

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEROY O'NEIL HOPKINS, a/k/a ERIC
MOSLEY,

Defendant-Appellant.

UNPUBLISHED
February 26, 2009

No. 283610
Wayne Circuit Court
LC No. 07-014289-FC

Before: Donofrio, P.J., and K. F. Kelly and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right only from the sentences imposed on his convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, entered after a bench trial. The trial court sentenced defendant to concurrent terms of five to 20 years for the two convictions of assault with intent to do great bodily harm less than murder, and to a consecutive two-year term for the conviction of felony-firearm. Because the trial court's guideline sentence was not tainted by improper comment, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with two counts of assault with intent to commit murder, MCL 750.83, two counts of assault with intent to do great bodily harm less than murder, two counts of felonious assault, MCL 750.82, one count of felon in possession of a firearm, MCL 750.224f, and one count of possession of a firearm during the commission of a felony, MCL 750.227b, as a result of a shooting incident that occurred at the home of the estranged husband of defendant's girlfriend. The trial court acquitted defendant of the charges of assault with intent to commit murder, felonious assault, and felon in possession of a firearm, and convicted him of the charges of assault with intent to do great bodily harm less than murder and felony-firearm.

The sentencing guidelines, adjusted for defendant's status as a third habitual offender, MCL 769.11, recommended a minimum term range of 34 to 100 months for defendant's convictions of assault with intent to do great bodily harm less than murder. Defendant contended that he was defending himself during the incident, and that he did not go to the residence looking for trouble. The trial court made the following statement:

I reviewed the pre-sentence report, the letter, and the other things here, and I have to tell you one thing, this is a very serious offense. And I am concerned about how much you have learned from it.

You tell me in your letter you have had a lot of time to reflect in the jail. But really all you admit is that you were at the wrong place at the wrong time.

The incident and your reactions to it were clearly uncalled for. I am very concerned, and you know my first reaction would be to give you the most time possible, because I am concerned about what [sic] whether you are a danger out there.

However, you are 23 years old. There must be some possibility of the time that you do serve in prison to hopefully encourage you not to commit especially a violent crime again. Because the next time you commit any crime you are, I'm sure, going to get the most time possible, with your record at your young age.

The trial court sentenced defendant to concurrent terms of five to 20 years for the convictions of assault with intent to do great bodily harm less than murder, and to a consecutive two-year term for the conviction of felony-firearm. Defendant received credit for 247 days served.

Under the sentencing guidelines act, if a minimum sentence is within the appropriate sentencing guidelines range, we must affirm the sentence and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied on by the trial court in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). A party may not raise on appeal an issue challenging the scoring of the guidelines or the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand. MCL 769.34(10); *Kimble, supra*.

Defendant did not raise this issue at sentencing, in a motion for resentencing, or in a proper motion to remand. Generally, under such circumstances, our review would be for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). However, the error alleged by defendant, that the trial court improperly considered his refusal to admit guilt when imposing sentence, is constitutional in nature. We review a claim of constitutional error de novo. See *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004). The limitations imposed on sentence review by MCL 769.34(10) do not apply to claims of constitutional error. *People v Conley*, 270 Mich App 301, 316-317; 715 NW2d 377 (2006).

Defendant argues that the trial court's comment that all defendant indicated in his letter was that he was in the wrong place at the wrong time was an improper attempt to secure an admission of guilt from defendant, and that the trial court implied that the length of the minimum terms imposed were linked to defendant's refusal to admit guilt. Defendant asserts that he is entitled to be resentenced before a different judge.

A trial court cannot base a sentence on a defendant's refusal to admit guilt, *People v Yennior*, 399 Mich 892; 282 NW2d 920 (1977), and cannot offer to impose a lesser sentence in

return for an admission of guilt. *Conley, supra* at 315. To determine if a trial court improperly relied on a defendant's refusal to admit guilt when imposing sentence, we must examine three factors: "(1) the defendant's maintenance of innocence after conviction; (2) the judge's attempt to get the defendant to admit guilt; and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe." *People v Wesley*, 428 Mich 708, 713; 411 NW2d 159 (1987).

The trial court neither asked defendant to admit guilt, nor offered to reduce defendant's minimum terms if defendant did so. The trial court referred to a letter defendant had written in which defendant did not maintain his complete innocence, but rather insisted that he acted in self-defense and that he was in the wrong place at the wrong time. The trial court stated that it was concerned that defendant had learned little from the incident. The trial court's remarks are more accurately characterized as comments on defendant's failure to show remorse for his actions. The consideration of a lack of remorse is relevant to determining a defendant's potential for rehabilitation. *People v Dobek*, 274 Mich App 58, 104; 732 NW2d 546 (2007). Furthermore, the fact that the trial court initially considered giving defendant as much time as possible, i.e., 100-month minimum terms, but then gave defendant 60-month minimum terms, indicates that the trial court did not impose more severe sentences based on a perceived refusal by defendant to admit guilt. The trial court committed no error in imposing sentence. Defendant is not entitled to resentencing.

Affirmed.

/s/ Pat M. Donofrio
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering