

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD JEROME JONES,

Defendant-Appellant.

UNPUBLISHED

March 24, 2000

No. 208833

Wayne Circuit Court

Criminal Division

LC No. 96-007060

Before: Neff, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to thirty to sixty years in prison for the murder conviction, to be served consecutively to his two-year term for the felony-firearm conviction. Defendant now appeals as of right. We affirm.

This case arises from a shooting that occurred on July 26, 1995, at around 5:00 p.m., at a Coney Island restaurant in the City of Detroit. Two men, Steven Daniels and defendant, were outside the restaurant together when Daniels stopped to talk to a friend in the parking lot. Daniels had a friendly conversation with the woman and he and defendant then walked away. Within a few steps, with no sign of strife, defendant turned and shot Daniels between nine and eleven times. Defendant walked away from the scene and Daniels died shortly thereafter. Defendant was arrested on August 19, 1996, and was identified as the shooter by two witnesses in a corporeal lineup on September 10, 1996, and by several other witnesses at trial.

Defendant claims on appeal that his sentence was disproportionate to the offense and the offender. We disagree.

This Court reviews a defendant's sentence for an abuse of discretion. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). A court abuses its discretion if the

sentence violates the principle of proportionality which requires a sentence to be proportionate to the offense committed and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Defendant first claims that the trial court's departure from the guidelines range of eight to twenty-five years in prison was improper because the seriousness of the crime was already embodied in the offense variables for second-degree murder. Generally, the proportionality of a sentence is determined by whether it "reflects the seriousness of the matter" and not whether the sentence departs from the recommended range. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). Where the sentencing guidelines fail to account for the seriousness of a particular offense, a sentencing court may lengthen a sentence based on factors already considered by the guidelines. *People v Granderson*, 212 Mich App 673, 680; 538 NW2d 471 (1995). However, a deviation from the guidelines range based on factors already considered by the guidelines should be made with caution. *Milbourn, supra*, 435 Mich 660 n 27. Therefore, when deviating from the guidelines "because of the special characteristics of the offense or the offender, [the court] must specifically explain those characteristics" warranting the departure. *People v Stone*, 195 Mich App 600, 608; 491 NW2d 628 (1992).

In this case, the trial judge explained her reasons for departing from the sentencing guidelines for the offense by citing the number of bullets used to kill Daniels. In addition, in her departure evaluation form, the judge explained that the increased sentence was also based on the fact that Daniels was defenseless at the time of attack, that defendant fired additional shots after Daniels fell to the ground, and that defendant walked away and left Daniels helpless.

The brutality of the offense and the number of wounds inflicted by a defendant can constitute legitimate factors that are not adequately considered or weighed in the sentencing guidelines. *People v Grady*, 204 Mich App 314, 316; 514 NW2d 541 (1994). In this case, the pathologist found nine direct gunshot wounds on Daniels and two grazing wounds, one of which may have been an exit wound. Offense variable 3 for homicide, which defendant claims covers this crime, takes into account only whether the intent to kill was premeditated or not. Michigan Sentencing Guidelines (2d ed, 1988), p 77. Defendant essentially unloaded an entire clip of bullets in shooting Daniels, which evidences an unusually excessive amount of force that is not contemplated by that variable. Further, defendant stood only three feet from Daniels when he fired on him, making his use of nine to eleven bullets even more extreme.

The trial court also noted that Daniels was essentially defenseless when defendant opened fire on him. The infliction of multiple wounds upon an unarmed victim can be a valid reason for departing from the sentencing guidelines. *People v Shavers*, 448 Mich 389, 393; 531 NW2d 165 (1995). Further, this Court has held that the surprise nature of an attack can be a factor that has not been adequately considered by the guidelines offense variables. *People v Castillo*, 230 Mich App 442, 448-449; 584 NW2d 606 (1998). Here, Daniels had a jovial conversation with friends and was shot by defendant a few steps later, without argument or confrontation. The sudden and severe nature of defendant's attack on Daniels, who had no opportunity to defend himself or to flee, places this offense in a category more severe than those contemplated by the guidelines variables.

In addition, testimony revealed that defendant paused after shooting Daniels several times and then he fired two or more shots while Daniels lay helpless on the ground. While the jury did not find that this amounted to premeditation or deliberation to warrant a first-degree murder conviction, the trial court was entitled to take this evidence into account when determining defendant's sentence. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). Evidence that defendant fired after Daniels was obviously incapacitated was also not adequately reflected in the guidelines variables and was properly considered by the trial court.

The seriousness of defendant's offense is further evidenced by his behavior after he shot Daniels. The fact that defendant simply walked away, essentially leaving Daniels for dead, is another factor not adequately reflected in the variables that raises this crime to a level beyond the guidelines range. Given the extreme amount of force used on a surprised and defenseless victim, and defendant's continued barrage upon Daniels after at least some momentary reflection, there was no abuse of discretion in the trial court's sentence; the sentence was proportionate to the seriousness of this offense and the egregiousness of the crime was not sufficiently addressed by the sentencing guidelines.

Defendant also contends that his sentence was disproportionate to the offender because he had no history of violence and because the trial court improperly took his personal history into account without considering his chances for rehabilitation. In addition to being proportionate to the seriousness of the crime, a sentence must also be proportionate to the defendant's prior record. *Milbourn, supra*, 435 Mich 636. A trial court may legitimately consider a defendant's prior criminal behavior, including juvenile records, in imposing an appropriate sentence. *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985). Specifically, the trial court cited defendant's prior crimes involving drugs and firearms, his involvement in the criminal justice system since a young age, and his escape from a detention facility in deviating from the guidelines.

Defendant's prior criminal contacts did not fit into the prior record variables in the sentencing guidelines. However, defendant's presentence report reveals a significant history of criminal behavior from an early age. At fifteen, defendant was charged with a violation of the controlled substances act and he was convicted of possession with intent to deliver cocaine. Defendant later escaped from the Phoenix Detention Center in 1992, after curfew and school attendance violations. In addition, a warrant was issued in 1996 for defendant's arrest in New York for eight counts of drug possession. Several criminal violations were also reported by the Youth Bureau regarding defendant's history of felonious assault and possession of a stolen motor vehicle. This prior criminal conduct for a twenty-one-year-old defendant was extensive.

A trial court is also authorized to consider a defendant's social and personal history in imposing an appropriate sentence. *Ross, supra*, 145 Mich App 495. Defendant's presentence report indicates he had substance abuse problems and that he had some prior involvement with guns. Moreover, the report indicates that defendant himself was shot several times in 1993. In addition, the trial court found no evidence of any effort by defendant to follow standards of responsible behavior in his choice to quit school after the ninth grade in favor of a life of crime. And, the trial judge specifically addressed defendant's age when she stated that he was not too young to understand how to comport with societal

norms. Finally, defendant's personal history shows little or no interest in bettering himself through further education or employment.

The above factors regarding defendant's criminal and personal history were properly considered by the trial court and it was not an abuse of discretion for the court to conclude that defendant's pattern of behavior suggested little possibility for rehabilitation. *People v Stammer*, 179 Mich App 432, 437; 446 NW2d 312 (1989). The court's deviation from the sentencing guidelines range, based upon the seriousness and severity of this offense and this offender, did not violate the principle of proportionality and was not an abuse of discretion.

Affirmed.

/s/ Janet T. Neff

/s/ David H. Sawyer

/s/ Henry W. Saad