

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL HENDERSON,

Defendant-Appellant.

UNPUBLISHED

January 14, 2021

Nos. 350800; 350803

Ingham Circuit Court

LC Nos. 18-000539-FH;

18-000540-FH

Before: BOONSTRA, P.J., and GADOLA and TUKEL, JJ.

PER CURIAM.

In consolidated case no. 350800, defendant appeals on delayed leave granted his sentence of 160 to 240 months' imprisonment for his conviction of assault with intent to commit criminal sexual conduct (CSC) involving sexual penetration, MCL 750.520g(1). In consolidated case no. 350803, defendant appeals on delayed leave granted his sentence of 32 to 48 months' imprisonment for his convictions of three counts of fourth-degree criminal sexual conduct (CSC-IV), MCL 750.520e, to be served concurrently with his sentence for assault with intent to commit CSC involving sexual penetration. We affirm defendant's sentence of 32 to 48 months for the three counts of CSC-IV, but remand to the trial court for either resentencing on the conviction of assault with intent to commit CSC or for the trial court to further articulate its reasons for the extent of the departure from the sentencing guidelines.

I. FACTS

These consolidated cases arise from defendant's pleas of guilty to charges resulting from two separate incidents in which defendant sexually assaulted two 14-year-old girls, each of whom was staying the night in his home as a guest of his stepdaughter. With respect to the incident involving the first victim, defendant pleaded guilty to assault with intent to commit CSC involving

sexual penetration. With respect to the incident involving the second victim, defendant pleaded guilty to three counts of CSC-IV.¹

In calculating the sentencing guidelines, prior record variable (PRV) 1 initially was scored at 50 points, resulting in a sentencing guidelines range of 43 to 114 months for defendant's minimum sentence for the conviction of assault with intent to commit CSC, and a sentencing guidelines range of 7 to 34 months for defendant's minimum sentence for the convictions of CSC-IV.² The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to 160 to 240 months' imprisonment for his conviction of assault with intent to commit CSC, exceeding the guidelines range for the maximum minimum sentence by 46 months. The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to 32 to 48 months' imprisonment for his convictions of CSC-IV, thereby imposing a sentence within the guidelines range, to be served concurrently with the sentence for assault with intent to commit CSC. At the sentencing hearing, the trial court stated:

You're a predator. You've been a predator, and you assaulted those who can least protect themselves. You've known you've had this problem, you did nothing. What you did is you violated and stole innocence that will never, ever be returned. The feeling of safety in their own homes will never, ever be there. They're always going to live in fear. They're going to have triggers they don't even expect because of you, sir. You took a part of their life and now we're going to take a part of yours. The shame and guilt all reside[] with you. It is a weak man who preys on those who cannot protect themselves.

In looking at your history here and the actions that were taken against these innocent girls, I happen to agree with the people, I don't see any ability for you to be rehabilitated. You need intense treatment. You need to be locked away for as long as possible. This needs to stand as a deterrent to others, to protect the public, to protect the innocent, because you are a predator. I'm hoping for rehabilitation while you're locked up but there's only so much that can be done while you're incarcerated, and it didn't work the last time. You don't just have the one offense. You have, what—this is your 11th offense? There are multiple offenses prior.

* * *

¹ These cases were heard together by the trial court, and the appeals were consolidated by this Court. See *People v Henderson*, unpublished order of the Court of Appeals, entered July 16, 2020 (Docket Nos. 350800, 350803).

² Assault with intent to commit sexual penetration is a class D felony, with a statutory maximum of 120 months. MCL 750.520g(1); MCL 777.16y. The maximum sentence was doubled to 240 months because defendant was sentenced as a third-offense habitual offender. MCL 769.11. CSC-IV is a class G felony with a statutory maximum of 24 months. MCL 750.520e(1)(a); MCL 777.16y. The maximum sentence was doubled to 48 months because defendant was sentenced as a third-offense habitual offender. MCL 769.11.

The first two [were] dismissed so maybe it's nine. You should have been scared after you had police contact in Cook County a couple times, and you weren't. You moved to Michigan and you have been raping and assaulting women and damaging property and having a lack of regard for [] safety while driving, operating while impaired.

When I look at this history and I look at this case particularly, because I can only sentence on this, I'm looking at your rehabilitation, and it seems not likely. I'm hoping that I'm wrong, but with that in mind, in regard to docket 18-539-FH, I am sentencing you to 160 months to 240 months with credit for 231 days.

* * *

As to docket 18-540-FH . . . you will serve 32 months to 48 months with credit for 231 days served.

