

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAVANNAH MAE VANDIVER,

Defendant-Appellant.

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UNPUBLISHED

August 19, 2021

No. 354119

Shiawassee Circuit Court

LC No. 2018-003332-FH

Before: BORRELLO, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted,<sup>1</sup> the sentence imposed upon her for her guilty plea conviction of possession of methamphetamine, MCL 333.7403(2)(b)(i). The trial court sentenced defendant to serve 60 to 120 months’ imprisonment for the conviction. We affirm.

Defendant testified at her plea hearing that in November 2018 she was arrested on a felony warrant for probation violations. She was asked by the arresting officer whether she had any methamphetamine on her person and defendant responded affirmatively. Defendant’s presentence investigation report (PSIR) indicates that she removed a “small zipper pouch” from under her shirt and gave it to the arresting officer. The pouch contained a Ziploc baggie with a crystalline substance that tested positive for methamphetamine. Defendant was thereafter charged with possession of methamphetamine and delivery/manufacture of methamphetamine.

In March 2019, defendant pleaded guilty to possession of methamphetamine in exchange for the dismissal of the delivery/manufacture of methamphetamine charge. Defendant’s minimum

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<sup>1</sup> *People v Vandiver*, unpublished order of the Court of Appeals, entered August 13, 2020 (Docket No. 354119).

sentence guidelines range was 5 to 23 months.<sup>2</sup> The trial court, however, departed upwardly from that range and sentenced defendant to serve 60 to 120 months' imprisonment.

On appeal, defendant challenges the trial court's upward departure from the guidelines minimum sentence range. We review a sentence that departs from the sentencing guidelines range for reasonableness. *People v Lockridge*, 498 Mich 358, 365; 870 NW2d 502 (2015). "[T]he standard of review to be applied by appellate courts reviewing a sentence for reasonableness on appeal is abuse of discretion." *People v Steanhouse*, 500 Mich 453, 471; 902 NW2d 327 (2017) (*Steanhouse I*). A trial court abuses its discretion if it fails to adhere to the principle of proportionality in imposing its sentence on a defendant. *People v Lampe*, 327 Mich App 104, 125; 933 NW2d 314 (2019). A trial court's findings of fact at sentencing are reviewed for clear error. *People v Odom*, 327 Mich App 297, 303; 933 NW2d 719 (2019). Clear error occurs when "the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *Id.* at 304 (quotation marks and citation omitted).

A sentence is reasonable "if it adheres to the principle of proportionality" provided in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). *People v Walden*, 319 Mich App 344, 351; 901 NW2d 142 (2017). The principle of proportionality requires a sentence "to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Milbourn*, 435 Mich at 636. Although the sentencing guidelines are no longer mandatory,<sup>3</sup> they serve as a "useful tool" or as "guideposts" to help reduce disparity in sentencing. *People v Dixon-Bey*, 321 Mich App 490, 524-525; 909 NW2d 458 (2017).

The trial court may depart from the guidelines range when it determines that "the recommended range under the guidelines is disproportionate, in either direction, to the seriousness of the crime." *Milbourn*, 435 Mich at 657. When determining proportionality, the trial court may consider factors that include, but are not limited to:

(1) the seriousness of the offense; (2) factors that were inadequately considered by the guidelines; and (3) factors not considered by the guidelines, such as the relationship between the victim and the aggressor, the defendant's misconduct while in custody, the defendant's expressions of remorse, and the defendant's potential for rehabilitation. [*Walden*, 319 Mich App at 352-353 (quotation marks and citations omitted).]

"A trial court must articulate its reasons for imposing a sentence on the record at the time of sentencing." *People v Conley*, 270 Mich App 301, 312; 715 NW2d 377 (2006). To justify a departure sentence, a trial court must include "an explanation of why the sentence imposed is more

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<sup>2</sup> At sentencing, the prosecutor incorrectly stated that the sentencing guidelines range was 10 to 23 months. However, defendant's total offense variable (OV) score was 16 points, with an OV level of II. Her total prior record variable (PRV) score was 35 points, with a PRV level of D. The applicable sentencing guidelines range for cell D-II for Class D offenses is 5 to 23 months, not 10 to 23 months. MCL 777.65.

