defendant as the individual who brought the necklace into the pawn shop and testified that the victim subsequently arrived with the police and identified the necklace as hers. Moreover, we again conclude that in light of the evidence of defendant's guilt, defense counsel's failure to request an evidentiary hearing regarding the necklace's ownership did not affect the outcome of defendant's trial. *Pickens, supra*.

To the extent that defendant further argues that his trial counsel was unprepared for trial, the record below gives no indication that further investigation by trial counsel would have uncovered evidence sufficiently beneficial to defendant that it likely would have changed the outcome of the trial. *Pickens, supra*; *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). Lastly, while defendant alleges ineffective assistance arising from defense counsel's failure to inquire on the record of a juror regarding the content of his brief conversation with a prosecution witness (River Rouge Police Officer Jeffrey Harris) on the morning before the second day of trial, defendant offers absolutely no indication of any prejudice arising from this alleged failure of defense counsel. *Pickens, supra*.

Accordingly, we find no ineffective assistance of counsel.

Affirmed.

/s/ Brian K. Zahra

/s/ Henry William Saad

/s/ Hilda R. Gage

¹ Contrary to defendant's allegation in his brief that the trial court in imposing sentence simply "warehous[ed]" defendant by "put[ting him] away for as long as possible, without regard to the impact on the defendant, the taxpayers, or society as a whole," thus continuing a "tragic failure of leadership on issues of crime and rehabilitation," we note that the record clearly indicates the trial court's consideration of defendant's repeated failures to rehabilitate himself.

² Defendant also suggests that because he was forty-one years of age at the time of sentencing and is ineligible for good behavior credits due to his habitual offender status, the forty-year minimum sentence

imposed amounts to a sentence of natural life in prison. We observe, however, that the proportionality principle does not require that a trial judge tailor every defendant's sentence in relationship to the defendant's age. "Where a sentence falls within the permissible range of sentences . . . which is 'for life or for any term of years,' and is indeterminate, because the judge fixes both the minimum and the maximum, the sentence is lawful as long as it meets the requirements of proportionality." *People v Lemons*, 454 Mich 234, 258; 562 NW2d 447 (1997). Because we have found defendant's sentence proportionate to his crime and criminal background, we reject his suggestion that his age should have factored into the trial court's sentencing decision.