STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRAVIS JOSEPH CALLOWAY,

Defendant-Appellant.

UNPUBLISHED
July 30, 2020

No. 349870
Lenawee Circuit Court
LC No. 18-018798-FH

AFTER REMAND

Before: RONAYNE KRAUSE, P.J., and K. F. KELLY and TUKEL, JJ.

PER CURIAM.

This matter returns to us after having been remanded for resentencing. Previously, we affirmed defendant's convictions of three counts of delivery of less than 50 grams of heroin, MCL 333.7410(2)(a)(*iv*); but we vacated defendant's sentences because the trial court erred in the scoring of defendant's sentencing guidelines and imposed departure sentences on the basis of improper considerations.[1] We affirm defendant's sentences, but we direct that defendant's bond is temporarily continued, and the matter is remanded for the trial court's consideration of whether, under the circumstances, defendant should be returned to incarceration.

I. BACKGROUND AND HISTORY

As we discussed more fully in our previous opinion, defendant was convicted, pursuant to a plea agreement, of three counts of delivery of less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*), arising out of a series of seven controlled purchases of heroin performed by the Lenawee County Sheriff's Department. The purchased drugs were tested and found to contain fentanyl. In addition to the three counts to which defendant pleaded guilty, defendant was charged

[1] *People v Calloway*, unpublished per curiam opinion of the Court of Appeals, Docket No. 349870 (issued February 25, 2020).

with an additional four counts under the same statute of delivering less than 50 grams of "heroin and/or fentanyl." In exchange for defendant's pleas, the four fentanyl charges, a second-offense habitual offender notice, and a "backup" charge of maintaining a drug house were dismissed. However, pursuant to Lenawee County's policy, defendant was required to admit all of the charges for the purposes of sentencing. Defendant has consistently maintained that he knew he delivered heroin, but he did not know that the drugs contained fentanyl.

The trial court previously assigned a score of 10 points each under Offense Variable (OV) 14 (leader in a multiple offender situation), MCL 777.44(1)(a); and OV 15 (offense committed in a minor's abode), MCL 777.45(1). The trial court thus calculated defendant's sentencing guidelines range to be 0 to 17 months. We reversed both OV scores, but we declined to address whether doing so would have been sufficient to warrant resentencing, because we also found the trial court's departure sentences of three consecutive terms of 5 to 20 years to be based on impermissible considerations. Thus, we held:

> The trial court's departure sentence in this matter was apparently based on the facts (1) that defendant was from Detroit; (2) that fentanyl is an exceptionally dangerous substance even within the context of controlled substances; and (3) that defendant either must have known the heroin he sold contained fentanyl, or defendant should have known the heroin he sold contained fentanyl. The trial court also believed that "a message needs to be sent and that if you sell drugs in Lenawee County, we are going to take an approach that is harsh." The fact that defendant was from Detroit is apparently accurate, but it is an impermissible basis for a departure sentence and a very disturbing statement by the trial court. The fact that fentanyl is extremely dangerous is undoubtedly true, and the record discloses no reason to second-guess the trial court's finding that defendant was less ignorant of the contents of his drugs than he claimed. Finally, deterrence is one of the many roles criminal sentences play.
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> However, the trial court's reasoning for its departure essentially set forth the court's pronouncement that it was enacting a new class of crime with an across-the-board enhanced penalty specifically for fentanyl. Courts are not legislatures. In any event, simply imposing the trial court's own idea of an appropriate punishment for a class of crimes violates the requirement that departure sentences must be individualized to the circumstances and characteristics unique to the specific crime and the specific offender. Deterrence is also not the only role criminal sentences play. We do not hold that the trial court may not take into consideration the dangers of fentanyl, but the trial court erred by imposing a departure sentence based solely on the fact that defendant sold fentanyl. [*Calloway*, unpub at p 6.]

We explained that the trial court was not precluded from again imposing a departure sentence, or from taking the dangers of fentanyl into account as part of its basis for such a departure, but that it "must explain why a departure or consecutive sentences are appropriate to defendant and his offenses specifically." *Calloway*, unpub at p 7.

On remand, the trial court[2] recalculated defendant's sentencing guidelines range to be 0 to 11 months. The trial court refused the prosecutor's request to impose a departure sentence because defendant had exercised his right to a preliminary examination. It also recognized that it may not base a departure sentence solely on the involvement of fentanyl, but that fentanyl was a permissible consideration. It recited the charges that were dismissed pursuant to defendant's plea agreement and that defendant "admitted to the dismissed charges for the purposes of sentencing." It concluded that the guidelines did not take those dismissed charges into account, so "a guideline sentence would reflect only a small portion of the criminal activity that [defendant] was engaged in." It therefore opined that the dismissed charges justified a departure sentence by themselves. It also observed "in addition" that fentanyl was extremely dangerous and the evidence suggested that defendant was more aware of the fentanyl than he claims. The trial court also recognized that defendant had done very well in prison, had no misconduct tickets, was assigned to an honors floor, was working towards a GED, and thus showed the potential for rehabilitation. The trial court again imposed a departure sentence, albeit a lesser departure, of three concurrent terms of 3 to 20 years' imprisonment, with credit for 840 days served.

