

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD JOHNIGAN,

Defendant-Appellant.

FOR PUBLICATION

March 22, 2005

9:00 a.m.

Nos. 250909; 251408

Wayne Circuit Court

LC Nos. 03-004489-01;

03-004486

Official Reported Version

Before: Schuette, P.J., and Sawyer and O'Connell, JJ.

O'CONNELL, J. (*dissenting*).

The majority holds that defendant's life sentence was a departure from the minimum sentence guidelines range, but concedes that the sentence was proportionate to this criminal and this conviction.¹ I would hold that the habitual offender statutes provide the sentencing court with the discretion to sentence defendant to life imprisonment. I would also recognize that life imprisonment is a determinate sentence that does not carry a minimum term, so legislative guidelines for setting a minimum term simply should not apply.

Defendant is a contract killer. His convictions represent the outcome of two out of three trials he faced for the murders of three separate victims. At the murder trial for codefendants Ernest Gordon III and Corey McCullough, defendant testified that he alone, not his codefendants, killed Ian French. He killed one of his victims at the behest of a drug dealer who suspected the victim of providing information to the police. He has a long and violent criminal history and began his occupation as a street assassin shortly after his release from prison on another violent crime.

I first note that the sentence of life imprisonment for being a felon in possession of a firearm is expressly allowed under the felon-in-possession statute and the relevant enhancement provision for habitual offenders. The statute that enhances the sentence of a fourth-time felony offender states, "If the subsequent felony is punishable upon a first conviction by imprisonment

¹ In my opinion, it is a waste of judicial resources to remand this case to the trial court for resentencing.

for a maximum term of 5 years or more or for life, the court . . . may sentence the person to imprisonment for life or for a lesser term." MCL 769.12(1)(a). A first-time conviction for felon in possession is punishable by up to five years in prison. MCL 750.224f(3). Therefore, MCL 769.12(1)(a) allows a court to sentence a defendant to life imprisonment under the enhancement schedule, and defendant's sentence to life imprisonment was allowed by statute.

This Court's recent decision in *People v Houston*, 261 Mich App 463, 475; 683 NW2d 192 (2004), holds that a life sentence may still be a departure if the upper end of the minimum sentence guidelines range is less than three-hundred months. Under that case, defendant's life sentence represents a departure from the guidelines. I disagree with *Houston* and would not follow it if it were not binding precedent.

Life sentences do not (and may not) carry minimum terms, *People v Johnson*, 421 Mich 494, 497-498; 364 NW2d 654 (1984), so the *minimum* sentence guidelines should not affect them. The sentencing guidelines only require that "the minimum sentence imposed by a court . . . shall be within the appropriate sentence range" MCL 769.34(2). In this case, the trial court did not impose a minimum sentence (presumably because *Johnson* and MCL 769.9[2] prohibited the practice) and, instead, the court exercised its statutory discretion to sentence defendant to life imprisonment. Without a minimum sentence, the restriction in MCL 769.34 was not violated, and defendant's argument that his life sentence constitutes a departure lacks legal merit. While I understand that the Legislature included life sentences in the guidelines as a permissible sentence under some circumstances, this fact falls far short of a legislative directive that rescinds the particularized statutory grant of discretion to impose a life sentence against our most dangerous repeat offenders. I note that even the panel in *Houston* was required to guess at when the guidelines might allow a trial court to impose a life sentence in a habitual-offender case. The panel's final estimate was not based on any statutory mandate, but on a compromise based on the general range of numbers the Legislature provided for first-time offenses. In my opinion, if the Legislature intended to use a loose designation in a sentencing grid to revoke its authorization of defendant's life imprisonment, it would have indicated that intent directly.

Furthermore, the trial court placed on the record substantial and compelling reasons justifying the departure, so I would affirm the sentence. The trial court emphasized that defendant had taken every opportunity to obtain lethal weapons and use them on others, even while he was in prison. While defendant argues that this justification gave unfair consideration to prior convictions that were already used to calculate his guidelines range, the sentencing court did not emphasize the convictions as much as their temporal proximity. The facts that defendant wasted no time in establishing a new and homicidal criminal enterprise after his release from prison and that short time spans separated his other offenses were objective and verifiable reasons for departing from the sentencing guidelines range. These reasons were substantial and compelling and correctly led the court to conclude that defendant would likely never be rehabilitated. Therefore, they justified the court's discretionary imposition of the life sentence. *People v Babcock*, 469 Mich 247, 256-257; 666 NW2d 231 (2003).

The jury found that defendant, a hardened contract killer, was at least carrying a firearm during Moore's murder, even if it doubted defendant's role as the shooter. Therefore, given this

fact and defendant's extensive and violent criminal history, the sentence of life imprisonment was proportionate to this crime and this defendant. *Id.* at 264.

Finally, our recent decision in *People v Mack*, 265 Mich App 122; ___ NW2d ___ (2005), settles this issue. In *Mack*, we explained that when it is ordering concurrent sentences, a sentencing court needs only to calculate the guidelines for the "crime having the highest crime class . . ." *Id.* at 127, quoting MCL 771.14. In *Mack*, we found that the sentence for the greater charge fell within the guidelines range, so the sentencing court was not required to calculate and adhere to the guidelines for the lesser offense. *Mack, supra* at 127. It follows that any qualms about the guidelines application to defendant's conviction for felon in possession of a firearm is rendered moot by defendant's conviction and life sentence for the murder of Larry Rogers.

I would affirm defendant's sentence.

/s/ Peter D. O'Connell