

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

THOMAS S. SURANT,

Defendant-Appellee.

UNPUBLISHED

July 16, 1999

No. 213496

Recorder's Court

LC No. 97-009467

Before: Gage, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Plaintiff appeals by delayed leave granted defendant's sentence of five years' probation. We vacate defendant's sentence and remand for resentencing.

Defendant was charged with manslaughter with a motor vehicle, MCL 750.321; MSA 28.553, and failure to stop at the scene of a serious personal injury accident, MCL 257.617; MSA 9.2317. Prior to pleading to the charges, defendant received a preliminary sentence evaluation under *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993). The trial court indicated that, if defendant pleaded to the charges, it would likely impose a minimum sentence of five or six years' imprisonment. Defendant pleaded nolo contendere to the charges. As a factual basis for the plea, the parties stipulated that defendant was driving at an excessive speed in a residential area when he struck and killed the victim as she was getting out of her car. He stopped briefly and then left the area. About ninety minutes later, when defendant turned himself in to the police, his blood alcohol level was .12 percent. Defense counsel noted that defendant may have fallen asleep before the accident. The trial court accepted the plea.

At sentencing, plaintiff noted that the sentencing guidelines provided for a minimum sentence of two to seven years' imprisonment. Members of the victim's family indicated that three children were left without a mother as a result of defendant's actions and they felt that a prison sentence would be appropriate. The trial court adjourned the hearing and requested information regarding how the children would be cared for in the future. At the continued hearing on March 13, 1998, the prosecutor requested that the trial court sentence defendant in accordance with the *Cobbs* evaluation, and noted that the victim's extended family was able to help care for the children. The trial court stated that it

would not abide by the evaluation. The court found that, although defendant had committed a serious offense, he did not deliberately kill the victim. The court noted that it did not receive the information it had requested regarding the present and future care of the victim's children. The court found that justice would be better served by restitution rather than a jail term. The court also found that defendant had no prior record, but was corrected by the prosecutor, who indicated that defendant had two prior convictions for driving while impaired. The court sentenced defendant to five years' probation, and ordered him to pay \$100 per week to support the children and pay restitution in the amount of \$26,062.28 for insurance benefits paid to the victim's family. Defendant was also ordered to continue attending Alcoholics Anonymous meetings, and was prohibited from driving, except to go to and from work and in emergency situations.

On March 25, 1998, the probation department petitioned the trial court to amend the order of probation stating in its petition:

[Y]our Honor ordered the offender to pay \$26,062.28 to the victim's family. The offender's insurance company Allstate Insurance paid the full amount of \$26,062.28. Therefore it is respectfully recommended the \$100.00 a week to the family be deleted as a condition of probation. The Credit Collection Services at Allstate Insurance indicates the offender is responsible for the payments to their company.

Allstate Insurance Company has made arrangements for the offender to reimburse them for restitution in the amount of \$26,062.28. He was instructed to send payments directly to the Credit Collection Services on behalf of Allstate. Therefore, it is recommended that restitution be deleted as a condition of probation.

Apparently, the probation department was under the mistaken belief that as a condition of probation, defendant was simply required to pay restitution in the amount of \$26,062.28 at the rate of \$100.00 per week. Our review of the record, judgment of probation and defendant's brief on appeal, confirm that not only was defendant ordered to pay \$100 to the victim's family, he was also ordered to pay for restitution to an insurance company, the amount of \$26,062.28. In any event, the trial court, pursuant to the petition, amended the order of probation to rescind defendant's obligation to pay to the victim's family \$100 per week.

Plaintiff argues that defendant's sentence of probation is disproportionate under the circumstances of this case. We agree. Provided permissible factors are considered, appellate review of sentencing determinations is limited to whether the sentencing court abused its discretion. *People v Fetterley*, 229 Mich App 511, 525; 583 NW2d 199 (1998). A sentencing court abuses its discretion when it violates the principle of proportionality. A sentence must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995).

The sentencing guidelines are designed to assist the trial court in determining where a particular defendant falls on the sentencing continuum. *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). A sentence that departs from the guidelines in the absence of factors not adequately reflected in

the guidelines should alert the appellate court that the sentence may be disproportionate. *Milbourn, supra* at 659-660.

Defendant's sentence is disproportionate. The court's primary reason for sentencing defendant to probation was to give him an opportunity to help support the victim's children. Although the children's welfare was a reasonable concern, incarceration was warranted where defendant, who had two prior convictions for driving while impaired, caused the victim's death by driving at an excessive speed in a residential area while under the influence of alcohol and left the scene of the accident. In addition, we are deeply troubled and confused by the trial court's entry of a subsequent order eliminating the specific condition of probation, i.e., weekly payments to the family, which was the very justification for not imposing incarceration. Under these circumstances, we conclude that the trial court abused its discretion.

Finally, we express concern with a sentence which was influenced so significantly by a defendant's ability to pay restitution. Penalizing or rewarding a defendant based upon his financial ability is contrary to the very foundation upon which our system of justice was built.

Although plaintiff contends that defendant should be resentenced before a different judge, we are not convinced that the original trial judge would have substantial difficulty setting aside her previously expressed views. Thus, resentencing before a different judge is not required. *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997).

Defendant's sentence is vacated, and this case is remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Michael R. Smolenski
/s/ Brian K. Zahra