STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LINARD M. MALONE,

Defendant-Appellee.

UNPUBLISHED
September 4, 1998

No. 202554
Oakland Circuit Court
LC No. 96-146705 FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LINARD M. MALONE,

Defendant-Appellant.

No. 202647
Oakland Circuit Court
LC No. 96-146705 FH

Before: Markman, P.J., and Saad and Hoekstra, JJ.

HOEKSTRA, J. (dissenting).

I respectfully dissent from the portion of the majority's opinion vacating defendant's sentence. In all other respects, I am in agreement with the majority.

The statutory maximum sentence for defendant's conviction is fifteen years. MCL 750.88; MSA 28.283. However, the lower court was permitted to sentence defendant for the term of life or a lesser term of years because defendant is an habitual offender, fourth offense. MCL 769.12(1)(a); MSA 28.1084(1)(a). The court sentenced defendant to four to twenty years' imprisonment and ordered that defendant serve the sentence consecutive to a sentence he was currently serving. On appeal, the prosecution challenges the proportionality of defendant's sentence under *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). Our review is limited to determining whether the

court abused its discretion. *Id.* at 635. In exercising its sentencing discretion, a court must impose a sentence that is proportional to the nature of the offense and the background of the offender. *Id.* at 651.

In this case, the sentencing judge had presided over defendant's trial and was an eyewitness to the testimony and evidence admitted. He also possessed the presentence investigation report, which recommended a sentence within the guideline range of four to ten years' imprisonment.[1] Last, he had the benefit of confidential discussion with counsel in chambers and heard the testimony of defendant's character witnesses and defendant himself at the sentencing proceeding in this case, which lasted over thirty minutes.

At the sentencing proceeding, the court heard testimony from two of defendant's supervisors from the rescue mission where defendant lived and worked for six months while on parole. They stated that defendant worked very hard at the mission despite receiving no pay. They described him as a "good" and "caring" man, who was trying to fight his addiction to drugs and "get his life together." The court also heard at length from defendant. First, defendant apologized to the victim for the "physical, psychological and emotional trauma" to which he subjected her. Defendant admitted responsibility for the crime of which he was convicted, but stated that the crime and his criminal history were a direct result of the addiction to drugs he developed as an adult. Next, defendant pointed out to the court that he has been steadily employed for the majority of his adult life, including work as a construction foreman with supervisory responsibilities over twenty to fifty employees, and work as an environmental technician at a nuclear power plant, which also involved being sent to Brussels as a member of a disposal team. He stated that he has voluntarily entered substance abuse treatment at least twice and was on the waiting list at a third treatment facility at the time he committed the crime in this case. In conclusion, defendant opined to the court that his life was "salvageable."

Within this framework, the lower court judge advised defendant of his sentence of four to twenty years' imprisonment. The judge stated that defendant had no juvenile record and obviously was an intelligent person. The judge also emphasized that defendant, who was then forty-eight years old, had assembled an adult criminal record that "goes back quite a way" and now included the crime in this case, which he described as "very horrendous and vicious." The judge conceded, "I really should [sentence] you to more time but I take into consideration the fact that you did well when you were at the Rescue Mission and also that you're trying to control your habit."

On appeal, the majority elects to vacate defendant's sentence as an abuse of discretion. The majority supports its finding by placing substantial emphasis on five factors drawn from the nature of the crime committed and defendant's criminal history, and by discounting the relevance and/or weight to be accorded to defendant for such mitigating factors as his assistance in a police investigation, his character and credibility, his unconditional admission of culpability and remorse for his crime, his desire and reasonable potential for rehabilitation, and his social and personal history. However, in my view, the majority's reasoning does not support a conclusion that discretion was abused by the trial court. Each of the five aggravating factors was well known to the sentencing judge, as were the others that favored defendant. In arriving at the sentence, it is clear that the trial court considered all of these factors. Although the majority would weigh the factors differently than the judge did, the Legislature delegated

sentencing discretion to the trial court, not appellate courts. MCL 769.1; MSA 28.1072. By definition, the exercise of discretion

means that different results may be reached on the basis of the same evidence. *Milbourn, supra* at 686-687 (Boyle, J., dissenting). Thus, in vacating defendant's sentence, the majority has merely substituted its discretion for that of the trial court.

In my opinion, the mitigating factors that the majority dismisses as irrelevant or of little weight constituted sufficient grounds for the lower court's leniency. Further, these are well-settled considerations upon which to fashion a sentence. See *People v Ross*, 145 Mich App 483, 495-496; 378 NW2d 517 (1985). In weighing all the factors in this case, both positive and negative, the lower court was exercising its discretion, not abusing it. I must emphasize that were I the sentencing judge in this case, I may not have imposed this same sentence; however, when faced with the limited task of reviewing the sentence on appeal, I cannot say that the sentence represents an abuse of discretion. Rather, the sentence is proportional because it takes into account not only the nature of the offense but also the background of the offender. *Milbourn, supra* at 651.

In reviewing sentences alleged to be disproportionately harsh, neither this Court nor our Supreme Court has been hasty to overturn the sentencing decision of a lower court judge.[2] Although appellate courts are seldom required to review a sentence alleged to be disproportionately lenient, our approach in such cases should be no less cautionary. "To conclude otherwise and hold a given penalty unlawful because the majority draws a different inference than the trial court did from the same record is simply to say there is no discretion." *Milbourn, supra* at 687 (Boyle, J., dissenting).

I would affirm defendant's sentence.

/s/ Joel P. Hoekstra

[1] The court was neither constrained by the guidelines computed on the underlying charge because the guidelines do not apply, nor was it obligated to impose enhanced punishment. *People v Bewersdorf*, 438 Mich 55, 66; 475 NW2d 231 (1991) (citing *People v Hendrick*, 398 Mich 410, 424; 247 NW2d 840 (1976)).

[2] See, e.g., *People v Crawford*, 144 Mich App 86, 89; 372 NW2d 688 (1985) ("In this case, we doubt that, if we were sitting as a trial judge, we would impose sentences of not less than 80 years nor more than 120 years in prison. But, as indicated, the appellate review of a sentence does not have for a purpose another substitute sentence and another subjective exercise of discretion."). See generally *People v Phillips (After Second Remand)*, 227 Mich App 28, 35-36; 575 NW2d 784 (1997) (observing that the trend in restricting the circumstances under which a lengthy sentence will be found disproportionate is continuing).