

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
July 19, 2016

v

DAVID JAMES THOMAS,
Defendant-Appellant.

No. 327226
Bay Circuit Court
LC No. 12-010002-FH

AFTER REMAND

Before: OWENS, P.J., and BORRELLO and O'BRIEN, JJ.

PER CURIAM.

This case returns to the Court following remand for resentencing. A jury convicted defendant of receiving and concealing a stolen firearm, MCL 750.535b(2), receiving and concealing stolen property valued at more than \$1,000 but less than \$20,000, MCL 750.535(2)(b), felon in possession of a firearm, MCL 750.224f, possession of heroin less than 25 grams, MCL 333.7403(2)(a)(v), resisting arrest, MCL 750.81d(1), and two counts of possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1). Defendant was acquitted of three additional counts of felony-firearm.

Defendant appealed, and this Court affirmed his convictions but remanded for resentencing¹ on his convictions of felon in possession of a firearm, heroin possession, and resisting arrest.² On remand, the trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 150 months' to 30 years' imprisonment for felon possessing a firearm, 10 to 15 years' imprisonment for possessing heroin, and 10 to 15 years' imprisonment for

¹ *People v Thomas*, unpublished opinion per curiam of the Court of Appeals, issued May 29, 2014 (Docket No. 313305).

² This Court mistakenly remanded for resentencing on "counts 5, 7 and 8" when it should have specified counts 5, 7 and 9. On remand, the trial court correctly observed the error and resentenced defendant on count 9 anyway.

resisting arrest. Defendant appeals as of right. For the reasons set forth in this opinion, we remand for a *Crosby*³ hearing.

I. BACKGROUND

The underlying facts were set forth in this Court's prior opinion:

This case involves robberies defendant allegedly committed between December 24, 2011 and January 4, 2012 at the homes of Scott Wagner and Deniege Barcia. Both testified that their homes were broken into during the 2011-2012 holiday season. Barcia testified that she was on an extended vacation through December 2011. A few days after returning, she noticed that a few things were out of place in her home. After searching her home, she realized that several items were missing, including a wedding ring, a Pandora bracelet, a wristlet purse, a watch, some other pieces of jewelry, and a paintball gun. Altogether, Barcia estimated that the items were worth about \$2,000. Wagner testified that he discovered on January 4, 2012 that several items were missing from his house and garage, including multiple long-barreled firearms and a .22-caliber handgun. He valued the missing firearms at around \$4,000. He also said he was missing a motorcross helmet, a computer, fishing equipment, backpacking equipment, a bow, a boat motor, a chain saw, a fish finder, and a GPS unit. Wagner estimated that these items were worth several thousand dollars. When cleaning up the break-in, Wagner found a prescription drug card in the living room. The card belonged to defendant. [*People v Thomas*, unpublished opinion per curiam of the Court of Appeals, issued May 29, 2014 (Docket No. 313305).]

Defendant's guidelines minimum sentencing range for the sentencing offense was 19 to 76 months. Originally, the trial court departed upward from the guidelines on defendant's convictions of felon in possession (count 5), heroin possession (count 7) and resisting arrest (count 9). This Court, in a pre-*Lockridge*⁴ opinion, concluded that one of the trial court's reasons for exceeding the guidelines was not objective and verifiable and remanded for resentencing on "counts 5, 7 and 8 [sic]." *Thomas*, unpub op at 7.

On remand, the trial court again departed from the guidelines' recommended minimum sentencing range and sentenced defendant to 150 months to 30 years for count 5, 10 to 15 years for count 7, and 10 to 15 years for count 9. Applying the substantial-and-compelling standard, the court reasoned that an upward departure was warranted because of defendant's repeated failure on probation and parole, his parole status at the time of these crimes, his decision to sell the stolen firearms so that they are a threat to the community, and his 120-point prior record variable (PRV) score, which was well beyond the 75-point maximum promulgated in the guidelines. This appeal ensued.

³ *United States v Crosby*, 397 F3d 103, 117-118 (CA 2, 2005).

⁴ *People v Lockridge*, 498 Mich 358, 394; 870 NW2d 502 (2015).

II. ANALYSIS

Initially, defendant argues that *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), does not apply in this case. However, the *Lockridge* Court specified that its holding applied to cases that were pending appellate review at the time *Lockridge* was decided. See *Id.* at 394 (applying the plain-error standard to “the many cases that have been held in abeyance for this one,” i.e., the cases in which sentences have already been imposed and are awaiting appellate review).⁵ Accordingly, because defendant’s appeal was pending at the time *Lockridge* was decided, *Lockridge* governs our analysis.

