

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMETRIUS BENJAMIN POSEY,

Defendant-Appellant.

FOR PUBLICATION

November 30, 2023

No. 345491

Wayne Circuit Court

LC No. 18-000074-01-FC

ON REMAND

Before: BOONSTRA, P.J., and MARKEY and RICK, JJ.

RICK, J. (*dissenting*)

I respectfully dissent from the majority’s decision to affirm defendant’s sentences. In light of our Supreme Court’s pronouncement that this Court shall now review within-guidelines sentences for reasonableness, see *People v Posey*, ___ Mich ___, ___; ___ NW2d ___ (2023) (Docket No. 162373), it is my opinion that the trial court did not give adequate reasons for resentencing defendant. Accordingly, I would vacate defendant’s sentences and remand for resentencing.

In *Posey*, *supra* at ___; slip op at 26, our Supreme Court overruled the portion of *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016), and MCL 769.34(10), requiring appellate courts to affirm within-guidelines sentences. The Court found that the portion of MCL 769.34(10) requiring an appellate court to automatically affirm a within-guidelines sentence violates a defendant’s Sixth Amendment rights because doing so “would necessarily render the guidelines mandatory.” *Id.*; slip op at 30. Thus, this Court is now at liberty to fully review defendant’s within-guidelines sentences. The majority would find that the trial court’s rationale was sufficient to support sentencing defendant to concurrent terms of 22 to 40 years’ imprisonment for his convictions of assault with intent to commit murder, MCL 750.83. Upon review of the record, I disagree. In setting forth its rationale at defendant’s resentencing, the trial court stated:

While [defendant] may have had some improvement while he was in prison in his attitudes and his outlook on life, it doesn’t change the fact that these offenses

were committed while he was on parole after having previously served time for a similar offense, and the Court is not convinced that his sentence should be any different than what was imposed before. The prior sentences were well within the guidelines.

While, now they are advisory, you will be sentenced on Charges 1 and 3, assault with intent to commit murder as a third habitual offender to a minimum of twenty-two, to a maximum of forty years in the Michigan Department of Corrections. That's on Charges 1 and 3.

The court gave no further explanation for resentencing defendant as it did. Additionally, in noting that the sentences are “well within the guidelines,” the court was operating under the assumption that any within-guidelines sentence is presumptively proportionate and bound to be affirmed on appeal, in accordance with MCL 769.34(10).

After *Posey*, we now know that “the guidelines remain highly relevant to sentencing decisions and that a within-guidelines sentence may indeed be disproportionate or unreasonable.” *Posey*, ___ Mich at ___; slip op at 36. Generally, “the defendant bears the burden of demonstrating that their within-guidelines sentence is unreasonable or disproportionate.” *Id.* A defendant may do so by “present[ing] unusual circumstances that would render the presumptively proportionate sentence disproportionate.” *People v Bowling*, 299 Mich App 552, 558; 830 NW2d 800 (2013) (quotation marks and citation omitted). Notably, defendant was resentenced to the same term of years despite his minimum sentencing guidelines range having been corrected to reflect a decrease from 225 to 562 months to 171 to 427 months. In resentencing defendant, the trial court merely noted that he exhibited some good behavior while in prison, which failed to negate the fact that he committed the charged crimes while on parole for a similar offense. However, at no point did the court explain why this necessarily warranted resentencing defendant to the same term of years. It further failed to explain why this sentence was proportionate to the offense and the offender.

This is not to say that the trial court did a poor job. Defendant's resentencing occurred before *Posey* was issued, and thus the trial court would have had no idea that its within-guidelines sentence would be so closely scrutinized. Regardless, the fact remains that the trial court's rationale is inadequate. Indeed, in my view, the majority's analysis of the trial court's sentencing decision gives far more supporting detail than the trial court's analysis itself. Commendable as that is, our Supreme Court has now given us the task of reviewing within-guidelines sentences as we would departure sentences, and we must undertake to do so to the best of our ability. It is my opinion that the trial court should have explained its sentencing rationale in more thorough detail. Without further clarification from the trial court, its decision to resentence defendant to the same term of years despite a decrease in defendant's overall sentencing guidelines range is the sort of unusual circumstance that could suggest that defendant's sentences are disproportionate or unreasonable, *Bowling*, 299 Mich App at 558. Under the circumstances, and in light of our responsibilities under *Posey*, it certainly merits a remand for further explanation.

The majority notes that the mere fact that defendant was resentenced to the same term of years after a correction to his guidelines range does not mean that he is automatically entitled to a lesser sentence. I agree with the majority on that point, as nothing in our caselaw would support such a conclusion. The sentencing guidelines are indeed advisory, and defendant is not *entitled* to

anything upon resentencing. See *People v Lockridge*, 498 Mich 358, 399; 870 NW2d 502 (2015). Nevertheless, I again reiterate that I find the lack of explanation for the trial court's resentencing decision concerning, and I would direct the trial court to more thoroughly explain why defendant's sentence is reasonable and proportionate on remand.

I also write to express my concern that our Supreme Court's ruling in *Posey* does not offer sufficient guidance to this Court regarding the review of within-guidelines sentences for reasonableness and proportionality. Until *Posey* was issued, all within-guidelines sentences were presumed to be reasonable. Although the guidelines are advisory and any sentence necessarily involves an exercise of the trial court's discretion, departure sentences have historically been subjected to greater appellate scrutiny than within-guidelines sentences, given that MCL 769.34(10) required appellate courts to affirm within-guidelines sentences outright. With the advent of *Posey*, this Court is now being asked to give *every* sentence the same level of scrutiny. It is my fear that without concrete guidance as to how to approach the appellate review of within-guidelines sentences, the inclination will be to sign off on any such sentence as reasonable and proportionate while paying little more than lip service to *Posey*'s mandate.

In *United States v Booker*, 543 US 220, 261; 125 S Ct 738; 160 L Ed 2d 621 (2005), the United States Supreme Court noted that despite rendering the federal sentencing guidelines advisory, "[18 USC] 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable." The factors include the nature and circumstances of the offense; the need to punish the defendant; the protection of the public; deterrence of other offenders; reformation of the defendant; the types of sentences available, and so on. See 18 USC 3553(a). While a nonexhaustive list, these *Booker* factors would certainly aid litigants, trial and the appellate courts in determining whether a within-guidelines sentence is reasonable and proportionate. I would therefore urge our Supreme Court to set forth a similar list of factors or guidelines for this Court to utilize when reviewing within-guidelines sentences for reasonableness on appeal. In lieu of that, however, I would nonetheless vacate defendant's sentences and remand once again for resentencing.

/s/ Michelle M. Rick