

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD HERBERT LEWIS,

Defendant-Appellant.

UNPUBLISHED

May 19, 2000

No. 216051

Jackson Circuit Court

LC No. 98-089276-FC

Before: Fitzgerald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Defendant was charged with open murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2), for killing Derrick Booth. Following a jury trial, he was convicted of voluntary manslaughter and felony-firearm. He was sentenced as a third-habitual offender, MCL 769.11; MSA 28.1083, to a term of twenty to thirty years' imprisonment for the manslaughter conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm defendant's convictions, and remand for resentencing.

First, the court did not improperly make an independent finding of guilt of first-degree murder and sentence defendant on the basis of that finding, but instead recognized that it was constrained by the jury verdict of voluntary manslaughter in the sentence it imposed on defendant. In fashioning an appropriate sentence for manslaughter, the sentencing court properly could consider conduct underlying the first-degree murder charge for which defendant was acquitted. The court presided over the trial, and a preponderance of the evidence showed that defendant's killing of the victim was premeditated and deliberate. *United States v Watts*, 519 US 148; 117 S Ct 633; 136 L Ed 2d 554 (1997); *People v Ewing (After Remand)*, 435 Mich 443; 458 NW2d 880 (1990); *United States v Ward*, 190 F3d 483, 492 (CA 6, 1999). Thus, defendant was not deprived of due process by the court's consideration of defendant's conduct, which showed first-degree murder.

Second, defendant's offers of proof were insufficient to establish prima facie proof that his prior convictions, on which his third-habitual offender status is based, are unconstitutionally infirm due to a Sixth Amendment violation of his right to representation by counsel with respect to the prior convictions.

A defendant who collaterally challenges a prior conviction allegedly procured in violation of *Gideon*¹ bears the initial burden of establishing that the conviction was obtained without counsel or without a proper waiver of counsel. *People v Moore*, 391 Mich 426, 440-441; 216 NW2d 770 (1974). The defendant must present prima facie proof that a prior conviction violated *Gideon* or present evidence that the sentencing court either failed to reply to a request for or refused to furnish requested copies of records and documents, such as a docket entry showing the absence of counsel or a transcript evidencing the same. *People v Carpentier*, 446 Mich 19, 32; 521 NW2d 195 (1994); *Moore, supra* at 440-441.

The presentence report in this case specifically states that defendant was “represented” at his two prior convictions, which occurred in Chicago, Illinois and, at sentencing, defense counsel did not challenge the accuracy of the presentencing report or the trial court’s statements in this regard. The certificates of disposition and conviction from the Illinois court that defendant presented in support of this claim do not address defendant’s claim of lack of representation with respect to those convictions, nor did defendant present any proof that he even asked the Illinois courts for records or documents that would show whether he was represented by counsel. Accordingly, defendant has not met his burden of proof, and the Illinois judgments are entitled to a presumption of regularity in this collateral attack. See *Carpentier, supra* at 36-37.

Third, there is no evidence that the sentencing court believed that it lacked discretion or that the court failed to exercise discretion in the sentence it imposed on defendant. Cf. *People v Mauch*, 23 Mich App 723, 730-731; 179 NW2d 184 (1970). Thus, defendant is not entitled to resentencing due to a lack of discretion by the court in sentencing defendant. *People v Alexander*, 234 Mich App 665, 674-675; 599 NW2d 749 (1999).

Fourth, the trial court was precluded from sentencing defendant as an habitual offender. *People v Morales*, ___ Mich App ___; ___ NW2d ___ (Docket No. 211296, issued 4/21/00). At oral argument the prosecutor agreed that *Morales* applies to this case, but argued that defendant waived the notice requirements of MCL 769.13; MSA 28.1085, at sentencing. However, our review of the sentencing transcript does not support that conclusion. Defense counsel argued that notice of enhancement was not timely, but acknowledged that case law arguably supported the prosecutor’s claim of timeliness. Counsel went on to indicate that he would leave the question “for the court of appeals”. This is clearly not the language of waiver. Accordingly, we vacate defendant’s enhanced sentence and remand this case to the trial court for resentencing.

In light of our decision to remand for resentencing, it is unnecessary to address defendant’s remaining issue with regard to the length of his sentence.

Defendant’s convictions are affirmed and the case is remanded for resentencing. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Janet T. Neff

/s/ Michael R. Smolenski

¹ *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963).