

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
March 20, 2018

v

SHUKUR TEROME BROWN,
Defendant-Appellant.

No. 337540
Genesee Circuit Court
LC No. 13-034170-FC

Before: TALBOT, C.J., and BECKERING and CAMERON, JJ.

PER CURIAM.

In this criminal matter, defendant appeals as of right an order denying resentencing for his convictions of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. For the reasons set forth below, we vacate the trial court’s order and remand the matter to the trial court to follow the procedure set forth in *People v Lockridge*, 498 Mich 358, 398; 870 NW2d 502 (2015) in determining again whether it would resentence defendant.

I. RELEVANT FACTS AND PROCEDURAL HISTORY

This case arises from the shooting death of 15-year-old Gianni Herron. Defendant was sixteen years old at the time of the incident. Defendant, his cousin Veondra Bartee, and Herron were in defendant’s basement during the early morning hours of January 1, 2013. The three smoked marijuana while “playing” with guns in the basement. The three were “playing, giggling,” while holding their guns and pointing them at each other. At some point between 2:00 a.m. and 3:00 a.m., Herron jokingly pointed his gun at Bartee and said, “I could have shot you . . .” In response, Bartee, also jokingly, raised his gun at Herron and said, “[N]o it won’t happen like that.” Defendant also raised his shotgun in jest towards Herron and said, “[W]on’t happen like that.” However, defendant’s shotgun discharged, striking Herron in the upper-right chest. Herron died from the gunshot wound.

A jury convicted defendant of the aforementioned offenses. At sentencing, the trial court calculated defendant’s minimum guidelines range at 13 1/2 to 22 1/2 years. Without explanation, trial court sentenced defendant to the maximum possible minimum sentence within the guidelines range, being 22½ years, with a maximum 40 years’ imprisonment for the second-degree murder conviction and two years’ imprisonment for the felony-firearm conviction.

In his initial appeal in this Court, defendant raised various issues related to the conduct of his trial and the assistance rendered by his counsel. We affirmed defendant's convictions in an unpublished opinion. *People v Brown*, unpublished per curiam opinion of the Court of Appeals, issued February 25, 2016 (Docket No. 324189). Defendant then applied for leave to appeal our decision in the Michigan Supreme Court. After our Supreme Court denied the motion, defendant filed a motion for reconsideration in which he sought review of his sentence in light of the ruling in *Lockridge*, which made the sentencing guidelines advisory to correct the constitutional violation arising from the imposition of minimum sentences based on facts not found by a jury or admitted by a defendant. *Lockridge*, 498 Mich at 391-392. Subsequently, our Supreme Court vacated its order that denied defendant's application for leave to appeal and, in lieu of granting leave, remanded the case to the trial court to determine whether the court would have imposed a materially different sentence under the sentencing guidelines procedure described in *Lockridge*. *People v Brown*, 500 Mich 856, 856; 888 NW2d 67 (2016). The order instructed that on remand, "the trial court shall follow the procedure described in Part IV of [*Lockridge*]." *Id.* In all other respects, the Supreme Court denied leave to appeal. *Id.*

On remand, the trial court issued an order that summarily declined to resentence defendant, indicating that it would not have imposed a materially different sentence absent the prior unconstitutional restraint on its discretion. It is from this order that defendant now appeals.

II. ANALYSIS

Defendant argues on appeal that his minimum sentence for the second-degree murder conviction is unreasonable and disproportionate given that, at the time he accidentally shot his best friend, he was only sixteen years old. Defendant points out recent caselaw acknowledging our scientific understanding that minors are categorically less culpable than adults because their brains are not fully mature and they are less able to appreciate the dangers of their conduct. Defendant acknowledges that his conduct was reckless, but he had no intention to kill his best friend. Moreover, defendant did not have a prior criminal record, either felony or misdemeanor, nor did he have a juvenile record. In addition, defendant contends that afterwards, he understood the severity of his crime, was deeply remorseful, and showed potential for rehabilitation by obtaining his GED prior to sentencing, while incarcerated. Further, defendant argues that the trial court failed to "justify" its sentence. To the extent plaintiff argues that the trial court failed to provide "an appropriate explanation" of its decision not to resentence defendant, and thus to follow the Michigan Supreme Court's remand instructions, we agree.

