

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HENRY ALBERT MOORE JR.,

Defendant-Appellant.

UNPUBLISHED

November 23, 2021

No. 354280

Eaton Circuit Court

LC No. 18-020012-FH

Before: RICK, P.J., and RONAYNE KRAUSE and LETICA, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted the sentence imposed after the trial court revoked his probation. We vacate defendant's sentence and remand to the trial court for resentencing.

I. BACKGROUND

Defendant was a United States Marine. He served combat duty in the Iraqi conflicts, and as a consequence of his experiences, he is on disability, and he suffers from Post-Traumatic Stress Disorder (PTSD), anxiety, depression, and alcoholism. He encountered significant difficulty returning to a stable and normal civilian life. He was twice convicted of drunk driving. He was discharged unsuccessfully from probation following the first drunk driving. He was placed in a two-year Veteran's Court for the second offense. He had two probation violations, but graduated from the program. On a third occasion, he was convicted of unlawfully entered a building. He received a sentence of fines and costs.

Within several months of his Veteran's Court graduation, defendant was convicted after pleading no contest to assault by strangulation, MCL 750.84(1)(b), interfering with electronic communications, MCL 750.540(5)(a), and domestic assault, MCL 750.81(2). The charges involved his wife. He was sentenced to serve 36 months in the Swift and Sure Sanctions Probation Program (SSSPP) and five months in jail, with credit for 38 days and with all but 12 days suspended and to be served on weekends, for the assault-by-strangulation and interfering-with-electronic-communications convictions, and to time served for the domestic-assault conviction.

Defendant later violated the terms of his probation. Defendant's probation was revoked and he was sentenced to serve 6 to 10 years' imprisonment for assault by strangulation and time served for interfering with electronic communications. Defendant applied for leave to appeal his sentence for assault by strangulation in this Court, which denied the application.¹ Defendant then applied for leave to appeal in the Supreme Court, which, in lieu of granting leave, remanded the case to the trial court with instructions to issue an order articulating why the guidelines departure was warranted, or to resentence defendant.² On remand, the trial court entered an order explaining the reasons for departure. Defendant now appeals that order by delayed leave granted.³

II. ANALYSIS

Defendant argues that his minimum sentence, which exceeded the recommended range under the sentencing guidelines, was unreasonable and disproportionate. Defendant also argues that the trial court relied on inaccurate information when considering the facts underlying the probation violation. We agree.

“A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness.” *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015). “Resentencing will be required when a sentence is determined to be unreasonable.” *Id.* “[T]he proper inquiry when reviewing a sentence for reasonableness is whether the trial court abused its discretion by violating the ‘principle of proportionality’ set forth in *People v. Milbourn*, 435 Mich 630, 636, 461 NW2d 1 (1990), ‘which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.’ ” *People v Steanhouse*, 500 Mich 453, 459-460; 902 NW2d 327 (2017).

“Because the guidelines embody the principle of proportionality and trial courts must consult them when sentencing, it follows that they continue to serve as a ‘useful tool’ or ‘guideposts’ for effectively combating disparity in sentencing.” *People v Dixon-Bey*, 321 Mich App 490, 524-525; 909 NW2d 458 (2017). Relevant factors for whether a departure sentence is more proportionate than a sentence within the guidelines range include whether the guidelines accurately reflect the seriousness of the crime, factors not considered by the guidelines, and factors considered by the guidelines but given inadequate weight. *Id.* at 525.

In determining proportionality, a trial court may consider its “familiarity with the facts and its experience in sentencing, [a] defendant’s extensive criminal history reflecting that past sentences of probation, jail, and prison had not deterred him, and the trial court’s legitimate concern for the protection of society” *People v Solmonson*, 261 Mich App 657, 671; 683 NW2d 761 (2004) (cleaned up). “However, reliance solely on a trial court’s familiarity with the facts of a case and its experience in sentencing cannot effectively combat unjustified disparity in

¹ *People v Moore*, unpublished order of the Court of Appeals, entered February 4, 2019 (Docket No. 346874).

² *People v Moore*, 504 Mich 1001; 934 NW2d 269 (2019).

