

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHANIEL POWE,

Defendant-Appellant.

UNPUBLISHED

June 21, 2002

No. 232674

Wayne Circuit Court

LC No. 00-007737

Before: Kelly, P.J., Murphy and Murray, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to life imprisonment for the second-degree murder conviction and two years' imprisonment for the felony-firearm conviction. Defendant now appeals as of right. We affirm defendant's conviction but remand for resentencing.

Defendant first contends that the trial court erred in imposing a life sentence because that sentence was outside the properly scored sentencing guidelines range without compliance with departure requirements. We agree. The prosecution concedes that the defendant's sentencing guidelines were scored inaccurately. The prosecution also acknowledges on appeal that the life sentence imposed by the trial court was outside the guidelines because the appropriate recommended minimum sentence range was "162 to 540 months," but not "or life."

Effective January 1, 1999, Michigan became subject to legislative guidelines "with sentencing ranges that *do* require adherence." *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001) (emphasis in the original). A trial court may depart from the appropriate sentencing guidelines range only when it finds on the record that there is a substantial and compelling reason for that departure. *Id.* at 439, quoting MCL 769.34(3). In this case, the trial court's comments indicate that it either mistakenly believed that the sentence guidelines did not apply to this case or that a life sentence was within the guidelines. However, the trial court failed to recognize that under the statutory sentencing guidelines, it must either sentence defendant within the recommended guidelines range or find and state on the record a substantial and compelling reason for departure from the appropriate guidelines range. *Id.* at 439-440. Therefore, remand for resentencing is required. MCL 769.34(11); *Hegwood*, *supra* at 440; *People v Babcock*, 244 Mich App 64, 74, 80; 624 NW2d 479 (2000). On remand, the trial court

is free to impose any sentence within the appropriate guidelines range or to depart from that range if it finds on the record a substantial and compelling reason for such a departure. *Id.* at 80.

Defendant further argues that resentencing should occur before a different judge as authorized by statute. We disagree.

If, upon a review of the record, the court of appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, the court shall remand the matter to the sentencing judge or another trial court judge for resentencing under this chapter. [MCL 769.34(11).]

This Court considers three criteria to determine whether a different judge should impose sentence upon remand, *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997), which are: (1) whether the assigned judge could reasonably be expected to be able to set aside expressed views or findings found to be erroneous, (2) whether reassignment is necessary to maintain the appearance of justice, and (3) whether waste and duplication caused by reassignment would outweigh any gain in preserving the appearance of fairness. *Id.*, quoting *People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986) (citations omitted). In the present case, the trial court committed legal errors applying the sentencing guidelines, rather than expressing erroneous views indicative of a bias or prejudice against defendant. Therefore, assignment to a new judge for resentencing is not required. *Hegwood, supra* at 440 n 17; *Hill, supra*.

Because we remand for resentencing, we need not address defendant's remaining issues. Defendant's convictions are affirmed, but his life sentence is vacated and the case is remanded for resentencing. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ Christopher M. Murray