On March 31, 2020, this Court entered an order granting defendant's motion for an appellate bond and ordering his immediate, albeit conditional, release from incarceration, based on the ongoing COVID-19 health emergency. We permitted the parties to file supplemental briefs, and defendant again challenges his sentence as disproportionate and based on impermissible considerations.

II. STANDARD OF REVIEW

As we stated previously:

> This Court reviews departure sentences for reasonableness. *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015). This Court reviews a trial court's determination that a particular sentence is reasonable for an abuse of discretion. *People v Steanhouse*, 500 Mich 453, 471; 902 NW2d 327 (2017). A trial court abuses its discretion by imposing a departure sentence when it violates the principle of proportionality. *Id*. The principle of proportionality requires that the defendant's sentence must "be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Lampe*, 327 Mich App 104, 125; 933 NW2d 314 (2019), quoting *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The trial court must explain "why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been." *People v Smith*, 482 Mich 292, 311; 754 NW2d 284 (2008); see also *Steanhouse*, 500 Mich at 474. Thus, a trial court imposing a departure sentence must explain how that sentence is individualized to the specific defendant and to the circumstances surrounding the specific offense. [*Calloway*, unpub at pp 5-6.]

[2] The matter was assigned to a successor judge, the original sentencing judge having retired.

We additionally note that, pursuant to the above standards, *Lockridge* and its progeny do not return sentencing to "the 'era' of the judicial sentencing guidelines," under which "[c]ourts could sentence outside the guidelines simply by articulating a reason why such a sentence should be imposed." See *People v Muttscheler*, 481 Mich 372, 375; 750 NW2d 159 (2008).

III. ANALYSIS

Defendant contends that the trial court again relied on impermissible considerations and imposed a disproportionate sentence. We disagree.

Defendant's recalculated sentencing guidelines range calls for the imposition of an intermediate sentence. MCL 769.34(4)(a); *People v Stauffer*, 465 Mich 633, 634-636; 640 NW2d 869 (2002); *Muttscheler*, 481 Mich at 374-375. However, *Lockridge* held unconstitutional the mandatory nature of MCL 769.34. *People v Schrauben*, 314 Mich App 181, 193-195; 886 NW2d 173 (2016). We do not construe *Lockridge* as overturning our Supreme Court's prior rulings that the imposition of any sentence other than an intermediate sanction constitutes a departure sentence. See *Muttscheler*, 481 Mich at 375. Thus, any implication in *Schrauben* to the contrary, imposition of an intermediate sanction is not merely an option available to a sentencing court. Rather, imposition of an intermediate sentence was an obligation from which the sentencing court *may* depart, subject to an explanation of why that departure is more proportionate and how that departure is personalized.

As an initial matter, we greatly commend the trial court for rejecting the prosecutor's wholly improper request to base a departure sentence on defendant having exercised his right to a preliminary examination. Indeed, we have difficulty imagining how an officer of the court could countenance suggesting that a defendant be punished for exercising his rights. It is not only well-established, but we would expect it to be obvious, that punishing a person for exercising a constitutional or statutory right is a due process violation. *People v Ryan*, 451 Mich 30, 35; 545 NW2d 612 (1996). Had the court acceded to the prosecutor's request, we would have found error warranting reversal and, potentially, reassignment to a new judge. See *People v Pennington*, 323 Mich App 452, 466-469; 917 NW2d 720 (2018). We hope the prosecutor will not make any such unacceptable suggestions in the future.

Secondly, defendant objects to the trial court having again relied on the presence of fentanyl in the drugs he sold. We recognize that defendant has consistently maintained that he was unaware that the drugs contained fentanyl. Defendant unambiguously has an absolute right to maintain his innocence, in whole or in part. *Pennington*, 323 Mich App at 467. However, although the sentencing court would not be permitted to punish defendant for maintaining his innocence, the court was not required to accept defendant's version of events. As we previously explained, the trial court may not base a departure sentence solely on the presence of fentanyl in the drugs, nor may the trial court usurp the role of the Legislature by effectively or implicitly creating a new class of crime. We agree with defendant that a departure sentence based on a formal or informal local sentencing policy cannot be considered individualized. *People v Whalen*, 412 Mich 166, 170; 312 NW2d 638 (1981). Nevertheless, the trial court may consider the presence of fentanyl and base its sentence in part on its conclusion that the drugs were therefore more dangerous than ordinary heroin. The trial court may also consider the evidence and conclude that the evidence does not support defendant's assertion that he was unaware of the fentanyl.

