STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 12, 2016
v	Nos. 329790-L, 329791-L Saginaw Circuit Court
JOELLE JEAN MCALLISTER, Defendant-Appellant.	LC Nos. 14-040438-FH, 14-040439-FH

Before: BORRELLO, P.J., and WILDER and Borrello, JJ.

PER CURIAM.

In these consolidated cases, defendant pleaded guilty to larceny in a building, MCL 750.360, and uttering and publishing, MCL 750.249. The trial court initially imposed sentences of time served plus probation, conditioned in part on defendant's participation in drug-rehabilitation programs. After defendant twice violated probation by absconding from such programs, the court revoked her probation and sentenced her, as a third habitual offender, MCL 769.11, to five to eight years for the larceny conviction, and eight to 28 years for the uttering and publishing conviction. Defendant appeals by delayed leave granted.[1] We remand for further proceedings consistent with this opinion.

I. FACTS

Defendant admitted that in January 2013 she took from a building a laptop computer that did not belong to her, and that in January 2014 she knowingly presented a "bogus" check for $200 to a bank. In exchange for her guilty pleas, additional charges of uttering and publishing, along with forgery and home invasion, were dropped, but there was no sentencing agreement.

[1] *People v McCallister*, unpublished order of the Court of Appeals, entered November 30, 2015 (Docket No. 329790); *People v McCallister*, unpublished order of the Court of Appeals, entered November 30, 2015 (Docket No. 329791). The appeals were consolidated thereafter. *People v McCallister*, unpublished order of the Court of Appeals, entered December 2, 2015 (Docket Nos. 329790; 329791).

On November 24, 2014 the trial court ordered defendant to complete the "TRI-CAP" program as a condition of probation. Defendant started the program, but she walked away from it five days later. The hearing on that probation violation began as follows:

> THE COURT: I was real close to sending you to prison. Real close. You wouldn't have your baby in prison, would you?
>
> THE DEFENDANT: No.
>
> THE COURT: Where were you?
>
> THE DEFENDANT: Where was I?
>
> THE COURT: Yeah? You took off on us.
>
> THE DEFENDANT: I was at home with my kids.
>
> THE COURT: So you didn't think you needed TRI-CAP?
>
> THE DEFENDANT: Yeah, and then I was kicking myself in the butt for leaving, but I just wasn't using my better judgment and I had a weak moment and left.
>
> THE COURT: Well, I was going to send you to prison, but they said you hadn't been technically signed up for drug court yet. I'm still hoping I'm not going to regret this decision.
>
> THE DEFENDANT: No.
>
> THE COURT: Because I was really pissed off at you. Really pissed off. We gave you a break, and then you just walked away.

The court further elicited from defendant that she had been a drug addict for about 12 years.

The court expressed the hope that "we'll get you somewhere where you can keep your baby with you, or at least have some visiting time," and continued defendant's probation with conditions, now including participation in the Drug Court's "Odyssey House" program. The court admonished defendant, "You've already really ticked me off by going AWOL from TRI-CAP. I'm going to wish you luck. I want you to complete drug court successfully. If you don't I'm going to go over [the] guidelines." Defendant indicated that she understood what the court was saying.

Defendant reported for participation in Odyssey House, but walked away the following day, and thereafter gave birth to a child who tested positive for cocaine and heroin. The hearing on the probation violation began as follows:

> THE COURT: [Y]ou were ordered to complete Drug Court, true?
>
> THE DEFENDANT: Yes.

THE COURT: What happened?

THE DEFENDANT: I got sentenced to the Odyssey House and I left and went home.

THE COURT: What have you been doing ever since?

THE DEFENDANT: I had my baby. And just been spending time with the kids.

THE COURT: Do you realize you were going to go to prison once you got caught, or did you just think we were going to put you back in Odyssey House?

THE DEFENDANT: No. I figured that.

