

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHELLE LYNN MCCLUNG,

Defendant-Appellant.

UNPUBLISHED

October 7, 2021

No. 353371

Jackson Circuit Court

LC Nos. 18-004414-FH; 18-
004674-FH

AFTER REMAND

Before: SHAPIRO, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM.

This case returns to us after remand to the trial court. Defendant pleaded guilty to operating while intoxicated third offense (OWI-third), MCL 257.625(1) and (9)(c), and she pleaded *nolo contendere* to OWI causing serious injury (OWI-injury), MCL 257.625(5)(a). On appeal, she challenged the trial court’s decisions to impose two departure sentences and consecutive sentencing. In our prior opinion, we vacated the sentences and remanded for resentencing primarily because the trial court made a statement erroneously indicating that consecutive sentencing was mandatory in this case. On remand, the trial court sentenced defendant within the minimum sentencing guidelines range for OWI-third to a prison term of 23 to 60 months. The court again imposed an upward departure sentence for OWI-injury, sentencing defendant to a prison term of 29 to 60 months. The trial court also exercised its discretion to impose consecutive sentencing. For the reasons stated in this opinion, we affirm.

I. BACKGROUND

We previously set forth the background to this case:

In a two-day span, defendant was twice arrested for driving while intoxicated, with the second incident causing serious injury to another driver. Lower court Case No. 18-004414-FH arose on April 14, 2018, when officers observed defendant perform two traffic infractions, including driving onto the yellow dividing line. Defendant was arrested for driving while intoxicated and

released on a personal recognizance bond. Lower court Case No. 18-004674-FH arose two days later, on April 16, 2018, when defendant again drove while intoxicated, rear-ended one vehicle, and then crashed head-on into an oncoming pickup truck, seriously injuring the driver of the pickup truck.

In Case No. 18-004414-FH, defendant pleaded guilty to OWI-third. In Case No. 18-004674-FH, she pleaded nolo contendere to OWI-injury. At the sentencing hearing, the victim spoke about the ongoing injuries he suffered in the accident and how he was forced to close the business that he had operated for 20 years. The prosecution requested that the trial court sentence defendant at the high end of the guidelines for each offense and exercise its discretion to impose a consecutive sentence. For OWI-third, defendant's minimum sentence guidelines range was 7 to 23 months' imprisonment. For OWI-injury, the guidelines range was 14 to 29 months' imprisonment.

Before sentencing defendant, the trial court noted defendant's criminal history, which included 13 misdemeanors, and that the court had thoroughly reviewed the presentence information report (PSIR). The court found the chronology of events important, noting that after being arrested on the OWI-third offense and released on bond, within two days defendant was again drunk driving, which caused the OWI-injury offense. After reading parts of the PSIR into the record, the court departed from the guidelines range and sentenced defendant to 40 to 60 months' imprisonment for OWI-third. The court then imposed a consecutive sentence of 36 to 60 months' imprisonment for OWI-injury. [*People v McClung*, unpublished per curiam opinion of the Court of Appeals, issued May 27, 2021 (Docket No. 353371), p 2.]

Defendant appealed her sentences, arguing that the trial court did not adequately justify the departure sentences or consecutive sentencing. We vacated the imposition of consecutive sentences "in light of the court's statement [at sentencing] that it was imposing a 'mandatorily consecutive' sentence." *Id.* at 2. "[T]he prosecutor conceded that the trial court's statement referring to a mandatory consecutive sentence required resentencing." *Id.* at 2 n 2. We also noted that review of the departure sentences was problematic "because in sentencing defendant for the OWI-third conviction, the trial court relied exclusively on the circumstances underlying the other conviction, i.e., OWI-injury." *Id.* at 3. Given the possibility that the trial court confused the two offenses, and because we were remanding on the consecutive sentencing issue, we also vacated the underlying sentences and remanded for full resentencing. *Id.* at 3-4.

On remand, the trial court decided to sentence defendant within the minimum sentencing guidelines range for OWI-third in large part because of defendant's positive conduct in prison since the initial sentencing. However, the court decided that a departure sentence for OWI-injury and a discretionary consecutive sentence were warranted based on the sequence of events, i.e., while defendant was out on bail for the OWI-third offense, she again drove while intoxicated,

resulting in a head-on collision with the victim. The court also considered that the victim was seriously injured and “totally lost his ability to even conduct his business.”¹

II. ANALYSIS

We conclude that the trial court’s decisions to impose a departure sentence for OWI-injury and consecutive sentencing do not constitute an abuse of discretion.²