<sup>3</sup> See *Lockridge*, 498 Mich at 391.

proportionate to the offense and the offender than a different sentence would have been[.]” *Dixon-Bey*, 321 Mich App at 525 (quotation marks and citations omitted). If it is unclear why a trial court departed from the guidelines range, “an appellate court cannot substitute its own judgment about why the departure was justified.” *People v Smith*, 482 Mich 292, 304; 754 NW2d 284 (2008).

Defendant contends that the trial court erred by sentencing defendant as if she had been convicted of the dismissed charge of possession with intent to deliver methamphetamine. However, it was proper for the trial court to consider the circumstances of defendant’s plea bargain, including the charges that were dismissed in exchange for the plea. See *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994).

In addition, although defendant testified at her plea hearing that she intended to consume the methamphetamine, defendant’s PSIR indicated that the arresting officer searched defendant’s bag and found a pocket book and \$365. He also found a notebook which contained a drug sales ledger. The arresting officer indicated that the denominations of the bills he found were consistent with narcotics sales. A trial court’s factual findings for a departure sentence must be supported by a preponderance of the evidence, See *People v Lawhorn*, 320 Mich App 194, 207; 907 NW2d 832 (2017), and the factual findings were so supported in this matter.

Defendant also argues that the trial court erred when it assessed five points for offense variable (OV) 15, but then concluded that five points were inadequate and took that scoring into consideration when fashioning her sentence. Defendant is correct that OV 15 is a *McGraw*<sup>4</sup> variable and a trial court should not consider dismissed conduct when assessing points for OV 15. See *People v Gray*, 297 Mich App 22, 32; 824 NW2d 213 (2012). However, it is generally appropriate for a trial court to consider dismissed conduct when departing from the sentencing guidelines range. See *id.* The trial court here did not consider the dismissed conduct in scoring OV 15, but instead properly considered the dismissed charge in imposing an upward departure sentence.

Defendant next argues that the trial court failed to provide adequate reasons for its sentencing departure. However, in addition to considering the dismissed charge, the trial court stated that prior record variable (PRV) 6 did not adequately consider the circumstances of defendant’s probation in that defendant had been placed on probation for the same offense less than one month prior to incurring the sentencing charge in the instant case and had already absconded from probation. The trial court further opined that defendant lacked the potential for rehabilitation, and that it needed to consider the deterrence of others and the protection of the community from the effects of defendant’s drug dealing.

The trial court properly considered the circumstances of defendant’s probation, because although 10 points are assessed for PRV 6 if a defendant is on probation, PRV 6 does not consider *the circumstances* of a defendant’s probation. See MCL 777.56. It was also proper for the trial court to consider defendant’s potential for rehabilitation, which is not accounted for in the guidelines. See *Walden*, 319 Mich App at 353. It was additionally appropriate for the trial court

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<sup>4</sup> *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009).

to consider the deterrence of others and the protection of the community when imposing the departure sentence, because those considerations are goals of sentencing. See *People v Solmonson*, 261 Mich App 657, 672 n 4; 683 NW2d 761 (2004). Therefore, the trial court provided adequate reasons for departing from the sentencing guidelines.

Defendant also argues that the trial court did not articulate why the departure was proportionate to the offense and the offender. The reason for the extent of a departure from the guidelines must be included in the trial court's justification of a departure sentence, *Dixon-Bey*, 321 Mich App at 529 and "[a] sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear." *Smith*, 482 Mich at 304.

Contrary to defendant's assertion, the trial court did explain why it felt the extent of departure was proportionate. It stated that defendant pleaded guilty to possession of methamphetamine, a Class D felony, but was originally charged with possession with intent to deliver methamphetamine, a Class B felony. The trial court examined the guidelines minimum sentencing range for cell D-II in the Class B grid, which was 51 to 85 months, and found that range adequately encompassed the concerns it articulated. One way to justify the extent of the departure "is to place the specific facts of a defendant's crimes in the sentencing grid." *Smith*, 482 Mich at 306. As discussed previously, the trial court properly found that defendant intended to deliver the methamphetamine, and it was proper for the trial court to consider the sentencing range for the Class B grid. The trial court therefore did not abuse its discretion in imposing the upward departure sentence.

We affirm.

/s/ Stephen L. Borrello  
/s/ Deborah A. Servitto  
/s/ Cynthia Diane Stephens