

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM RAY JOHNSON,

Defendant-Appellant.

UNPUBLISHED

May 15, 2001

No. 213902

Wayne Circuit Court

LC No. 88-06617

Before: Bandstra, C.J., and Gage and Wilder, JJ.

PER CURIAM.

This case is before this Court for the second time. In 1988, defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life in prison for the second-degree murder conviction, fifty to seventy-five years in prison for the assault with intent to murder conviction, and a mandatory two years in prison for the felony-firearm conviction.

On appeal, this Court affirmed defendant's convictions, but remanded for articulation of the reasons for the life sentence imposed for the conviction of second-degree murder, finding that the trial court "failed to articulate reasons for the sentence imposed or the departure from the guidelines." *People v Johnson*, 187 Mich App 621, 630-631; 468 NW2d 307 (1991).¹ This Court also vacated defendant's fifty to seventy-five year sentence for the assault with intent to murder conviction and remanded for resentencing "in accordance with the principle of proportionality because defendant's minimum sentence "is twice the highest minimum term of years possible and because the trial court did not articulate reasons for the sentence imposed." *Id.* at 631-632. On remand,² the trial court resentenced defendant to forty to seventy-five years

¹ defendant had not challenged the life sentence on his second-degree murder conviction as an abuse of discretion, but only argued that the trial court failed to articulate reasons for the sentence imposed and for departure from the sentencing guidelines. This Court agreed and remanded only for articulation of the trial court's reasons, not for resentencing. *Johnson, supra* at 631.

² For reasons that are not clear from the record, defendant was not resentenced until December 15, 1997, over nine years after his initial sentencing and six years after this Court's first opinion remanding for resentencing and articulation of reasons for departure.

for the assault with intent to murder conviction, citing the complainant's testimony regarding the circumstances of the offense and the injuries inflicted upon him as an innocent bystander as the basis for its sentence. The trial court then adopted the reasons set forth in the prosecutor's brief as its own for imposing a life sentence for defendant's second-degree murder conviction. Specifically, the trial court stated that there was premeditation and viciousness displayed by defendant, that defendant murdered one victim and seriously injured another, and there was evidence that the killing was drug related and that defendant was "an enforcer of some kind of drug ring." Defendant again appeals as of right. We affirm.

The underlying facts regarding defendant's convictions were stated in this Court's previous published opinion in this matter and are repeated, in part, as follows:

The prosecutor charged that, shortly before 2:00 P.M. on April 25, 1988, defendant shot and killed Marcelle Hickman and shot and wounded Michael Sanders and William Price. The prosecutor's theory was that defendant was protecting his drug territory. Defendant's theory was self-defense.

Complainant Sanders testified that approximately a week before the shooting, he was threatened by defendant, who displayed an automatic pistol and said, "If you come over this way, you know what I got in store for you." On April 25, 1988, Sanders and Hickman delivered drugs to a house rented by Sanders at Lothrop and Wildemere. Both men were armed with 9-mm rifles. After making the delivery, they walked back to Sanders' car, which was parked at Dexter and Northwestern. As they approached Sanders' car, a car turned the corner and came to a stop. Defendant, who was hanging out of the car window, fired an automatic rifle at Sanders and Hickman. Hickman was fatally shot. Sanders, who was shot in the leg and back, sought cover behind the steps of a house. . . .

* * *

Complainant Price testified that on April 25, 1988, he was visiting his parents. He heard gunshots, looked out the door, and saw defendant in a car, firing a gun. After the car drove away, Price went outside and walked toward where the gunshots were fired. He saw Sanders and Hickman lying on the ground. He saw that Sanders was alive, grabbed Sanders' gun, and took the clip out. At the same time, he heard a noise. When Price looked up, he saw defendant pointing a gun at him. Price asked defendant not to shoot, and put his hands up. He heard a loud bank, felt his leg burn, and started running across the street. Price was hit by another shot and fell to the ground.

* * *

The jury found defendant guilty of second-degree murder in the death of Hickman, guilty of assault with intent to murder Price, not guilty of assault with intent to murder Sanders, and guilty of felony-firearm. [*Johnson, supra* at 623-625.]

In addition, following remand, Price testified at defendant's resentencing hearing that, as a result of his injuries, he must wear a colostomy bag for the rest of his life.

I

In this appeal, defendant argues that his forty to seventy-five year sentence for his assault with intent to commit murder conviction is disproportionate. Defendant maintains that the trial court was under the mistaken belief that the applicable guidelines for the minimum sentence range was fifteen to twenty-five years, rather than eight to fifteen years, did not articulate sufficient reasons for deviating from the guidelines because the concerns cited by the trial court were adequately addressed by the guidelines, and disregarded his rehabilitative progress and potential in imposing sentence. Nonetheless, because we find that the trial court articulated sufficient reasons for a significant departure from the guidelines in this case, and since that departure was proportionate to defendant's crime, we find this issue to be without merit.

