

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREEMAN EUGENE FRANKS,

Defendant-Appellant.

UNPUBLISHED

March 16, 2004

No. 245181

St. Clair Circuit Court

LC No. 99-000222-FH

Before: Zahra, P.J., and Saad and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his sentence on remand of five years, four months to eight years for his jury conviction of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At the original sentencing hearing the trial court failed to resolve defendant's challenge to the accuracy of a prior Illinois conviction listed in the presentence investigation report. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to five years, four months to eight years in prison. The trial court doubled defendant's maximum term based on his prior conviction of a controlled substance offense. MCL 333.7413(2).

In *People v Franks*, unpublished opinion per curiam of the Court of Appeals, issued August 17, 2001 (Docket No. 222118), another panel of this Court rejected defendant's arguments and affirmed his sentence. The *Franks* Court determined that while the trial court erred in failing to resolve defendant's challenge to the prior Illinois conviction, the error was harmless because defendant's sentence fell within the statutorily authorized maximum term. The *Franks* Court also determined that defendant's sentence was proportionate based on his criminal history and the circumstances of the offense, and rejected his assertion that he was entitled to resentencing in light of the ameliorative penalty provisions of the statutory sentencing guidelines. *Id.*, slip op at 1-4.

Our Supreme Court vacated that portion of the *Franks* opinion that found the trial court's failure to resolve defendant's challenge to the prior Illinois conviction to be harmless, and remanded the matter to the trial court for resentencing. Our Supreme Court denied leave to appeal in all other respects.

On remand, defendant did not renew his objection to the prior Illinois conviction, and the trial court did not resolve the previous challenge. The trial court imposed the same sentence of five years, four months to eight years, and granted defendant credit for 1,322 days served.

The statutory sentencing guidelines do not apply to offenses committed prior to January 1, 1999, and are not to be considered when fashioning a sentence for such an offense. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000). Similarly, the judicial sentencing guidelines do not apply to habitual offenders. *People v Colon*, 250 Mich App 59, 65; 644 NW2d 790 (2002). A habitual offender sentence is reviewed pursuant to the principle of proportionality. *People v McFall*, 224 Mich App 403, 415; 569 NW2d 828 (1997). The key test of the proportionality of a sentence is whether it reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). When a habitual offender's underlying criminal history demonstrates that he is unable to conform his conduct to the law, a sentence within the statutory limits is proportionate. *Colon, supra*.

On appeal defendant does not address the trial court's failure to resolve his challenge to the prior conviction;¹ however, he argues that he is entitled to a second resentencing because his minimum term is disproportionate. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). We disagree and affirm. The *Frank* Court's holding in its original decision that defendant's sentence was not disproportionate was left undisturbed by our Supreme Court; thus, that holding constitutes the law of the case. *People v Fisher*, 449 Mich 441, 447; 537 NW2d 577 (1995). Furthermore, defendant has failed to specify how his sentence is disproportionate, and thus has waived the issue of proportionality for appellate review. *People v Hill*, 221 Mich App 391, 397; 561 NW2d 862 (1997).

Even if defendant's argument were properly before us, it would be without merit. Neither the statutory nor the judicial guidelines applied in this case. MCL 769.34(1); *Colon, supra*. Defendant's prior criminal history, which included convictions for assaultive offenses as well as controlled substance offenses, demonstrates that he is unable to conform his conduct to the law. His minimum term, which is within statutory limits and does not violate *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972), is proportionate under the circumstances. *Houston, supra*; *Colon, supra*. Defendant is not entitled to resentencing.

Affirmed.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Bill Schuette

¹ Defendant's failure to address the issue constitutes an abandonment of the issue. *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).