

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUBEN DeLEON,

Defendant-Appellant.

UNPUBLISHED

July 27, 2001

No. 224546

Genesee Circuit Court

LC No. 98-003598-FC

Before: Wilder, P.J., and Hood and Griffin, JJ.

MEMORANDUM.

Defendant appeals as of right from his sentence of twenty-five to fifty years' imprisonment for second-degree murder, MCL 750.317. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant originally pleaded guilty to second-degree murder pursuant to a plea bargain wherein the prosecutor agreed to dismiss counts charging him with open murder, carrying a concealed weapon, and possession of a firearm during the commission of a felony. The prosecutor also agreed to recommend that the court sentence defendant within the guidelines for manslaughter. The circuit court refused to follow the prosecutor's recommendation and sentenced defendant to twenty to forty years' imprisonment for second-degree murder. Defendant moved to withdraw his guilty plea, which the circuit court granted. Following a three-day jury trial, defendant was convicted of second-degree murder, carrying a concealed weapon, and possession of a firearm during the commission of a felony. The same circuit judge then sentenced defendant to twenty-five to fifty years' imprisonment for second-degree murder, a concurrent prison term of forty to sixty months' for CCW, plus a consecutive two-year term for felony-firearm.

Defendant raises two arguments in his appeal: (1) the trial court improperly based his sentence on a finding of first-degree murder; and (2) that the court improperly increased his sentence based on defendant's decision to withdraw a prior guilty plea and proceed to trial. We find no error.

Our review of the circuit court's comments shows that the sentencing judge did not sentence defendant based on an independent finding of first-degree murder, but instead noted that defendant murdered the victim in a very deliberate and cold-blooded manner which could have

justified a verdict of first-degree murder. Defendant's sentence was properly based on the evidence before the court rather than any independent finding of guilt. *People v Shavers*, 448 Mich 389, 393; 531 NW2d 165 (1995); *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998).

While defendant's second sentence is longer than his first, at the second sentencing hearing the trial judge possessed information which was unavailable to her at the initial sentencing, namely the evidence presented at defendant's jury trial. At the second sentencing, the circuit court cited the evidence presented at trial and noted that this showed that defendant was guilty of a vicious and deliberate killing. The new information was sufficient to overcome the presumption of vindictiveness and justified the increase in defendant's sentence. *People v Mazzie*, 429 Mich 29, 34-35; 413 NW2d 1 (1987); *People v Lyons (After Remand)*, 222 Mich App 319, 323; 564 NW2d 114 (1997).

Affirmed.

/s/ Kurtis T. Wilder

/s/ Harold Hood

/s/ Richard Allen Griffin