Defendant thereafter moved to correct his sentence on the basis that PRV 1 had been incorrectly scored at 50 points. The parties and the trial court agreed that the correct score for PRV 1 was 25 points, with a corresponding change to PRV 2 to assess five points; the trial court ordered that the guidelines scores be corrected. As a result of the scoring corrections, the sentencing guidelines range was recalculated at 38 to 114 months for defendant's conviction of assault with intent to commit CSC, and 5 to 34 months for defendant's convictions for CSC-IV. The trial court nevertheless denied defendant's motion for correction of the sentence or for resentencing, holding that the original sentences remained appropriate. At the hearing on the motion for resentencing, the trial court stated:

Your client just didn't get it, and I believe that the record I previously made conformed with the [People v] *Snow* [, 386 Mich 586, 592; 194 NW2d 314 (1972)] factors in terms of his ability to be reformed, protection of society, punishment of the offender, and deterrence, so you certainly can make your record for the Court of Appeals, but in reading the sentencing and looking at this whole file once again, I don't think this client gets it, and I'm leaving my sentencing as is, although I do agree that the guidelines should be changed, and they will be.

This appeal followed.

II. DISCUSSION

Defendant first contends that his minimum sentence of 160 months for the assault with intent to commit CSC is unreasonable, and therefore disproportionate. We conclude that the trial court did not articulate adequate reasons to explain the extent of its departure from the sentencing guidelines, necessitating remand.

A. STANDARD OF REVIEW

This Court is required to review for reasonableness only sentences that exceed the range recommended by the sentencing guidelines. *People v Anderson*, 322 Mich App 622, 636; 912 NW2d 607 (2018). The proper inquiry for this Court 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 a sentence 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) (*Steanhouse II*). “A sentence is reasonable under [*People v*] *Lockridge*[, 498 Mich 358; 870 NW2d 502 (2015)] if it adheres to the principal of proportionality set forth in *Milbourn*.” *People v Lampe*, 327 Mich App 104, 126; 933 NW2d 314 (2019). An abuse of discretion occurs when the trial court violates the principle of proportionality or fails to provide adequate reasons for the extent of the departure from the recommended guidelines range. *Id.* at 476. An abuse of discretion also occurs when the trial court’s decision falls outside the range of reasonable and principled outcomes. *People v Blanton*, 317 Mich App 107, 117; 894 NW2d 613 (2016). In addition, we review for clear error the trial court’s fact-finding at sentencing. *Lampe*, 327 Mich App at 125-126.

B. ASSAULT WITH INTENT TO COMMIT CSC

A trial court is required to calculate and consider the recommended sentencing guidelines range when determining a defendant’s sentence. *People v Lockridge*, 498 Mich 358, 391-392; 870 NW2d 502 (2015). However, the sentence range calculated under the guidelines is advisory only, and the trial court is not required to impose a minimum sentence within the guidelines range. *Id.* at 365. A sentence that departs from the recommended guidelines range may be imposed when the trial court determines that the recommended range is disproportionate to the seriousness of the crime. *Lampe*, 327 Mich App at 125. Factors that may be considered under the principle of proportionality 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. [*Id.* at 126.]

When reviewing a sentence that departs from the guidelines, this Court must evaluate whether reasons exist that justify departure from the recommended guidelines range and whether the extent of the departure satisfies the principle of proportionality. *People v Steanhouse (On Remand)* 322 Mich App 233, 239; 911 NW2d 253 (2017) (*Steanhouse III*), vacated in part on other grounds 504 Mich at 969. “[E]ven in cases in which reasons exist to justify a departure sentence, the trial court’s articulation of the reasons for imposing a departure sentence must explain how the extent of the departure is proportionate to the seriousness of the circumstances surrounding the offense and the offender.” *Id.* If a trial court does not clearly address its reasons for the extent of the departure, we may not substitute our own judgment regarding the justifications relied upon by the trial court. *People v Smith*, 482 Mich 292, 304; 754 NW2d 284 (2008).