³ *People v Moore*, unpublished order of the Court of Appeals, entered September 22, 2020 (Docket No. 354280).

sentencing because it construes sentencing review so narrowly as to avoid dealing with disparity altogether” *Dixon-Bey*, 321 Mich App at 530 (cleaned up). Additionally, a defendant’s potential for rehabilitation is a proper consideration for a departure sentence. *Id.* at 525 n 9. “When making this determination and sentencing a defendant, a trial court must justify the sentence imposed in order to facilitate appellate review, which includes an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been.” *Id.* at 525 (cleaned up). Further, “[a] defendant is entitled to be sentenced by a trial court on the basis of accurate information.” *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006).

Defendant’s recommended minimum sentence range under the legislative guidelines was 5 to 23 months’ imprisonment. The trial court sentenced defendant to a minimum sentence of 6 years. At the sentencing hearing, the trial court expressed the belief that defendant had exhibited disturbingly repetitive conduct that it could envision resulting in the victim’s death one day. It further stated,

And I’m sorry that this happened because of our military, if this did occur because of your service in the military, that it changed you, I apologize for that, because that is – what – what our military has to go through is awful, sir. And – and – but, you just can’t beat on women.

Defendant’s sentence constitutes a substantial upward departure from the recommended guideline range. On remand, the trial court further justified the sentence as follows:

The sentencing offense was a highly violent offense which involved the defendant slamming the victim (his wife) on the ground and choking her. In addition to the defendant’s wife being assaulted, the defendant also threw his wedding ring at her, ultimately hitting his less than two month old infant. During the assault, the defendant pulled the victim off the couch by her legs while she was holding said infant.

In the probation offense, defendant punched his wife in the face. She further indicated to the 911 dispatcher that her husband had taken her keys and her phone.

The guidelines do not consider that the defendant has been a complete failure on probation.

- 1) The defendant was originally charged and convicted of strangling/choking his wife and placed on Swift & Sure Sanction Probation.
- 2) While on probation the defendant committed the exact same crime of strangling/choking his wife.
- 3) As stated by [the prosecuting attorney] on pages 8 and 9 of the sentencing transcript, defendant had completed Batters [sic] Intervention treatment at Prevention & Training Services. He was sent to substance abuse residential treatment through the Veterans Administration and cognitive processing therapy but he continued to commit the same assaultive behavior over and over again.

4) Defendant's progress report from Prevention & Training Services dated 6/5/18 states, "*He does not take much ownership for the offense or his power/control tactics; his style is to minimize his behavior and blame the victim. He presents as the victim, therefore he will have a great deal of difficulty making positive behaviors change because he cannot focus on his behaviors and what he needs to do to remain non-violent. Progress is guarded.*"

The court articulates it's [sic] reasons for the extent of the guidelines departure as follows:

In the court's opinion, the defendant was placed on Swift & Sure Sanction Probation so that his actions could be monitored.

Defendant committed a new crime of assaulting his wife that is very similar to the one for which he is on probation to this court after receiving Swift & Sure Sanction Probation and Veterans treatment.

The defendant differs from other defendants in his guidelines status in that he continues to reoffend, even after all of the services provided him. Because of this, the court found that society must be protected and sentenced him to the maximum penalty allowed by law. [(Emphasis in original).]

Although the trial court provided some reasoning for the upward departure, "it is difficult to ascertain the trial court's reasoning or rationale for the extent of the departure imposed and to ascertain where on the 'continuum from the least to the most serious situations' " this case falls. *People v Steanhouse*, 322 Mich App 233, 242-243; 911 NW2d 253 (2017), vacated in part 504 Mich 969 (2019), quoting *Milbourn*, 435 Mich at 654. As indicated, the trial court "must justify the sentence imposed in order to facilitate appellate review, which includes an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been." *Dixon-Bey*, 321 Mich App at 525 (cleaned up). Additionally, we conclude that the trial court, at least in part, relied on inaccurate information related to the facts underlying the offense forming the basis for the probation violation.

