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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 13, 2020
v	No. 349523 Wayne Circuit Court
MICHAEL DEMOND LAWSON, Defendant-Appellant.	LC No. 14-005613-01-FC

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

PER CURIAM.

Defendant appeals the trial court's decision to impose on resentencing concurrent terms of 37½ to 75 years' imprisonment for convictions of second-degree murder, MCL 750.317, and assault with intent to commit murder, MCL 750.83. We affirm.

This case arises out of the shooting of two security guards outside a Detroit nightclub, one of whom died. The prosecution's theory was that Carl Bruner was the shooter and that defendant aided and abetted the crimes. Bruner and defendant were tried jointly before a single jury. Evidence reflected that the incident was sparked by multiple altercations that Bruner had with the security guards. After these altercations, defendant was observed driving a vehicle that circled around the nightclub several times with Bruner in the passenger seat. The security guards were closing watching and monitoring the car. When the vehicle finally stopped, Bruner was no longer in the car, and defendant exited the vehicle. With their attention directed at the car, the security guards then came under gunfire from Bruner from behind their position.

After the jury convicted defendant, he appealed to this Court. Defendant challenged his convictions and argued that the trial court engaged in improper judicial fact-finding under *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), with respect to the 15-point assessment for offense variable (OV) 5, MCL 777.35(1)(a) (serious psychological injury to the victim's family). Defendant contended that absent the 15-point score for OV 5, the minimum sentence guidelines range would be reduced from 315-to-1050 months to 270-to-900 months. This Court affirmed defendant's convictions. *People v Bruner*, unpublished per curiam opinion of the Court of Appeals, issued October 11, 2016 (Docket Nos. 325730 & 326542); unpub op at 1. But with regard

to defendant's sentencing argument, which was unpreserved, the panel concluded that defendant established plain error because judicial fact-finding did occur in scoring OV 5 and because the guidelines range would change if OV 5 were not taken into consideration. *Id.* at 14; see *Lockridge*, 498 Mich at 399 ("To make a threshold showing of plain error that could require resentencing, a defendant must demonstrate that his or her OV level was calculated using facts beyond those found by the jury or admitted by the defendant and that a corresponding reduction in the defendant's OV score to account for the error would change the applicable guidelines minimum sentence range.").

This Court remanded the case for procedures consistent with part VI of the *Lockridge* opinion. *Bruner*, unpub op at 14. In part VI of *Lockridge*, the Supreme Court discussed *Crosby*[1] remands, stating:

> Thus, in accordance with this analysis, in cases in which a defendant's minimum sentence was established by application of the sentencing guidelines in a manner that violated the Sixth Amendment, the case should be remanded to the trial court to determine whether that court would have imposed a materially different sentence but for the constitutional error. If the trial court determines that the answer to that question is yes, the court shall order resentencing.
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> [O]n a *Crosby* remand, a trial court should first allow a defendant an opportunity to inform the court that he or she will not seek resentencing. If notification is not received in a timely manner, the court (1) should obtain the views of counsel in some form, (2) may but is not required to hold a hearing on the matter, and (3) need not have the defendant present when it decides whether to resentence the defendant, but (4) must have the defendant present, as required by law, if it decides to resentence the defendant. Further, in determining whether the court would have imposed a materially different sentence but for the unconstitutional constraint, the court should consider only the circumstances existing at the time of the original sentence. [*Lockridge*, 498 Mich at 397-398 (quotation marks and citations omitted).]

The *Bruner* panel ruled that defendant "made a sufficient showing of plain error to justify remanding this case to the trial court to allow it to determine whether, now aware of the advisory nature of the guidelines, it would have imposed materially different sentences." *Bruner*, unpub op at 14.

Eventually, the case returned to the trial court. Unfortunately, the court did not act in accordance with the *Crosby* remand procedure outlined in part VI of *Lockridge*. Instead, the court simply conducted a resentencing hearing. See *People v Biddles*, 316 Mich App 148, 157; 896 NW2d 461 (2016) ("a *Crosby* remand results in *the possibility* of resentencing"). At the resentencing hearing, the prosecutor stated that this Court had concluded that OV 5 should have been assessed zero points, and the trial court essentially accepted and agreed with that position.

[1] *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

This Court, however, did not hold that the 15-point score for OV 5 was substantively erroneous or that a score of zero points was the proper assessment. Rather, the Court merely held that OV 5 was scored on the basis of unconstitutional judicial fact-finding. *Lockridge* allowed judicial fact-finding to continue, curing the constitutional infringement by making the guidelines advisory only. This Court in *Biddles* explained:

> The constitutional evil addressed by the *Lockridge* Court was not judicial fact-finding in and of itself, it was judicial fact-finding in conjunction with required application of those found facts for purposes of increasing a mandatory minimum sentence range. *Lockridge* remedied this constitutional violation by making the guidelines advisory, not by eliminating judicial fact-finding. [*Biddles*, 316 Mich App at 158.]