In this case, under the sentencing guidelines the defendant’s recommended maximum minimum sentence for assault with intent to commit CSC is 114 months. The minimum sentence of 160 months imposed by the trial court is an increase of slightly over 40% and represents the highest possible minimum sentence. The trial court justified the departure from the sentencing guidelines by describing defendant as a predator and referring to the impact of the crimes on the

victims. Although this may be an accurate assessment, these factors are addressed by the guidelines, specifically in OV 4 (psychological damage to victim) and OV 10 (exploitation of vulnerable victim; predatory conduct). MCL 777.34; MCL 777.40. The trial court did not explain how these factors were given inadequate weight by the guidelines such that an upward departure sentence was warranted, nor did it explain the justification for the extent of departure.³

The trial court additionally noted that it had little hope for defendant's rehabilitation, particularly in light of defendant's multiple prior offenses. While an inability to rehabilitate is one factor properly considered to justify a departure sentence, the trial court failed to explain how much weight was given to this factor versus the other factors considered by the trial court. Accordingly, we remand to the trial court either for resentencing or for the trial court to further articulate its reasons for the extent of the departure. See *Steanhouse IV*, 504 Mich at 969.

C. CSC-IV

Defendant also challenges his sentence of 32 to 48 months for his three convictions of CSC-IV. Defendant contends that the trial court was required to resentence him on these convictions because the sentencing guidelines for those offenses were reduced after PRV 1 and 2 were corrected. We disagree.

Initially, defendant's sentencing guidelines for the CSC-IV convictions were calculated at 7 to 34 months. The trial court sentenced defendant on those counts within the guidelines to 32 to 48 months imprisonment, to be served concurrently with his sentence for assault with intent to commit CSC. After the trial court corrected the scores for PRV 1 and 2, defendant's sentencing guidelines for the CSC-IV convictions were reduced to 5 to 34 months. The trial court denied defendant's motion for resentencing on the CSC-IV convictions, however, holding that the original sentence remained appropriate, and explaining that the change in the scoring would not have led the trial court impose a different sentence.

Under MCL 769.34(10),⁴ this Court is required to affirm a minimum sentence that falls within the recommended minimum guidelines range unless there was an error in the scoring of the guidelines or the trial court relied upon inaccurate information, *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016), or absent a valid constitutional challenge to the sentence. *People v Posey*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket Nos. 345491, 346039, 351834); slip op at 7-8. In this case, defendant's sentence of 32 to 48 months for the CSC-IV convictions is within the revised guidelines range, which reflect the corrected information. In response to defendant's motion for resentencing, the trial court explained that it considered the original sentence to be appropriate even in light of the corrected information. Because the trial

³ To be clear, a minimum sentence of 160 months for defendant may be justified in this case. However, the trial judge failed to provide a proper rationale for the above guidelines sentence given here.

⁴ The Supreme Court's decision in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), "did not alter or diminish MCL 769.34(10)" *People v Schrauben*, 314 Mich App 181, 196 n 1; 886 NW2d 173 (2016).

court considered the corrected information before it and imposed a sentence within the guidelines range, we are thus required to affirm the sentence.

We also observe that when a defendant is sentenced on multiple convictions, a trial court is not required to score the guidelines for the lower-crime-class offenses, and the defendant's guidelines range may properly be based solely on the highest-crime-class conviction when all of the sentences will be served concurrently. *People v Reynolds*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 345813); slip op at 2-3, citing *People v Lopez*, 305 Mich App 686, 690-691; 854 NW2d 205 (2014). The rationale is that the guidelines range for the higher-crime-class conviction will almost always be greater than the guidelines for the lower-crime-class convictions, and when the sentences are to be served concurrently, the guidelines for the highest-crime-class conviction subsumes the range for the lower-crime-class offenses, thus providing no benefit to determining the range for the lower-crime-class conviction. *Id.* at 691-692. In any event, the trial court in this case scored the guidelines for the CSC-IV convictions, revised those guidelines in light of the corrected information, sentenced defendant to a sentence that fell within the revised guidelines, and stated that it considered the sentence to be appropriate even in light of the corrected information. We therefore find no abuse of discretion by the trial court in imposing the sentence of 32 to 48 months for defendant's convictions of CSC-IV.

We affirm defendant's sentence of 32 to 48 months for the three counts of CSC-IV, but remand to the trial court for either resentencing on the conviction of assault with intent to commit CSC or for the trial court to further articulate its reasons for the extent of the departure from the sentencing guidelines. We do not retain jurisdiction.

/s/ Michael F. Gadola

/s/ Jonathan Tukel

If this opinion indicates that it is “FOR PUBLICATION,” it is subject to revision until final publication in the Michigan Appeals Reports.

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Before: BOONSTRA, P.J., and GADOLA and TUKEL, JJ.

BOONSTRA, P.J. (*concurring*).

I concur in affirming the sentences imposed for defendant’s CSC-IV convictions, and otherwise concur in the result.

/s/ Mark T. Boonstra