STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED January 27, 2009
v	No. 280815 Wayne Circuit Court
ARDENDOYLE ARMY, a/k/a/ TYSON ARMY, Defendant-Appellant.	LC No. 93-005642-01

Before: Talbot, P.J., and Bandstra and Gleicher, JJ.

PER CURIAM.

After pleading guilty to a charge of probation violation, defendant was sentenced to a term of 15 to 20 years for the underlying offense of possession with intent to deliver less than 50 grams of a controlled substance. Defendant appeals as of right,[1] challenging only his sentence. We affirm the departure from the sentencing guidelines but remand for entry of a sentence that complies with the two-thirds rule of *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972). This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the trial court impermissibly departed from the statutory sentencing guidelines range. Although the trial court referred to these guidelines at sentencing, we conclude that they do not apply to the underlying offense for which defendant was sentenced. In *People v Hendrick*, 472 Mich 555, 557; 697 NW2d 511 (2005), our Supreme Court held that the statutory sentencing guidelines apply to sentences for a probation violation where the underlying felony was committed after January 1, 1999, the effective date of the statutory sentencing guidelines. Here, the underlying felony on which defendant was sentenced was committed on May 6, 1993, at which time the judicial sentencing guidelines were in effect. *People v Potts*, 436 Mich 295, 298; 461 NW2d 647 (1990). However, as this Court noted in *People v Parker*, 267 Mich App 319, 322; 704 NW2d 734 (2005), the judicial sentencing guidelines, "were not applicable to a wide variety of offenses, including sentences imposed after probation violations." Therefore, the judicial guidelines are also inapplicable to the instant sentence. *Id*. Consequently, defendant is entitled to relief only if the sentencing court abused its

[1] This Court dismissed a claim of appeal in Docket No. 284365 as duplicative of this appeal.

discretion by imposing a sentence that was not "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

When sentencing defendant, the trial court noted the number of times defendant violated his probation, as well as his participation in other criminal conduct, including a murder. Defendant admitted to participation in the crime resulting in the murder. Additionally, the trial court had direct knowledge of the evidence pertaining to that crime, having presided over defendant's trial in that matter, which twice ended without a verdict. A trial court may consider facts concerning uncharged offenses, pending charges, and even acquittals, provided that the defendant is afforded the opportunity to challenge the information and, if challenged, it is substantiated by a preponderance of the evidence. *People v Ewing (After Remand)*, 435 Mich 443, 446; 458 NW2d 880 (1990) (Brickley, J.); *Id.* at 473 (Boyle, J.); *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994). Defendant was being sentenced for a probation violation relative to a conviction of possession with intent to deliver less than 50 grams of a controlled substance. The fact that he was involved and/or complicit in a murder would support a determination that the guidelines did not accurately account for this particular offender. Moreover, the court independently relied on defendant's five previous probation violations. This also reflected that the sentence was proportionate to this offender. We find no abuse of discretion.

Defendant also argues that his sentence of 15 to 20 years violates the rule of *Tanner*, supra at 690, which holds "that any sentence which provides for a minimum [sentence] exceeding two-thirds of the maximum is improper as failing to comply with the indeterminate sentence act." The prosecutor concedes this point.

> Where a court imposes a sentence that is partially invalid, the Legislature has provided that the sentence is not to be "wholly reversed and annulled," but rather is to be set aside only "in respect to the unlawful excess." [*People v Thomas*, 447 Mich 390, 393; 523 NW2d 215 (1994), quoting MCL 769.24.]

Accordingly, we remand for correction of the judgment of sentence to reflect a sentence of 13 years, 4 months to 20 years. *Id*. at 393-394.

We remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Richard A. Bandstra
/s/ Elizabeth L. Gleicher