

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUSTIN ANDREW WALLACE,

Defendant-Appellant.

UNPUBLISHED

January 29, 2002

No. 227046

Wayne Circuit Court

Criminal Division

LC No. 99-005668

Before: White, P.J., and Whitbeck, C.J., and Holbrook, J.

PER CURIAM.

Defendant, a juvenile, was charged as an adult with first-degree premeditated murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court entered an order declaring MCL 769.1, the statute providing for the sentencing of a juvenile as an adult, unconstitutional. In a prior appeal, this Court peremptorily reversed and remanded for further proceedings. On remand, following a jury trial, defendant was convicted of voluntary manslaughter, MCL 750.321, and felony-firearm. He was sentenced as an adult to consecutive terms of ten to fifteen years' imprisonment for the manslaughter conviction and two years for the felony-firearm conviction. He appeals as of right. We affirm defendant's convictions, but remand for resentencing.

Defendant first challenges the trial court's decision to sentence him as an adult. We agree with defendant that the trial court's failure to make the required factual findings on each of the statutory factors set forth in MCL 769.1(3) requires resentencing. *People v Thenghkam*, 240 Mich App 29; 610 NW2d 571 (2000); *People v Hazzard*, 206 Mich App 658; 522 NW2d 910 (1994). ". . . [I]f the trial court fails to make findings of fact, it cannot fully exercise its discretion by giving proper weight to the various factors it must consider to make its decision under the sentencing statute." *Thenghkam*, *supra* at 48.

Because resentencing is required for failure to comply with MCL 769.1(3), it is unnecessary to rule on defendant's claims that the trial court made an improper assumption of guilt when determining that he should be sentenced as an adult and in determining the length of his adult sentence. However, because these issues may arise again on remand, we address them briefly.

In general, a trial court is permitted to consider trial evidence as an aggravating factor in determining an appropriate sentence. *People v Shavers*, 448 Mich 389, 393; 531 NW2d 165

(1995). “[W]here there is record support that a greater offense has been committed by a defendant, it may constitute an aggravating factor to be considered by the judge at sentencing without an admission of guilt by defendant.” *People v Fleming*, 428 Mich 408, 418; 410 NW2d 266 (1987). Nevertheless, this does not end the inquiry whether the trial court’s consideration of its own assessment of the evidence of defendant’s intent conforms to the law. Aggravating or mitigating factors recognized by the sentencing guidelines are part of the criteria that the trial court considers when determining whether to sentence a juvenile as an adult. See MCL 769.1(3)(a) and (b). However, where the juvenile is ultimately sentenced as an adult under legislative sentencing guidelines, the court’s discretion to depart from the recommended minimum sentence range is limited to the circumstances allowed by the Legislature. See *People v Hegwood*, ___ Mich ___; 636 NW2d 127 (2001); *People v Babcock*, 244 Mich App 64, 77; 624 NW2d 479 (2000).

Offense variable six of the legislative sentencing guidelines plainly requires that a sentencing judge score this variable “consistent with a jury verdict unless the judge has information that was not presented to the jury.” MCL 777.36(2)(a). Also, the departure standard prescribed in MCL 769.34(3)(b) plainly prohibits departures based on offense characteristics¹ already taken into account by the guidelines “unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.”

We are unable to determine from the record whether the trial court recognized and applied the statutory standard for departures when imposing a sentence outside the recommended range of the guidelines. Having already determined that resentencing is required for failure to make the requisite findings under MCL 769.1(3), we further direct that resentencing be consistent with the law.²

Lastly, defendant argues that the trial court erred by refusing his request to instruct the jury on the misdemeanor offense of reckless, careless, or negligent discharge of a firearm, MCL 752.861. We disagree. A trial court must instruct on a misdemeanor as a lesser offense where there is a proper request, an appropriate relationship between the charged offense and the requested misdemeanor, support for the requested misdemeanor instruction based on a rational view of the evidence, and instruction on the requested misdemeanor will not result in undue confusion or other injustice. *People v Stephens*, 416 Mich 252; 330 NW2d 675 (1982).

The statute proscribing the misdemeanor reckless discharge of a firearm, MCL 752.861, provides:

¹ “Offense characteristics” is defined in MCL 769.31(e) as, “the elements of the crime and the aggravating and mitigating factors relating to the offense that the commission determines are appropriate and consistent with the criteria described in section 33(1)(e) of this chapter. . . .”

² We note that defendant’s claim based on the proportionality of the sentence must fail. The controlling inquiry is whether a departure was justified under the legislative guidelines. *People v Babcock*, *supra*, at 77.

Any person who, because of carelessness, recklessness or negligence, but not willfully or wantonly, shall cause or allow any firearm under his immediate control, to be discharged so as to kill or injure any other person, shall be guilty of a misdemeanor

In light of defendant's own testimony, which indicated that the weapon was fired intentionally, rather than due to carelessness, recklessness or negligence, the requested misdemeanor instruction was not supported by a rational view of the evidence, and the trial court properly denied defendant's request. Further, defendant did not claim that he acted under the influence of marijuana in firing the weapon.

Affirmed in part and remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White

/s/ William C. Whitbeck

/s/ Donald E. Holbrook, Jr.