The principle of proportionality “requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.” *People v Walden*, 319 Mich App 344, 351-352; 901 NW2d 142 (2017) (quotation marks and citation omitted). Although the sentencing guidelines are now advisory, the sentencing court still must determine the applicable guidelines and consider the guidelines when imposing a sentence. *Id.* at 351. If the trial court finds that a guideline sentence is not proportional, the court must “justify the sentence imposed in order to facilitate appellate review.” *People v Steanhouse*, 500 Mich 453, 470; 902 NW2d 327 (2017) (quotation marks and citation omitted). Factors relevant to whether a departure sentence is proportionate to the offense and offender include “(1) whether the guidelines accurately reflect the seriousness of the crime, (2) factors not considered by the guidelines, and (3) factors considered by the guidelines but given inadequate weight.” *People v Dixon-Bey*, 321 Mich App 490, 525; 909 NW2d 458 (2017).

“In Michigan, concurrent sentencing is the norm, and a consecutive sentence may be imposed only if specifically authorized by statute.” *People v Ryan*, 295 Mich App 388, 401; 819 NW2d 55 (2012) (quotation marks and citation omitted). In cases where the trial court has discretion to impose a consecutive sentence and chooses to exercise that discretion, the court must provide “particularized reasons” supporting that decision with references to the specific offenses and the defendant. *People v Norfleet*, 317 Mich App 649, 666; 897 NW2d 195 (2016).

On remand, the trial court acknowledged the sentencing guidelines range and that consecutive sentencing in this case was discretionary. But the court provided two justifications for departing from the guidelines range and imposing a consecutive sentence. First, the court discussed how defendant committed the OWI-injury offense only two days after her release on bond for the OWI-third offense. As noted, defendant was arrested for OWI on April 14, 2018. A blood draw showed a .150 blood alcohol content and cocaine in her system. Defendant was apparently unphased by this arrest and her bond conditions. According to her statement found in the presentence investigation report (PSIR), she spent the weekend “drinking and doing drugs.”

¹ The combined minimum sentences of the two offense was reduced by 24 months on remand.

² We review for an abuse of discretion the reasonableness of a trial court’s departure sentence. See *People v Steanhouse*, 500 Mich 453, 471; 902 NW2d 327 (2017). We also review a trial court’s decision to impose a consecutive sentence when it is not mandatory for an abuse of discretion. *People v Norfleet*, 317 Mich App 649, 654; 897 NW2d 195 (2016). “A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes.” *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

Defendant, wanting “to come down from [the] coke and meth,” took a Klonopin.³ Defendant did not realize “how strong that pill was” and does not “remember a thing.” What followed is the OWI-injury offense on April 16, 2018, where defendant, after rear-ending one vehicle, crashed head-on with the victim in this case. The toxicology report indicated that defendant had opiates, cocaine, amphetamines and THC in her system. Defendant’s complete disregard for her bond conditions and the safety of others were factors that were not adequately accounted for by the sentencing guidelines, *Dixon-Bey*, 321 Mich App at 525, and they also supported the trial court’s decision to impose a consecutive sentencing.

The trial court also considered the harm suffered by the victim in this case. At the initial sentencing hearing, the victim provided a thorough statement discussing the physical, emotional, and financial impact of his injuries. The victim had suffered significant injuries and after multiple surgeries had still not fully healed. Because of his injuries, he was forced to close the business that he had operated for almost 20 years. These are additional considerations that were not fully accounted for by the sentencing guidelines, and they provided further justification for the consecutive sentencing decision.

Finally, the trial court’s sentencing decisions are supported by defendant’s longstanding substance abuse issues. The PSIR shows that defendant, who was 44 years old at the time of instant offenses, has struggled with substance abuse since she was 18. She was convicted of drunk driving twice and driving on a suspended license three times. She had a total of 13 prior misdemeanors and had failed six of her eight probations, with her last probation being revoked in 2017. The PSIR further informs that defendant was court ordered into outpatient treatment in 2016 and that while she nearly completed the one-year program, she stopped attending when her probation ended. She was referred to treatment several times during other probation terms, but she would either have her probation revoked or refuse treatment. The PSIR also informs that defendant admitted that she has driven while under the influence “many times” without detection. Given this history, the trial court properly considered the danger defendant posed to society in imposing a departure sentence and consecutive sentencing.

In sum, the trial court reasonably determined that a minimum sentence of 29 months was proportionate to the circumstances and seriousness of the OWI-injury offense and defendant’s background. Based on those same factors, the trial court also adequately justified the decision to impose consecutive sentences. The trial court’s sentencing decisions were not outside the range of principled outcomes.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Jane M. Beckering

³ Defendant’s statement in the PSIR misspells the drug as “Kalonipen.”