The trial court confirmed that the sentencing guidelines recommendation for defendant's minimum sentence with regard to the larceny conviction was zero to 13 months, and that the recommendation for the uttering and publishing conviction was zero to 16 months. Defense counsel offered the explanation that defendant "does acknowledge . . . that she has made some poor choices, she regrets having left TRI-CAP and Odyssey House, but felt that she was not mentally ready to participate in those opportunities at that particular time," and requested a sentence within the guidelines.

The trial court summarized the case, and explained its sentencing decision, as follows:

> You were given two opportunities, on two separate felony files, to deal with your drug addiction. . . . You were . . . to begin that program in TRI-CAP on December 1st, and you went AWOL on December 6th from TRI-CAP.
>
> You . . . were given a second chance to participate in the Saginaw County Drug Court. You were transferred to Odyssey House on February 26th of this year and on February 27th you went AWOL from that program.
>
> You came into court when you pled guilty to the probation violation and said you didn't want to have your baby in that setting, that you wanted to have it at home, and that you weren't using drugs. Drug report came back and your baby had heroin and cocaine in its system. For that reason, I'm going to exceed the guidelines and I'm going to exceed them heavily, so that you don't have any more children that are addicted to drugs when they're born. These guidelines don't anywhere take into account having a child with cocaine and heroin in its system. You should be ashamed of yourself. You were given an opportunity to get into a program where you could have had a child that was healthy, and now you've got a drug-addicted child, that soon won't be your child because your parental rights will be terminated.

The trial court then announced sentences of five to eight years for the larceny in a building conviction, and eight to 28 years for the uttering and publishing conviction. Afterwards, it stated:

> If I could have put you in long enough for you to go through menopause I would have, but I'd get this case back as being excessive. Hopefully, the Appellate Courts can see the danger you put your child into and the total disregard you had for any help, but mostly the danger of having a child born with heroin and cocaine in its system, where you were on the doorstep and you were actually in the programs, that you could have had a healthy child.

II. ANALYSIS

Because defendant's sentences were imposed before our Supreme Court's decision in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), the rules concerning application of the sentencing guidelines that were announced by *Lockridge* and its progeny are at issue here, see *id.* at 397. In *Lockridge*, our Supreme Court held that "the rule from *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), as extended by *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), applies to Michigan's sentencing guidelines and renders them constitutionally deficient" because of "the extent to which the guidelines *require* judicial fact-finding beyond the facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range. . . ." *Id*. at 364 (parenthetical omitted). The *Lockridge* Court thus found it necessary to "sever MCL 769.34(2) to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory." *Id.* Accordingly, the Court decreed that, although the guidelines would remain in effect, "a guidelines minimum sentence range calculated in violation of *Apprendi* and *Alleyne* is advisory only," and sentencing courts departing from guidelines recommendations would no longer be required to articulate substantial and compelling reasons for doing so. *Id.* at 364-365 and n 1. The Court further stated that "sentences that depart from that threshold are to be reviewed by appellate courts for reasonableness." *Id*. at 365.

Our Supreme Court additionally held that, where a defendant has raised an *Alleyne* challenge in an appeal pending when *Lockridge* was decided, "the case should be remanded to the trial court to determine whether that court would have imposed a materially different sentence but for the constitutional error," and instructed that an affirmative answer to that question calls for resentencing. *Id*. at 397. Where remands are required to determine whether any such constitutional error resulted in prejudice, the Court cited *United States v Crosby*, 397 F3d 103 (CA 2, 2005), as the model. *Id.* at 395-396.

> [O]n a *Crosby* remand, a trial court should first allow a defendant an opportunity to inform the court that he or she will not seek resentencing. If notification is not received in a timely manner, the court (1) should obtain the views of counsel in some form, (2) may but is not required to hold a hearing on the matter, and (3) need not have the defendant present when it decides whether to resentence the defendant, but (4) must have the defendant present . . . if it decides to resentence the defendant. Further, in determining whether the court would have imposed a

> materially different sentence but for the unconstitutional constraint, the court should consider only the circumstances existing at the time of the original sentence. [*Id.* at 398 (footnote, internal quotation marks, and citation omitted).]

