

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT CISNEROS,

Defendant-Appellant.

UNPUBLISHED

December 1, 1998

No. 201870

Muskegon Circuit Court

LC No. 96-1-39805-FH

Before: White, P.J., and Markman, and Young, Jr., JJ.

PER CURIAM.

Defendant was convicted in a bench trial of home invasion, MCL 750.110a(3); MSA 28.305(a)(3), and breaking and entering a vehicle, MCL 750.356a; MSA 28.588(1). He was sentenced as an habitual offender, MCL 769.10; MSA 28.1082, to 9 to 22-1/2 years' imprisonment on the home invasion conviction and 5 to 7-1/2 years' imprisonment on the breaking and entering conviction. He appeals as of right, challenging his sentences. We affirm.

These convictions arose from a September 16, 1996 breaking and entering of the car and home of the victims. One of the victims testified that between 3:00 a.m. and 4:00 a.m., she was caring for her newborn child when she saw defendant in the utility room of her house looking at VCRs and space heaters that she and her husband owned. Defendant was wearing white cotton gloves at the time he was discovered. When the victim asked who defendant was, he told her he was looking for a party. Defendant approached the victim and she yelled for her husband. Defendant apologized to the victim, then ran out the door. The husband testified that he chased defendant. When he gave up the chase and returned to the house, he noticed that his car door was open. Various items, including a car-loan payment book, tapes, a car stereo, and a radar detector, were missing from the car. Both victims testified that defendant smelled of alcohol. Police later apprehended defendant. In searching him, they found the victims' loan-payment book and two tapes. Defendant admitted being in the victims' home, but said he had been drinking heavily for several hours and was intoxicated at the time of the offenses. He denied entering the car.

Defendant contends that his sentence for home invasion violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 653; 461 NW2d 1 (1991). The court gave as its reasons for assessing the sentences (1) defendant's prior criminal record, specifically, convictions for OUIL, his breaking and entering offense when he was a juvenile, and prior jail time in 1993, and (2) the seriousness of the offense.

Defendant bases his argument in part on the sentencing guidelines. However, defendant was convicted as an habitual offender, and use of sentencing guidelines in reviewing habitual-offender sentences is not proper. *People v Cervantes*, 448 Mich 620, 625; 532 NW2d 831 (1995); *People v Haacke*, 217 Mich App 434, 437; 553 NW2d 15 (1996).

Defendant further claims the trial court should not have considered his juvenile record because he was not given sufficient chance to respond to the court's consideration of the juvenile record in assessing sentence, the juvenile conviction was too remote in time to be properly used in considering what sentence to assess, and the record does not show that defendant was represented by counsel in the juvenile proceeding. We disagree. First, defendant was given sufficient notice of the court's potential reliance on the juvenile record when he was provided access to the presentence investigation report (PSIR). In addition, defendant was given a chance to respond to the PSIR and to make a statement. As to defendant's contention that the conviction was too remote in time to be considered, the court did not abuse its discretion in considering this juvenile incident. Lastly, defendant has not provided a sufficient record to challenge the juvenile conviction on the grounds that he was not represented by counsel. To make a claim that a sentencing judge improperly considered a constitutionally infirm conviction, the defendant must present prima facie proof that the prior conviction was violative of *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 733 (1973), such as a docket entry showing the absence of counsel or a transcript evidencing the same; or present evidence that he has requested such records from the trial court and it has failed to reply or has refused to furnish copies of records within a reasonable period of time. *People v Moore*, 391 Mich 426, 440-441; 216 NW2d 770 (1974); *People v Ristich*, 169 Mich 754, 756; 426 NW2d 801 (1988). Defendant has done neither.

The court referred to defendant's prior record in assessing sentence. In addition to his prior felony conviction, the record showed five misdemeanors. See *People v Pohl*, 202 NW2d 203, 213; 507 NW2d 819 (1993). The court also referred to the seriousness of the offense. While the home invasion may have been a non-violent encounter, the victim impact statement indicates that one of the victims has had trouble sleeping since the incident, and was considering counseling. The effect the offense had on the victims may be considered by the court. See *Girardin, supra*, 266. The trial court did not abuse its discretion in sentencing defendant to 9 to 22-1/2 years' imprisonment.

Affirmed.

/s/ Helene N. White
/s/ Stephen J. Markman
/s/ Robert P. Young, Jr.