In *Lockridge*, our Supreme Court concluded that Michigan’s sentencing guidelines were “constitutionally deficient” to the extent that judicial fact-finding could be used to increase the guidelines minimum sentence range. *Id.* at 364. As a result, the Court “sever[ed] MCL 769.34(2) to the extent that it is mandatory and [struck] down the requirement of a ‘substantial and compelling reason’ to depart from the guidelines range in MCL 769.34(3).” *Id.* at 391. Instead, the Court held that a sentencing court may impose a sentence that is “reasonable” and is not constrained by the sentencing guidelines’ recommended minimum sentencing range. *Id.* The Court explained that:

A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness. Resentencing will be required when a sentence is determined to be unreasonable. Because sentencing courts will hereafter not be bound by the applicable sentencing guidelines range, this remedy cures the Sixth Amendment flaw in our guidelines scheme by removing the unconstitutional constraint on the court’s discretion. Sentencing courts must, however, continue to consult the applicable guidelines range and take it into account when imposing a sentence. Further, sentencing courts must justify the sentence imposed in order to facilitate appellate review. [Id. at 391-392 (citations omitted) (emphasis added).]

In *People v Steanhouse*, 313 Mich App 1; ___NW2d___ (2015), this Court “considered the effect of [*Lockridge*], on departure sentences. *People v Shank*, 313 Mich App 221, 224; ___NW2d___ (2015). Specifically,

Steanhouse holds that under *Lockridge* . . . when the trial court departs from the applicable sentencing guidelines range, this Court will review that sentence for reasonableness. However, as stated in *Steanhouse*, “The appropriate procedure for considering the reasonableness of a departure sentence is not set forth in *Lockridge*.” *Steanhouse*, 313 Mich App at 42. After discussion of the approaches Michigan appellate courts should employ when determining the reasonableness of a sentence, [the *Steanhouse* Court] adopted the standard set forth by our Supreme Court in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

⁵ Defendant filed this claim of appeal on May 6, 2015. *Lockridge* was decided on July 29, 2015.

* * *

Under *Milbourn*, “a given sentence [could] be said to constitute an abuse of discretion if that sentence violate[d] the principle of proportionality, which require[d] sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.” *Milbourn*, 435 Mich at 636. [] In accordance with this principle of proportionality, trial courts were required to impose a sentence that took “into account the nature of the offense and the background of the offender.” *Milbourn* at 651. As stated in *Milbourn*:

Where there is a departure from the sentencing guidelines, an appellate court’s first inquiry should be whether the case involves circumstances that are not adequately embodied within the variables used to score the guidelines. A departure from the recommended range in the absence of factors not adequately reflected in the guidelines should alert the appellate court to the possibility that the trial court has violated the principle of proportionality and thus abused its sentencing discretion. Even where some departure appears to be appropriate, the extent of the departure (rather than the fact of the departure itself) may embody a violation of the principle of proportionality.

As set forth in *Steanhouse*, “[f]actors previously considered by Michigan courts under the proportionality standard included, among others, (1) the seriousness of the offense; (2) factors that were inadequately considered by the guidelines; and (3) factors not considered by the guidelines” *Steanhouse*, 313 Mich App at 46 (citations omitted). [*Shank*, 313 Mich App at 225-226 (citations omitted).]

After adopting the principle of proportionality test set forth in *Milbourn*, the *Steanhouse* Court did not apply that test to determine whether the defendant’s departure sentence was reasonable for purposes of *Lockridge*. *Steanhouse*, 313 Mich App at 23. Instead, according to *Steanhouse*, because the trial court “was unaware of and not expressly bound by” the reasonableness standard at the time of sentencing, a *Crosby* remand was necessary before this Court could review the sentence. *Id.* Upon remand, the *Steanhouse* Court directed the trial court to determine whether it would have imposed a materially different sentence had it been aware that the guidelines were merely advisory and that its sentence would be subject to reasonableness review. *Id.*

As in *Steanhouse*, here, the trial court was not aware of the advisory nature of the guidelines at the time of sentencing, or that it would be subject to a reasonableness standard of review. Accordingly, pursuant to *Steanhouse*, we must remand this case to the trial court for a *Crosby* hearing. *Shank*, 313 Mich App at 226. We note that, “the purpose of a *Crosby* remand is to determine what effect *Lockridge* would have on the defendant’s sentence so that it may be determined whether any prejudice resulted from the error.” *Shank*, 313 Mich App at 226 (quotation marks and citation omitted). In addition, a defendant may avoid resentencing by “promptly notifying the trial judge that resentencing will not be sought.” *Id.*, citing *People v Stokes*, 312 Mich App 181, 200-201; 877 NW2d 752 (2015).

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

/s/ Donald S. Owens
/s/ Stephen L. Borrello
/s/ Colleen A. O'Brien