By failing to follow the *Crosby* remand procedure, by conducting a resentencing hearing as the first step on remand, and by altering the score for OV 5, the trial court exceeded the scope of the remand order. See *Int'l Business Machines Corp v Dep't of Treasury*, 316 Mich App 346, 352; 891 NW2d 880 (2016) ("the well-accepted principle in our jurisprudence [is] that a lower court must strictly comply with, and may not exceed the scope of, a remand order"). At the resentencing hearing, the trial court decided to stay with the minimum sentence of 37½ years. We must assume, therefore, that had the trial court followed the *Crosby* remand procedure, the court would have decided that it would not have imposed materially different sentences knowing that the guidelines were advisory. That would have ended the matter without resentencing. Now defendant raises issues concerning the proportionality of the sentences and the constitutionality of MCL 769.34(10). Although defendant had the full opportunity to do so, he raised none of these issues in the original appeal. These newly-developed arguments exceed the scope of the remand. See *People v Jones*, 394 Mich 434, 435-436; 231 NW2d 649 (1975) ("we hold that the scope of the second appeal is limited by the scope of the remand"). Nevertheless, assuming that the issues are properly before us, they do not warrant a second resentencing.

Defendant argues that MCL 769.34(10) is unconstitutional because it deprives a defendant of the right to challenge a sentence that falls within the guidelines range when there are no scoring errors or inaccuracies regarding sentencing information. More specifically, defendant claims an infringement of due process protections, deprivation of an appeal by right, violation of the separation of powers doctrine, and imposition of cruel and unusual punishment. MCL 769.34(10) 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. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

In *People v Garza*, 469 Mich 431, 435; 670 NW2d 662 (2003), our Supreme Court discussed the constitutionality of MCL 769.34(10), holding that "[w]e have not been presented with a persuasive argument that the constitution of this state or of this nation bars the Legislature from enacting such a measure; nor have we located such an argument on our own." Although the defendant in *Garza* challenged MCL 769.34(10) on the basis of separation of powers, the Supreme Court made a sweeping ruling that upheld the constitutionality of MCL 769.34(10). Defendant argues that *Garza* was wrongly decided; however, we are bound by *Garza*, and it is up to the Michigan Supreme Court whether *Garza* should be revisited. *People v Anthony*, 327 Mich App 24, 44; 932 NW2d 202 (2019) (the Court of Appeals is bound to follow a decision by the Supreme Court except when a decision has clearly been overruled or superseded by the Supreme Court).

Furthermore, MCL 769.34(10) does not and cannot preclude *constitutional* appellate challenges to a sentence, e.g., an argument that a sentence constitutes cruel and unusual punishment. See *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008) (MCL 769.34[10]'s limitation on review does not apply to claims of constitutional error, but a sentence within the guidelines range is presumptively proportionate, and a proportionate sentence is not cruel or unusual punishment); see also *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006) ("It is axiomatic that a statutory provision, such as MCL 769.34[10], cannot authorize action in violation of the federal or state constitutions.").[2]

Finally, even if there are constitutional infirmities with respect to MCL 769.34(10), defendant's sentences were proportional, on a constitutional level or otherwise. A sentence within the guidelines range is presumptively proportionate. *Powell*, 278 Mich App at 323. And a defendant can only overcome the presumption by presenting unusual circumstances that would render a presumptively proportionate sentence disproportionate. *People v. Bowling*, 299 Mich App 552, 558; 830 NW2d 800 (2013). 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 Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Here, at the resentencing hearing, the trial court discussed rehabilitation, noting that defendant's criminal record spoke for itself. Defendant had nine prior felony convictions and 13 prior misdemeanor convictions. The trial court also cited deterrence as a basis for the sentence, noting that defendant, had he been a real friend to Bruner, would not have allowed the situation to develop as it did. There was evidence that defendant assisted Bruner in setting up the shootings, acting in a manner that allowed Bruner to get the "drop" on the security guards. Considering

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[2] We note that there is a distinction between "proportionality" as it relates to the constitutional protection against cruel or unusual punishment, with such proportionality being presumed when a sentence is within the guidelines range, and "proportionality" as it relates to reasonableness review of a sentence, which is not constitutional in nature. See *People v Bullock*, 440 Mich 15, 34 n 17; 485 NW2d 866 (1992) ("Because the similarity in terminology may create confusion, we note that the constitutional concept of 'proportionality' under Const 1963, art. 1, § 16 [cruel or unusual punishment prohibition] is distinct from the nonconstitutional 'principle of proportionality' discussed in *People v Milbourn*, 435 Mich 630, 650; 461 NW2d 1 [1990], although the concepts share common roots.").

defendant's role in the killing of the security guard and given defendant's abominable criminal record, the sentences of 37½ to 75 years' imprisonment were proportional. And defendant certainly did not overcome the presumption of proportionality as he did not present any unusual circumstances that would have rendered the presumptively proportionate sentences disproportionate. In light of our ruling, there is no need to address defendant's final argument that the case should be assigned to a different judge on remand.

We affirm.

/s/ Jane E. Markey
/s/ Kirsten Frank Kelly
/s/ Jonathan Tukel