STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

FRED LYNN GODSEY,

Defendant-Appellant.

UNPUBLISHED
July 5, 2002

No. 230295
Macomb Circuit Court
LC No. 96-001617-FC

Before: Hood, P.J., and Saad and E. M. Thomas,* JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of fleeing and eluding a police officer, MCL 750.479a, and accessory after the fact, MCL 750.505. The trial court sentenced him as a habitual offender, fourth offense, MCL 769.13, to twelve to twenty-five years in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was convicted as the driver of the "getaway" vehicle used to flee the scene of an armed robbery of a gas station. Both he and his co-defendant testified that defendant did not know about his co-defendant's intent to rob the gas station. Both further testified that, after the robbery, the co-defendant jumped into the truck in which the two arrived, and told defendant, who was just waking up, to drive. The co-defendant was holding a knife, and a witness testified she saw defendant helping his co-defendant pick up money that he had dropped in the truck. Defendant testified that he was scared and drove quickly from the gas station and then led police on a chase. The police finally stopped defendant by ramming his vehicle with a police car. When they stopped defendant, the police found a knife and money on the floor of the vehicle.

Defendant argues that his sentence is disproportionate. We disagree.

The sentence imposed by the trial court is reviewed for an abuse of discretion. *People v Rodgers*, 248 Mich App 702, 719; ___ NW2d ___ (2001). While a sentence within the guidelines is presumptively proportionate, *People v Alexander*, 234 Mich App 665, 679; 599 NW2d 749 (1999), the sentencing guidelines do not apply to habitual offenders and they may not be considered on appeal when reviewing a sentence. *Id.*; *People v Gatewood*, 450 Mich 1025; 546 NW2d 252 (1996). The sentence must be proportionate to the seriousness of the offense and the defendant's circumstances. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1

* Circuit judge, sitting on the Court of Appeals by assignment.

(1990). If the sentence is within the statutory limits established by the Legislature and the underlying felony, when viewed in context of his prior felonies, indicates that the defendant has demonstrated an inability to conform his conduct to the laws of society, there is no abuse of discretion. *People v Hansford*, 454 Mich 320, 326; 562 NW2d 460 (1997).

The trial court sentenced defendant as a habitual offender, fourth offense, and was therefore permitted to sentence him to life in prison. Defendant has an extensive criminal history spanning, at the time of this offense, nearly thirty years. He has served a substantial amount of time in jail and prison. Yet, he continues to engage in illegal conduct. In this offense, defendant led police on a high-speed chase, driving on the wrong side of the road and off the road and colliding with another vehicle that was waiting at a traffic signal at an intersection. He did not stop until police rammed his truck with a police vehicle. Considering the seriousness of this offense together with defendant's criminal history, we find that defendant has demonstrated an inability to conform his conduct to the laws of society. Thus, the trial court did not abuse its discretion in sentencing defendant to twelve to twenty-five years in prison.

We also reject defendant's argument that the trial court acted vindictively in sentencing him the second time. Defendant originally pleaded guilty to armed robbery, MCL 750.529, and the prosecution dismissed the charge of assault with a dangerous weapon, MCL 750.82, and habitual offender fourth offense. The court sentenced him pursuant to a plea agreement to 7½ to 25 years. After his appeals, defendant withdrew his plea and went to trial. The court then sentenced him to a minimum of twelve years' for his convictions based on his habitual offender status.

There is a presumption of vindictiveness when a defendant is resentenced by the same judge and the judge imposes a longer sentence on resentencing. *People v Lyons (After Remand)*, 222 Mich App 319, 323; 564 NW2d 114 (1997). However, the presumption of vindictiveness may be overcome if the trial court articulates its reasons for the increased sentence at resentencing. *Id*.

We find no vindictive sentencing. On resentencing, defendant was convicted of different offenses than that to which he pleaded guilty. Moreover, when the court sentenced him on his guilty plea, it did not sentence defendant as a habitual offender fourth offense. Defendant was sentenced pursuant to a plea agreement that his minimum sentence not exceed 7½ years. Moreover, while the court did not specifically articulate its reasons for sentencing defendant, it expressed dismay at defendant's criminal history and lack of response to prior periods of incarceration. It is clear that defendant's enhanced sentence is based on his lengthy criminal history. Defendant has failed to show that the trial court's sentence was vindictive.

Defendant next argues that the trial court erred in denying his motion for sentencing as a habitual offender second offense, rather than habitual offender fourth offense. We disagree. Pursuant to MCR 6.312, after defendant withdrew his guilty plea, the case against him could proceed to trial on any charges that had been brought against him, including sentence enhancement as a habitual offender. *See People v Brownfield (After Remand)*, 216 Mich App 429, 434; 548 NW2d 248 (1996). The prosecution had previously given defendant notice of its intent to seek sentencing based on defendant's status as a fourth-offense habitual offender. Thus, the trial court did not err in denying defendant's motion for sentencing as a habitual offender second offense.

Finally, defendant argues that the trial court erred in allowing the introduction of bad acts evidence pursuant to MRE 404(b) over his objection. We find any error harmless.

A conviction will not be reversed based on the erroneous admission of evidence over a defendant's objection unless, upon consideration of the entire matter, it affirmatively appears that it is "more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). In his opening and closing statements, defense counsel used the evidence of the prior incident to demonstrate that defendant does not like police and tries to get away from them. Defense counsel argued that in driving away from the scene, defendant panicked. Counsel focused on defeating the armed robbery charge, arguing that defendant was waking up and completely surprised when his co-defendant came into his truck and told defendant to drive away. Defense counsel suggested that defendant was fleeing from police and that he should have stopped. He used the prior incident to emphasize that defendant disliked police and his nature was to get away from them in an effort to support his theory that he knew nothing of the robbery and fled from police simply because he did not want to have to encounter them. In addition, we note that in light of the overwhelming untainted evidence, any error in the admission of the prior bad act evidence was not outcome determinative.

Affirmed.

/s/ Harold Hood
/s/ Henry William Saad
/s/ Edward M. Thomas