We are concerned by Lenawee County's alleged "admit all for sentencing" policy. In its explanation for the departure sentence on remand, the trial court noted that part of defendant's plea agreement involved "admit[ting] all of those [dismissed] counts for the purposes of sentencing and restitution." We have not received any meaningful briefing or argument on this issue, nor does the record reveal what the policy, if there even is one, really entails. A mandatory policy of admitting guilt, at least for sentencing purposes, of all charged counts might raise serious constitutional issues, including deprivation of due process and the voluntariness of a plea. However, even if the record adequately disclosed the existence and contours of any such policy, we would not reach that issue here, because "[i]t is our duty to refrain from deciding constitutional issues when a case can be decided on other grounds." *People v Meconi*, 277 Mich App 651, 653; 746 NW2d 881 (2008).

Our review of the plea hearing indicates that although defendant's counsel indicated that counsel "guess[ed] [defendant]'d admit them all for sentencing and restitution," defendant maintained during his colloquy that he was unaware that the heroin contained fentanyl. Nevertheless, although sentencing courts may not consider acquitted conduct, they may consider uncharged conduct. *People v Beck*, 504 Mich 605, 225- 226; 939 NW2d 213 (2019). Importantly, under the circumstances of this case, there is no serious dispute that defendant did in fact make seven deliveries of heroin, and the trial court clearly, and properly, drew its own independent conclusion that defendant had some awareness that the heroin contained fentanyl. The trial court gave no indication that it relied on the "backup charge" of maintaining a drug house. Therefore, any reliance by the trial court on defendant having "admitted all for sentencing" pursuant to Lenawee County policy was harmless.

We appreciate defendant's disappointment that the trial court did not afford greater weight to his exemplary prison record and other positive traits. However, the trial court explicitly recognized that defendant's model conduct while incarcerated and his efforts to obtain a GED were not accounted for and must "temper" the extent of any sentence departure. We have otherwise reviewed the trial court's reasoning for its departure sentence on remand, and we conclude that the trial court articulated an adequate explanation for why the sentence was individualized and proportionate to defendant and the offenses under the circumstances. Although defendant's sentence is harsh, it is not shockingly so as was his prior sentence, nor was it based on improper considerations. Defendant's sentences must therefore be affirmed.

IV. APPLICATION

We finally address the fact that defendant is currently released on bond, and the COVID-19 health emergency is far from over. Defendant has not submitted any supplemental briefing on the matter or otherwise asked for his bond pending appeal, which we granted, to be continued. However, because of the exceptional nature of the circumstances presented, which potentially have public health implications extending beyond just defendant personally, we choose to consider the matter *sua sponte*. Pursuant to Administrative Order 2020-1; which remains in effect, see Administrative Order 2020-12; the courts are *required* "to consider the public health factors arising out of the present public health emergency to mitigate the spread of COVID-19." *People v Chandler*, ___ Mich ___, ___; 941 NW2d 920 (2020) (Docket No. 161265). Although our Supreme Court in *Chandler* addressed public health factors applying to pretrial releases, we

construe Administrative Order 2020-1, in combination with Executive Order 2020-146, as having broader applicability.

According to the PSIR, defendant may have an asthma condition, which would place him at further risk above and beyond the elevated risk already faced by incarcerated individuals. See *People v Barber*, ___ Mich ___, ___; 942 NW2d 348 (2020) (Docket No. 161277). Defendant was not convicted of an assaultive crime, and as noted, the evidence shows that he was a model prisoner while incarcerated. As of the date our order was entered, defendant had served almost 28 months out of his revised 36-month minimum term. In the interim, we have not been made aware of any indication that defendant has been noncompliant with the terms of his release. In consideration of Executive Order 2020-146, the unusual circumstances of this case, and the extraordinary situation facing Michigan, we exercise our discretion under MCR 7.216(A)(7) to order that defendant shall temporarily remain released on bond notwithstanding our resolution of this appeal.

Furthermore, this matter must be remanded to the trial court for the limited purpose of determining whether defendant should remain not incarcerated, whether on bond or pursuant to any other legal mechanism deemed appropriate by the court. We do not impose any conditions or directions as to how the court should address that matter. However, we order that defendant's release on bond shall remain in effect, subject to the trial court's supervision of defendant's compliance with the terms of that bond pursuant to our prior order, until either the expiration of any time period within which defendant may seek further appellate relief, such as reconsideration or leave to appeal to our Supreme Court; or the trial court's determination of whether defendant should be returned to incarceration, whichever occurs later. Based on the thoughtful consideration expressed by the trial court at resentencing and its commendable resistance to an invitation to violate defendant's rights, we trust that the trial court will equally thoughtfully analyze all relevant considerations, including up-to-date information regarding defendant's conduct while released and the ongoing COVID-19 concerns.

V. CONCLUSION

Defendant's sentences are affirmed. Defendant's release on bond is temporarily continued, and this matter is remanded to the trial court as discussed above. We leave to the trial court's discretion how best to proceed consistent with this opinion. Likewise, we also leave it to the trial court's discretion to determine what conditions should be imposed upon defendant's release if the trial court concludes that it would not be appropriate to return him to incarceration. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Kirsten Frank Kelly
/s/ Jonathan Tukel