Appellate review of a sentencing decision is limited to whether the sentencing court abused its discretion. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990); *People v Fetterley*, 229 Mich App 511, 525; 583 NW2d 199 (1998). A sentencing court abuses its discretion when it violates the principle of proportionality, that is, when a sentence is disproportionate to the seriousness of the offense and the defendant's prior record. *Milbourn*, *supra* at 635-636. A sentencing court may deviate from the guidelines range when the range is disproportionate to the seriousness of the offense and the offender. *Id.* at 636, 657. However, while departures from the sentencing guidelines are permitted, they are suspect and subject to careful scrutiny on appeal. *Id.* at 656-657; *People v Rockey*, 237 Mich App 74, 79; 601 NW2d 887 (1999). When a sentencing court departs from the guidelines, it must articulate on the record the criteria considered and the reasons supporting its decision to depart. *People v Rice (On Remand)*, 235 Mich App 429, 445-446; 597 NW2d 843 (1999). A deviation from the guidelines range may be based on factors already considered in the guidelines calculations, but such a deviation must be made only with caution, and the extent of the departure must not violate the principle of proportionality. *Milbourn*, *supra* at 660, n 27; *People v Castillo*, 230 Mich App 442, 448; 584 NW2d 606 (1998).

Our Supreme Court has articulated four basic factors that a sentencing court should consider in determining an appropriate sentence: (1) reformation of the offender, (2) protection of society, (3) punishment and discipline of the offender, and (4) the deterrence of others from committing like offenses. *People v Snow*, 386 Mich 586, 592; 194 NW2d 318 (1972); *Rice*, *supra* at 446. There is no requirement, however, that a sentencing court expressly mention each goal when imposing sentencing. *Rice*, *supra*.

The minimum sentence under the guidelines for defendant's assault with intent to murder conviction was eight to fifteen years.³ The trial court originally sentenced defendant to fifty to

³ It is unclear from the record whether the trial court misapprehended the applicable guidelines range for assault with intent to murder. The prosecution offered a sentencing information report that reflected the correct sentencing range of eight to fifteen years; however, the resentencing transcript is void of any mention of the report. Additionally, defense counsel commented at

seventy-five years and then, on resentencing, sentenced defendant to forty to seventy-five years. In re-sentencing defendant, the trial court noted that the victim of defendant's assault was a young, innocent bystander who "was shot not once but twice by the defendant, and at least one of those shots was fired while the complainant was trying to escape." The trial court further noted that the victim was permanently injured as a result of this shooting. Based on these articulated reasons, we find that a significant deviation from the sentencing guidelines in this case was warranted, and we are unable to find an abuse of discretion on the part of the trial court. *Milbourn, supra* at 636, 657, 660 n 27; *Castillo, supra*; *Rice, supra* at 445-446. Further, since the trial court sentenced defendant to a term of imprisonment between forty and seventy-five years, we are unable to find that the trial court was misled by this Court's previous opinion in *Johnson, supra* at 631, stating that the guidelines called for a recommended sentence of between fifteen and twenty-five years. Clearly, the trial court did not find that "recommendation" to be proportionate. Accordingly, we hold that the trial court articulated sufficient reasons to support its departure from the guidelines, *Rice, supra*, and further hold that defendant's sentence was proportionate to the seriousness and of the offense. *Milbourn, supra*.

II

Defendant next challenges the trial court's articulation of its reasons for departing from the sentencing guidelines when imposing sentence for the second-degree murder conviction. The guidelines scored for this offense recommended a minimum sentence of ten to twenty-five years. The trial court sentenced defendant to life in prison, justifying its deviation from the guidelines by relying upon factors in the prosecution's resentencing memorandum, including premeditation, the viciousness of the offense, the fact that defendant murdered one victim and inflicted crippling injuries on another victim, and the prosecution's assertion that this offense was drug related.

At trial, Sanders testified that he and Hickman were delivering drugs to a house immediately before defendant shot them and that a week before the shooting he had been threatened by defendant. In addition, defendant's prior record indicated that he had been indicted by the FBI for conspiracy to possess with intent to deliver cocaine. To this end, the FBI records described defendant as an enforcer of a drug distribution ring. This evidence, taken as a whole, provides circumstantial evidence that this crime was drug related. Further, the evidence indicated that after killing Hickman, defendant returned to the scene and shot Price twice, once in the back, causing severe life changing injuries. This evidence demonstrated the premeditation and seriousness of defendant's assault on Price; thus, contrary to defendant's argument, the trial court did not find that defendant acted with premeditation when he committed second-degree murder, but rather correctly determined that defendant's assault on Price was premeditated.⁴

resentencing that a report was never prepared for this offense, and the prosecution did not dispute that comment at the hearing. Further, before resentencing defendant, the trial court read from this Court's prior opinion, stating that the highest range for this offense would be fifteen to twenty-five years. In any event, both parties agree on appeal that the proper guidelines range for the assault with intent to murder conviction was eight to fifteen years.

⁴ In addition, even though the jury acquitted defendant of first-degree premeditated murder, the trial court could still have found premeditation by a preponderance of the evidence and thus used defendant's premeditation in sentencing for second-degree murder. See *People v Ratkov*, 201

Accordingly, these factors were sufficient to justify the trial court's sentence of life imprisonment for defendant's second-degree murder conviction. *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994); See also *Milbourn, supra*; *Rice, supra*. Accordingly, we find that the trial court articulated sufficient reasons for its decision to deviate from the recommended guideline range of ten to twenty-five years and also find that a sentence of life imprisonment for defendant's second-degree murder violation was not an abuse of discretion, *Milbourn, supra* at 630, and therefore affirm defendant's life sentence with regard to the second-degree murder conviction.

Affirmed.

/s/ Richard A. Bandstra
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder

Mich App 123, 126; 505 NW2d 886, 888 (1993); *People v Purcell*, 174 Mich App 126, 130-131; 435 NW2d 782 (1989).