

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY SANDERS,

Defendant-Appellant.

UNPUBLISHED

September 19, 2000

No. 219823

Saginaw Circuit Court

LC No. 98-016158-FC

Before: Talbot, P.J., and Hood and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, being a felon in possession of a firearm, MCL 750.224f; MSA 28.421(6), carrying a concealed weapon, MCL 750.227; MSA 28.424, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced as a forth habitual offender, MCL 769.12; MSA 28.1084, to concurrent terms of 10 to 20 years' imprisonment for the assault conviction, 5 to 7 ½ years' imprisonment for the felon in possession and CCW convictions, consecutive to two-years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

On appeal, defendant contends that the ten to twenty year sentence for the assault conviction is disproportionately severe. We disagree. The sentencing guidelines do not apply to habitual offenders like defendant, and it is inappropriate to use them when reviewing his sentence. *People v Cervantes*, 448 Mich 620, 625-626, 630; 532 NW2d 831 (1995); *People v McFall*, 224 Mich App 403, 415; 596 NW2d 828 (1997). Instead, our review is limited to determining whether the trial court abused its discretion in imposing defendant's sentence. *People v Elliott*, 215 Mich App 259, 261; 544 NW2d 748 (1996). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

In this case, defendant approached the driver's seat of the car where the victim was seated, stated that he was going to kill the victim, fired two shots which struck the victim in the thumb and abdomen, and then fled from the crime scene and the police. At the time defendant committed the

offense, he had a lengthy criminal history and was on parole for a prior felony. The sentence imposed appropriately reflects the violent and intentional nature of the assault and defendant's apparent inability to reform his conduct to the requirements of the law. *People v Hansford (After Remand)*, 454 Mich 320, 325-326; 562 NW2d 460 (1997). Further, the sentence is well within the statutory limits set forth by our Legislature for a fourth habitual offender, MCL 769.12(1)(a); MSA 28.1084(1)(a). *Id.* at 326. We are not persuaded that the alleged assaults by the victim on other occasions or defendant's belief that contacting the police about these assaults would have been futile, warranted a reduced sentence. We therefore conclude that the trial court did not abuse its sentencing discretion.

Defendant also contends that the sentence is so severe and disparate that it amounts to cruel and/or unusual punishment under the United States and Michigan constitutions. We disagree. A proportionate sentence is not cruel and unusual. *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997); *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993). Further, the habitual offender statutes are constitutional, and sentences imposed under them are not cruel and unusual because "the state has a right to protect itself from individuals who continue to engage in criminal activities." *People v Curry*, 142 Mich App 724, 732; 371 NW2d 854 (1985). Because defendant's sentence does not exceed that which has been authorized under the habitual offender statute and is proportionate, his claim lacks merit.

Affirmed.

/s/ Michael J. Talbot

/s/ Harold Hood

/s/ Hilda R. Gage