

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DORAN RUSSELL COLLINS, a/k/a DAVE
MINSER,

Defendant-Appellant.

UNPUBLISHED

March 16, 2001

No. 219145

Macomb Circuit Court

LC No. 94-002712-FH

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

PER CURIAM.

Defendant was convicted by a jury of breaking and entering a building with intent to commit larceny, MCL 750.110; MSA 28.305, and possession of a burglar's tools, MCL 750.116; MSA 28.311. He was originally sentenced to twenty to forty years' imprisonment as a fourth habitual offender, MCL 769.12; MSA 28.1084. In a prior appeal, this Court affirmed defendant's convictions for breaking and entering and possession of burglar's tools, but reversed his conviction for fourth habitual offender and remanded for resentencing for a conviction of third habitual offender, MCL 769.11; MSA 28.1083. *People v Collins*, unpublished opinion per curiam of the Court of Appeals, issued October 6, 1998 (Docket No. 188080). On remand, defendant was sentenced to a term of twelve to twenty years. Defendant appeals as of right, raising several issues challenging his sentence. We affirm.

As a general rule, sentences are reviewed under the principle of proportionality to determine whether they are proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). The judicially created sentencing guidelines do not apply to habitual offender convictions. *People v Cervantes*, 448 Mich 620, 625; 532 NW2d 831 (1995). Habitual offender sentences are, therefore, reviewed to determine whether the trial court abused its discretion. *Id.* at 626-627.

In this case, the trial court did not abuse its discretion in sentencing defendant to a term of twelve to twenty years as a third habitual offender. Defendant's sentence is within the statutory framework for his conviction, MCL 769.11; MSA 28.1083. Defendant has a lengthy criminal record and was on parole at the time of the offense. Although defendant had done well in the prison environment, he had failed at previous attempts to rehabilitate him through probation, jail terms, and parole. The trial court was clearly aware of defendant's behavior while in prison, the

prison warden's letter on defendant's behalf, and defendant's military record. Indeed, the trial court was convinced by these factors to impose a lower sentence than it might have otherwise.

The trial court was not required to sentence defendant in accord with either public policy or the Department of Corrections' institutional policies. Nor was the trial court required to consider the statutory guidelines. The statutory guidelines apply to crimes committed on or after January 1, 1999, MCL 769.34(1), (2); MSA 28.1097(3.4)(1), (2), and defendant's crime was committed on October 28, 1994. Because the statutory guidelines do not apply, they need not be considered by either the trial court or this Court. *People v Alexander*, 234 Mich App 665, 679, n 3; 599 NW2d 749 (1999).

There is nothing in the record to suggest that the trial court improperly considered defendant's age. *People v Fleming*, 428 Mich 408, 423-424 n 17; 410 NW2d 266 (1987). Nor is there any evidence of bias. The trial court's recognition of the burglary's effect on its victims was not inappropriate. The protection of society is a legitimate sentencing concern. *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999).

Defendant's double jeopardy argument is not entirely clear. To the extent, however, that defendant is arguing that his sentence for third habitual offender violates his constitutional protections against double jeopardy, there is no merit to his claim. The habitual offender statute does not violate a defendant's right against double jeopardy. *People v Anderson*, 210 Mich App 295, 298; 532 NW2d 918 (1995). Further, to the extent that defendant is arguing that he is being punished a second time for the underlying crimes, there likewise is no merit to his claim. Because his original conviction and sentence were deemed invalid by this Court, resentencing is not prohibited by double jeopardy concerns. *People v Thenghkam*, 240 Mich App 29, 69-70; 610 NW2d 571 (2000).

Because we find that the trial court did not abuse its discretion in imposing its sentence, defendant's request for resentencing before a different judge is moot and need not be addressed.

Affirmed.

/s/ Michael R. Smolenski

/s/ Kathleen Jansen

/s/ E. Thomas Fitzgerald