The trial court noted that "defendant was originally charged and convicted of strangling/choking his wife and placed on Swift & Sure Sanction Probation," then stated that, while on probation, he "committed the exact same crime of strangling/choking his wife." But the record does not support the latter statement. Although the victim testified at the probation violation hearing that defendant slapped her in the face, there is nothing to suggest that he strangled her a second time. The trial court also stated that "[d]efendant committed a new crime of assaulting his wife that is very similar to the one for which he is on probation to this court after receiving Swift & Sure Sanction Probation and Veterans treatment." While there may have been similarities between the sentencing offense and the probation violation offense, it is clear that the trial court's characterization of defendant's new crime as "very similar to the one for which he is on probation"

was based on an inaccurate understanding of the facts or the mistaken belief that defendant engaged in a second strangulation offense.⁴

“A defendant is entitled to be sentenced by a trial court on the basis of accurate information.” *Francisco*, 474 Mich at 88; see also *People v Eason*, 435 Mich 228, 239; 458 NW2d 17 (1990) (holding that a criminal defendant has a due process right “to be sentenced on the basis of accurate information.”). Therefore, “The sentencing judge’s exercise of discretion must be based upon accurate information.” *People v Smith*, 423 Mich 427, 448; 378 NW2d 384 (1985). See also *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997) (“[A] sentence is invalid if it is based on inaccurate information.”). We conclude that the trial court erred to the extent that it found and based its sentence on the finding that defendant’s probation-violation offense involved a second instance of strangulation of his wife.

MCR 2.613(A) provides that an error does not justify disturbing a judgment “unless refusal to take this action appears to the court inconsistent with substantial justice.” However, as our Supreme Court has observed, “It is difficult to imagine something more ‘inconsistent with substantial justice’ than requiring a defendant to serve a sentence that is based upon inaccurate information.” *Francisco*, 474 Mich at 91 n 6 (cleaned up). Although slapping someone is in no way acceptable or justifiable, military service or notwithstanding, slapping someone is also not in the same class of assaults as strangulation. Accordingly, we remand this case to the trial court for resentencing.⁵

Because we conclude that the trial court’s reasoning related to the upward departure sentence was based on inaccurate information and, therefore, did not provide justification as to why the sentence imposed was more proportionate to the offense and the offender than a different

⁴ Defendant also takes issue with the trial court’s statement, “In the probation offense, defendant punched his wife in the face.” At the probation-violation hearing, the victim testified that defendant “slapped” her in the face. While the probation report stated that the police report reflected that the defendant “punched” the victim in the face, the prosecutor at the probation violation sentencing hearing acknowledged that defendant slapped the victim.

⁵ Defendant argues that the trial court erred by determining that he was a “complete failure” on probation and improperly “invoked the ‘nuclear option’ [of revoking probation entirely] in response to the first and only violation.” To the extent defendant argues that the trial court’s sentence was based on an exaggeration of his disappointing performance on probation, we need not address that issue because defendant may present it to the trial court on remand. We do not understand defendant to be arguing that we should reverse his probation revocation, but such an argument would be outside the scope of our remand, so it would not be properly before us in any event. See *People v Kaczmarek*, 464 Mich 478, 485; 628 NW2d 484 (2001). Likewise, defendant has articulated several “countervailing dynamics” that he contends “paint a far more complete picture” of defendant, but those are better addressed to the trial court. We trust that the trial court will take into consideration up-to-date information, including how well defendant has performed in his incarceration, any programming of which he has availed himself while incarcerated, and the extent to which defendant has taken more insightful responsibility for his actions.

sentence would have been, see *Dixon-Bey*, 321 Mich App at 525, we vacate defendant's sentence and remand for resentencing.

Remanded for resentencing within 60 days of the release of this opinion. We retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Anica Letica

Court of Appeals, State of Michigan

ORDER

People of MI v Henry Albert Moore Jr.

Docket No. 354280

LC No. 18-020012-FH

Michelle M. Rick
Presiding Judge

Amy Ronayne Krause

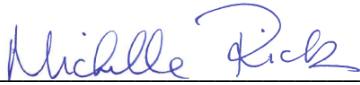
Anica Letica
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 60 days of the Clerk’s certification of this order, and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, defendant's sentence is vacated and this case is remanded to the trial court for resentencing. The proceedings on remand are limited to this issue.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.



Presiding Judge



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

November 23, 2021
Date



Chief Clerk