

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTUS L. JAMES,

Defendant-Appellant.

UNPUBLISHED

March 23, 2001

No. 219574

Wayne Circuit Court

LC No. 98-010139

Before: Hoekstra, P.J., and Whitbeck, and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his convictions following a bench trial of felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The convictions stemmed from defendant pointing a loaded AK-47 assault rifle at a uniformed police officer. The trial court sentenced defendant to two years and eight months' to four years' imprisonment for the felonious assault conviction and to a consecutive two-year prison term for the felony-firearm conviction. We affirm.

Defendant first argues that his sentence for the felonious assault conviction was disproportionate and an abuse of discretion because the trial court departed upward from the sentencing guidelines based on the type of weapon used and the fact that a uniformed police officer was assaulted. A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

We disagree that the court acted improperly. A court, in imposing sentence, may emphasize the type of weapon used in a crime. *People v Avant*, 235 Mich App 499, 520; 597 NW2d 864 (1999). Further, this Court has upheld an upward departure from the guidelines where the defendant shot an on-duty police officer who identified himself as such and who was attempting to effectuate a lawful arrest. *People v Marshall*, 204 Mich App 584, 589-590; 517 NW2d 554 (1994). We therefore find no abuse of discretion in the instant case. Indeed, we emphasize that defendant displayed a reckless disregard for the law by pointing a loaded assault rifle at a uniformed police officer.

Defendant next contends that the court should not have taken into account his conduct during the bench trial while rendering the sentences in this case. It is well-settled, however, that

a trial court may take into account a defendant's conduct at trial when imposing sentence. *People v Alameda*, 222 Mich App 612, 617; 564 NW2d 188 (1997), citing *People v Eason*, 435 Mich 228, 240; 458 NW2d 17 (1990). A defendant's misconduct is a legitimate factor to be taken into account because it may indicate a defendant's disposition to violence and impulsiveness, both of which bear on rehabilitation. See *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995). The trial court therefore properly considered defendant's inappropriate conduct¹ at trial when imposing sentence.

Defendant next argues that his sentence was disproportionate because the trial court considered factors in imposing sentence that were already adequately reflected in the sentencing guidelines. We disagree. First, we note that the trial court properly articulated its reasoning for departing from the sentencing guidelines. See *People v Bennett*, 241 Mich App 511, 516; 616 NW2d 703 (2000). Specifically, the trial court reasoned that defendant's act of pointing a loaded firearm at a uniformed police officer and his outburst during trial warranted a departure from the sentencing guidelines. Contrary to defendant's assertions, the trial court correctly recognized that these circumstances were not adequately reflected in the guidelines and adjusted defendant's sentence upward accordingly. See *Marshall*, *supra* at 589, and *Houston*, *supra* at 323. As the *Milbourn* Court noted, "[i]n some cases, there may be important sentencing factors that are not included in the sentencing guidelines." *Milbourn*, *supra* at 660. In our view, the instant case presents such circumstances.

Moreover, we note that a deviation from the guidelines' range may indeed be based on factors already considered in the guidelines' calculations, but such a deviation must be made with caution, *People v Castillo*, 230 Mich App 442, 448; 548 NW2d 606 (1998), and should be scrutinized by this Court for a possible violation of the principle of proportionality. *Milbourn*, *supra* at 660. We have scrutinized the deviation and find no such violation of the principle of proportionality. Therefore, even if the court did consider factors already accounted for by the sentencing guidelines, we would nonetheless find no basis for a remand.

Defendant next argues that the trial court abused its discretion by failing to consider defendant's youth and his lack of a "prior substantial" record. We disagree. First, a review of the record indicates that the trial court noted that defendant previously had been convicted of misdemeanors, as opposed to more serious offenses. Also, the trial court was apprised of defendant's youth by defense counsel. Any mitigating effect the trial court may have assigned to defendant's age or to the nature of defendant's criminal record was clearly outweighed by the seriousness of defendant's crime. Furthermore, we note that although the trial court may consider a defendant's age in imposing sentence, *People v Randolph*, 242 Mich App 417, 423; 619 NW2d 168 (2000), age should not be given undue weight. As our Supreme Court opined in another context, "[w]hile age may be considered a mitigating or aggravating factor [in sentencing] in terms of the individual defendant and the circumstances of a particular crime, its consideration should be limited. Any predictions of a defendant's future behavior based on a

¹ We note that defendant acknowledged during sentencing that his behavior at trial was inappropriate.

status characteristic such as . . . age [is] suspect.” *People v Fleming*, 428 Mich 408, 423-424, n 17; 410 NW2d 266 (1987) (emphasis added). No abuse of discretion occurred.

Finally, defendant argues that the trial court erred in scoring offense variable nine (OV-9) when it increased this score to reflect that defendant was the leader in a multiple-offender incident. Application of the guidelines presents a cognizable claim only if: (1) the factual predicate for a score is wholly unsupported, or (2) the factual predicate is materially false, and (3) the sentence is disproportionate. *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997), habeas corpus gtd sub nom *Mitchell v Mason*, 60 F Supp 2d 655 (ED Mich, 1999); *People v Cain*, 238 Mich App 95, 131; 605 NW2d 28 (1999). There must merely be adequate evidence to support a particular score. *People v Williams*, 191 Mich App 269, 276; 477 NW2d 877 (1991).

This Court has interpreted OV-9 to require that the entire criminal episode be taken into account in determining whether the defendant was a leader. *People v Johnson*, 202 Mich App 281, 289-290; 508 NW2d 509 (1993). When the transaction here is viewed as a whole, it constituted a multiple-offender situation in which other persons involved in criminal activity took their cues from defendant. The other offenders were engaged in an illegal activity – urinating in public – and fled the scene once defendant ordered them to “get out [of] the way” and assaulted the officer. A reasonable interpretation of defendant’s actions is that they were designed to help his cohorts illegally escape from the police officer’s investigation of their activities. Therefore, because the trial court based its application of the guidelines on a factual predicate that is neither wholly unsupported nor materially false, and because defendant’s assault sentence is proportionate, defendant has not presented a cognizable claim. See *Mitchell*, *supra* at 177.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Patrick M. Meter