

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LINARD MILTON MALONE,

Defendant-Appellant.

UNPUBLISHED

February 8, 2002

No. 226955

Oakland Circuit Court

LC No. 96-146705-FH

Before: Sawyer, P.J., and O’Connell and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to rob while unarmed, MCL 750.88. The court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to a term of four to twenty years’ imprisonment. This Court affirmed defendant’s conviction but vacated defendant’s sentence as disproportionately lenient¹ and remanded for resentencing. *People v Malone*, unpublished per curiam opinion of the Court of Appeals, issued September 4, 1998 (Docket Nos. 202554, 202647).² On remand, the trial court sentenced defendant to a term of ten to thirty years’ imprisonment. Defendant appeals as of right and we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that he is entitled to resentencing because the trial court failed to exercise its discretion when it imposed a minimum ten-year sentence. It is true that “a trial judge commits reversible error if he or she does not recognize that he or she has discretion and therefore fails or refuses to exercise it.” *People v Merritt*, 396 Mich 67, 80; 238 NW2d 31 (1976). Thus, if a court fails to exercise its discretion in passing sentence because of a mistaken belief that the law required a particular sentence, the defendant is entitled to resentencing. *People v Green*, 205 Mich App 342, 346; 517 NW2d 782 (1994). There is nothing in the record

¹ Judge Hoekstra dissented in Docket No. 202554, concluding that the trial court’s imposition of sentence did not amount to an abuse of discretion.

² Contrary to defendant’s argument, the prosecutor’s appeal was properly before the Court. The prosecutor had a right to appeal defendant’s sentence, MCL 770.12(1); *People v Mitchell*, 454 Mich 145, 172; 560 NW2d 600 (1997), and no special action below was required to preserve the issue of the proportionality of the sentence. *People v Cain*, 238 Mich App 95, 129; 605 NW2d 28 (1999).

to reflect that the trial court mistakenly believed that it was required to impose a ten-year minimum sentence or that it failed to recognize that it had at least some discretion in imposing a minimum sentence, taking into account the reason for the remand. To the contrary, it recognized and exercised its discretion, explaining the basis for its sentence. Therefore, resentencing is not required on this ground.

Defendant next contends that the trial court abused its discretion when it sentenced him at the high end of the guidelines and that the reasons stated by the court did not justify the sentence.

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). This Court’s review is limited to determining whether the trial court abused its discretion by violating the principle of proportionality. *People v St John*, 230 Mich App 644, 649; 585 NW2d 849 (1998). An abuse of discretion will be found “where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender.” *People v Castillo*, 230 Mich App 442, 447; 584 NW2d 606 (1998). Given that defendant showed poor potential for rehabilitation, that this was his ninth theft-related felony conviction and that the offense was committed while defendant was on parole, we are satisfied that the sentence imposed by the trial court, which was within the statutory limits, did not constitute an abuse of discretion. See *People v Hansford (After Remand)*, 454 Mich 320, 325-326; 562 NW2d 460 (1997). We further note that although the judicial sentencing guidelines are not applicable to habitual offenders, *People v Cervantes*, 448 Mich 620, 625; 532 NW2d 831 (1995) (Riley, J.), defendant’s minimum sentence was within the guidelines and is thus presumptively proportionate. *People v Lyons (After Remand)*, 222 Mich App 319, 324; 564 NW2d 114 (1997); *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993).

Affirmed.

/s/ David H. Sawyer
/s/ Peter D. O’Connell
/s/ Brian K. Zahra