In Part IV of *Lockridge*, our Supreme Court provided a series of steps for a sentencing court to follow when considering a *Crosby* remand. *Lockridge*, 498 Mich at 398. In its remand of this matter, the Supreme Court instructed the trial court to follow that procedure. *Brown*, 500 Mich 856. The *Lockridge* Court explained that a trial court considering a case on a *Crosby* remand should "first and foremost 'include an opportunity for a defendant to avoid resentencing by promptly notifying the [trial] judge that resentencing will not be sought.'" *Id.* at 398, quoting *United States v Crosby*, 397 F3d 103, 118 (CA 2, 2005). Second, if the defendant does not notify the court that he or she would like to avoid resentencing, the court " 'should obtain the views of counsel, at least in writing, but 'need not' require the presence of the Defendant,' in 'reaching its decision (with or without a hearing) whether to resentence.'" *Id.*, quoting *Crosby*, 397 F3d at 120 (quotation marks omitted). Finally, once the court has made its decision

regarding whether to resentence, the trial court “shall ‘either place on the record a decision not to resentence, with an appropriate explanation, or vacate the sentence and, with the Defendant present, resentence in conformity with’ this opinion.” *Id.*

In the case at bar, nothing in the order appealed from or the record submitted to this Court after remand allows us to conclude that the trial court heeded our Supreme Court’s instructions and followed the steps outlined above. There is no indication that upon receiving the case on remand the trial court obtained the views of counsel regarding resentencing. *Id.* Moreover, the trial court’s order does not provide an “appropriate explanation” for its decision not to resentence defendant. *Id.*

Plaintiff argues that, because defendant’s sentence is within the sentencing guidelines, it is presumptively proportionate and not subject to review for reasonableness or proportionality unless defendant shows that the sentence range was calculated incorrectly or that the trial court relied on inaccurate information when sentencing defendant. Because defendant has made neither of these showings, plaintiff argues that this Court is obligated to affirm the trial court’s sentence. Plaintiff cites in support of its argument *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016), which states, “[w]hen a trial court does not depart from the recommended minimum sentencing [guidelines] range, the minimum sentence must be affirmed unless there was an error in scoring or the trial court relied on inaccurate information.”¹ According to *Schrauben* and the statute it interprets and applies, this Court lacks the authority to do anything other than affirm a sentence within the minimum sentencing guidelines range. We note, however, that there is precedential authority that suggests that in some cases, “unusual circumstances may exist that overcome the presumption that a particular sentence within the guidelines range is reasonable and proportionate to the offense and the offender.”²

Notwithstanding any apparent split in authority regarding this Court’s extent of review of sentences within the minimum sentencing guidelines, it is beyond dispute that a court should

¹ *Schrauben* interprets and applies MCL 769.34(10), which 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.

² See *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000) (reviewing a sentence for proportionality and holding that a sentence within the applicable guidelines is “presumptively proportionate” and that presumption may be overcome only by “unusual circumstances”); see also *People v Steanhouse (On Remand)*, ___ Mich App ___; ___ NW2d ___ (Issued December 5, 2017, Docket No. 318329); slip op 2 n. 3 (“We note, however, that under ‘unusual circumstances,’ a sentence within the guidelines range may be ‘disproportionately severe or lenient,’ which would result in a sentence that violates principle of proportionality even though it is within the guidelines range.”) (Quoting *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990)).

follow instructions on remand, and that the trial court in this case did not. Accordingly, we vacate and remand the matter to the trial court to determine whether it would resentence defendant, and to do so in compliance with the procedures set forth at *Lockridge*, 498 Mich at 398. That would include an appropriate explanation for its reasoning if it elects not to resentence defendant, which is particularly called for here because the trial court gave no explanation for its chosen sentence at the time of defendant's original sentencing.

Vacated and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Jane M. Beckering
/s/ Thomas C. Cameron