The Court further held that where a sentencing court has imposed an upward departure from the guidelines recommendation, the defendant could not show prejudice from any *Alleyne* violation in the scoring of the guidelines because "[i]t defies logic that the court in those circumstances would impose a lesser sentence had it been aware that the guidelines were merely advisory." *Id*. at 395 n 31.

In this case, defendant raises no *Lockridge*-related or other objections to the scoring of her sentencing guidelines. In any event, defendant cannot show prejudice in connection from any *Alleyne* violation because her sentences exceeding the respective guidelines ranges are examples where the sentencing court "clearly exercised its discretion to impose a *harsher* sentence than allowed by the guidelines." *Id*. at 395 n 31.

However, because defendant contests the reasonableness and proportionality of her sentences, it is necessary to remand this matter to the trial court for further proceedings.[2] In *People v Steanhouse*, ___ Mich App ___; ___ NW2d ___ (2015) (Docket No. 318329); slip op at 21, 23-24, this Court determined that the reasonableness of a sentence should be evaluated in accord with the proportionality review set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), and related cases. *Steanhouse* set forth the following nonexclusive list of factors relevant to proportionality review:

> (1) the seriousness of the offense; (2) factors not considered by the guidelines, such as the relationship between the victim and the aggressor, the defendant's misconduct while in custody, the defendant's expressions of remorse, and the defendant's potential for rehabilitation; and (3) factors that were inadequately considered by the guidelines in a particular case. [*Id.* at ___; slip op at 24 (citations omitted).]

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[2] We reject defendant's request to remand this matter to a different trial judge. Defendant has failed to properly analyze the issue under the three-prong test discussed in *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997), and we refuse to pore over the record in order to perform such analysis on her behalf. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("Defendant has not properly presented this issue for appellate review. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.").

In addition to restoring *Milbourn* and related cases as the guideposts for reasonableness review, *Steanhouse* held that *Crosby* remands are required where the sentencing court "was unaware of and not expressly bound by a reasonableness standard rooted in the *Milbourn* principle of proportionality at the time of sentencing." *Id.* at ___; slip op at 25.

Hence, in this case, because defendant challenges the reasonableness of her departure sentences, a *Crosby* remand is required. On remand, "[g]iven the possibility that defendant could receive a more severe sentence, [she] should be provided the opportunity to avoid resentencing if that is h[er] desire." See *id.* She "may elect to forego resentencing by providing the trial court with prompt notice of h[er] intention to do so," but if the trial court does not timely receive such notice, it must proceed with the *Crosby* remand. See *id.* (quotation marks and citations omitted).

Having determined that a *Crosby* remand is appropriate, we decline to address defendant's argument that, by imposing a sentence expressly intended to prevent her from having "any more children that are addicted to drugs when they're born," the trial court impermissibly interfered with defendant's "fundamental due process right to procreate and essentially [] expose[d] her to a prison term that exceeds her fertile years and ability to bear any more children." Defendant's argument of this issue is exceedingly cursory, and she failed to include it in her statement of questions presented. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("Defendant has not properly presented this issue for appellate review. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority."). Moreover, the prosecution, perhaps because of the cursory treatment by defendant, also did not address this issue in its brief on appeal.

Nevertheless, if on remand the defendant does not elect to forego resentencing, and if the trial court in making its sentencing decision determines to consider factors related to defendant's gender and her ability to procreate, we further direct the trial court to first consider and decide whether such factors may be properly utilized as part of the *Milbourn* reasonableness test. In particular, we instruct the trial court to analyze whether its consideration of such factors is contrary to constitutional principles of substantive due process and equal protection, or contrary to MCL 769.34(a) ("The court shall not use an individual's gender . . . to depart from the appropriate sentence range.").

We remand this matter to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello