

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY LAMONT JONES,

Defendant-Appellant.

UNPUBLISHED

June 24, 2004

No. 247353

Oakland Circuit Court

LC No. 2002-186780-FC

Before: Murphy, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of armed robbery, MCL 750.529, carjacking, MCL 750.529a, and kidnapping, MCL 750.349. He was sentenced as a second habitual offender, MCL 769.10, to twenty to thirty years' imprisonment for the armed robbery conviction, twenty to thirty years' imprisonment for the carjacking conviction, and twenty to thirty years' imprisonment for the kidnapping conviction. The carjacking sentence is to be served consecutive to the armed robbery and kidnapping sentences, which are concurrent. Defendant appeals only the sentences imposed by the trial court. We affirm.

On the evening of August 13, 2002, Christine Vaghy was leaving her place of business when defendant, armed with a gun, forced Vaghy into her car, made her open the passenger door so he could enter the vehicle, and then forced her to drive around for approximately thirty-five minutes. During the ordeal, Vaghy developed breathing difficulty, and she eventually pulled the car over to the side of the road, telling defendant that she could not continue and that she needed to get out of the car. On defendant's insistence, Vaghy gave defendant all the money she had in her purse and a credit card. She then stepped out of the car, grasping her purse in the process, and ran to a nearby gas station. Vaghy left behind her briefcase that contained her checkbook as well as her mother's checkbook. Defendant drove off with Vaghy's car. The day after the crime, the victim continued having breathing problems, and she went to the hospital where she was diagnosed with a heart attack.

A few days after the crime, Vaghy's daughter received a telephone call from someone claiming to be from a bank and requesting the social security numbers for Vaghy and her mother. The source of a similar subsequent call was identified through caller ID, reflecting a Detroit address. Later, defendant was stopped and arrested when police saw him driving the victim's vehicle near the identified address. Vaghy identified defendant as the perpetrator in a police line-up. Defendant gave police various accounts of how he obtained the car, including a claim

that his brother first had the vehicle. Defendant subsequently stated that Vaghy freely and willingly gave him a ride and that he drove away with the car when she entered the gas station. Defendant denied having a gun and asserted that he simply needed a ride to a “safe” place. At trial, defendant testified that he was at home recovering from a work injury when the crime occurred. He maintained that his statements to police were coerced through police threats. The jury rejected the defense presented by defendant, and he was convicted of armed robbery, carjacking, and kidnapping.

On appeal, defendant challenges only the sentences imposed by the trial court, arguing that the consecutive terms of imprisonment are disproportionate to the offenses and the offender and constitute an abuse of sentencing discretion despite the individual sentences being within the minimum sentencing guideline ranges. Defendant contends that MCL 769.34(10) is unconstitutional in that it violates the principle of separation of powers, Const 1963, art 3, § 2, and divests the judicial power of the courts, Const 1963, art 6, § 1. Defendant further argues that MCL 769.34(10) violates procedural and substantive due process rights, requiring fundamental fairness, by prohibiting appellate review of a disproportionate sentence and precluding claims that a sentence conflicts with constitutional protections against cruel and unusual punishment. Finally, defendant maintains that MCL 769.34(10) is in derogation of Const 1963, art 1, § 20, which provides, in general, an appeal as a matter of right for those accused in criminal proceedings.

Interpretation of the sentencing guidelines and consideration of constitutional arguments present issues of law that this Court reviews de novo on appeal. *People v Babcock*, 469 Mich 247, 253; 666 NW2d 231 (2003); *McDougall v Schanz*, 461 Mich 15, 23; 597 NW2d 148 (1999). The legislative sentencing guidelines control in the case at bar because the charged offenses occurred after January 1, 1999. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 254; 611 NW2d 316 (2000).

MCL 769.34(10) provides:

If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant’s sentence. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.¹

¹ We note that MCR 6.429(C) provides, contrary to MCL 769.34(10), that scoring challenges and challenges regarding the accuracy of the presentence report must be raised at or before sentencing unless the defendant demonstrates that the challenge was brought as soon as an inaccuracy could reasonably have been discovered. This Court in *People v McGuffey*, 251 Mich App 155, 165-166; 649 NW2d 801 (2002), held that “the court rule, MCR 6.429(C), must prevail
(continued...) ”

As acknowledged by defendant, the sentences imposed by the trial court fell within the minimum sentencing guideline ranges. According to MCL 769.34(10), we are mandated to affirm the sentences without further consideration because there is no challenge to the scoring of the guidelines, nor is there a challenge concerning the accuracy of the presentence investigation report. Defendant wishes us to engage in an analysis of MCL 769.34(10) in order to determine its constitutional soundness. On closer inspection of defendant's argument, it becomes clear that it is unnecessary to address the constitutional validity of the statute because the essence of defendant's claim is not that the individual sentences are inappropriate and constitute an abuse of discretion but rather that the abuse of discretion lay with the trial court's ruling making the carjacking sentence consecutive.² In *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993), the Michigan Supreme Court stated that "there exists a general presumption by this Court that we will not reach constitutional issues that are not necessary to resolve a case." (Citation omitted.) Only when compelled may an appellate court render constitutional pronouncements, and then so with great circumspection and trepidation. *Council of Orgs & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 568; 566 NW2d 208 (1997).

Michigan's carjacking statute, MCL 750.529a(2), provides that "[a] sentence imposed for a violation of this section may be imposed to run consecutively to any other sentence imposed for a conviction that arises out of the same transaction." Concurrent sentencing is the norm in Michigan, and a court may impose consecutive sentences only if authorized by statute. *People v St John*, 230 Mich App 644, 646; 585 NW2d 849 (1998). The use of the term "may" signifies that a trial court has the discretion to either impose or not impose a consecutive sentence. *Id.* at 646-647; see also *Jordan v Jarvis*, 200 Mich App 445, 451; 505 NW2d 279 (1993). Thus, a trial court's decision to impose consecutive sentences is reviewed for an abuse of discretion. An abuse of discretion exists only where an unprejudiced person, considering the facts upon which the trial court made its decision, would find that there was no justification or excuse for the ruling made, *People v Miller*, 198 Mich App 494, 495; 499 NW2d 373 (1993), or where the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will and a defiance of judgment, *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

We find nothing in the language of MCL 769.34(10) that precludes appellate review of a trial court's decision to impose consecutive sentences as opposed to concurrent sentences, where the language of the statute merely requires affirmance of a sentence within the appropriate guidelines range absent a scoring error or presentence report inaccuracy. Affirming or reversing the twenty- to thirty-year prison terms is not the issue here. Rather, the imperative question

(...continued)

over the conflicting statutory provision, MCL 769.34(10)." (Citation omitted.)

² Defendant states on appeal that "the imposition of the two consecutive terms of 20 to 30 years of imprisonment in the case at bar is an abuse of sentencing discretion as the sentences are disproportionate to the circumstances surrounding the offenses and the offender." Defendant further argues that the trial court "essentially sentenced Mr. Jones to life in prison by giving him forty year[s] in prison." It is evident that defendant's complaint with the trial court's sentencing decision rests with and focuses on the fact that he is required to serve a minimum of forty years' imprisonment, which, according to defendant, is too extreme. The forty-year term necessarily arises out of the ruling making the carjacking sentence consecutive to the other sentences.

concerns the trial court's imposition of consecutive sentences. To the extent that defendant's argument can be read as a challenge to the individual sentences, we decline to address the argument in such a manner because it would unnecessarily compel constitutional pronouncements and because a mechanism exists to address the heart of defendant's claims through review of the court's decision to impose consecutive sentences. Because there exists a mode of appellate review in relation to the crux of defendant's grievance with the sentences, it is unnecessary to determine whether MCL 769.34(10) unconstitutionally hinders defendant from fully challenging the judgment of sentence.³

Defendant asserts that because he had a limited prior record with no history of assault, the judgment of sentence constituted an abuse of discretion and cruel and unusual punishment. We disagree.

"The enhancement of punishment through consecutive sentencing is a legislative action taken for the ostensible purpose of deterring certain criminal behavior." *People v Morris*, 450 Mich 316, 327; 537 NW2d 842 (1995)(citation omitted). If a defendant receives consecutive sentences and neither sentence exceeds the maximum punishment allowed under the law, the aggregate of the sentences will not be deemed disproportionate under the rule of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). *People v Miles*, 454 Mich 90, 95; 559 NW2d 299 (1997). The maximum punishment allowed for both armed robbery and carjacking is life in prison. MCL 750.529; MCL 750.529a. In determining whether a punishment is cruel and unusual, one must look to the gravity of the offense and harshness of the penalty, compare the penalty to those imposed for other crimes, and consider the goal of rehabilitation. *People v Launsbury*, 217 Mich App 358, 363; 551 NW2d 460 (1996). A sentence that is proportionate to the seriousness of the offense and the offender is not cruel and unusual punishment. *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997). We deem it appropriate to consider proportionality principles in the context of determining whether the trial court abused its discretion in making the carjacking sentence run consecutive to the armed robbery and kidnapping sentences.

We conclude that the trial court did not abuse its discretion in imposing consecutive sentences. Defendant had a prior felony drug conviction; however, he chose not to appear for sentencing, and there was an active warrant out for his arrest. This reflects a failure to take responsibility for his actions and a failure to be accountable. The victim offered defendant the car keys when he first approached her, which could have ended the matter, yet he refused the keys and instead forced Vaghy to drive the car. Defendant held Vaghy captive in her car for about thirty-five minutes at gunpoint, which certainly must have felt like an eternity to the victim. The uncertainty of what was going to occur, along with the fact that defendant attempted to direct Vaghy to drive into a deserted park, terrorized the victim, apparently resulting

³ We do note that our Supreme Court recently held that the Separation of Powers Clause of the Michigan Constitution, art 3, § 2, does not bar the Legislature from requiring the Court of Appeals to affirm, under MCL 769.34(10), a minimum sentence that falls within the guidelines range absent a scoring error or inaccurate presentence report. *People v Garza*, 469 Mich 431, 434-435; 670 NW2d 662 (2003).

in a heart attack. The imposition of consecutive sentences, which effectively will require defendant to serve a minimum of forty years' imprisonment, although severe, is consistent and proportionate with the gravity and seriousness of the crime and is not cruel and unusual. Minimally, there was no abuse of discretion.

Affirmed.

/s/ William B. Murphy

/s/ Kathleen Jansen

/s/ Jessica R. Cooper