STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DANTRAZ JAVON OLIVER-MCCLUNG,

Defendant-Appellant.

UNPUBLISHED
March 18, 2021

No. 351290
Wayne Circuit Court
LC No. 14-002709-02-FC

Before: SWARTZLE, P.J., and MARKEY and TUKEL, JJ.

PER CURIAM.

This case comes before this Court for the second time. A jury convicted defendant and his codefendant, Carlos Marquis Love, Jr., of three counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b, and four counts of assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1). The trial court originally sentenced defendant to 14 to 30 years' imprisonment for each of the CSC-I convictions and 5 to 10 years' imprisonment for each of the assault convictions. On appeal, this Court affirmed defendant's convictions but remanded for resentencing. *People v Love*, unpublished per curiam opinion of the Court of Appeals, issued July 21, 2016 (Docket Nos. 324992, 325107, and 329217). At resentencing, the court sentenced defendant to 126 months to 30 years' imprisonment for the CSC-I convictions and again imposed prison sentences of 5 to 10 years for the assault convictions. Defendant now appeals by right, arguing that the CSC-I sentences were unreasonable because they were disproportionate to the offenses and the offender. We affirm.

This case arises out of defendant's participation in the sexual assault of a 19-year-old woman at a party in Detroit. As originally calculated for the purposes of defendant's first sentencing, the minimum sentence guidelines range was 135 to 225 months. The court sentenced defendant within that range, imposing a minimum sentence of 14 years' imprisonment for each of defendant's CSC-I convictions. On appeal, this Court affirmed defendant's convictions but remanded the case for resentencing on the basis of a scoring error. *Love*, unpub op at 2. This Court indicated that the scoring error reduced the guidelines range for CSC-I to 126 to 210 months. On resentencing under the corrected guidelines range, the trial court imposed minimum sentences of 126 months' imprisonment for the three CSC-I convictions. Defense counsel explicitly

requested that the court impose a minimum sentence of 126 months for each of the CSC-I convictions, which was at the far bottom end of the guidelines range.[1]

On appeal, defendant contends that the 126-month minimum sentences are unreasonable and disproportionate; therefore, he is entitled to resentencing. In support of his position, defendant argues that he has no juvenile or adult criminal history, that his "prison history is stellar and he has participated in many programs and continues to do so," and that the trial court did not explain why the minimum sentences were fair and proportionate.

Defendant has waived his sentencing challenge given that he expressly requested the trial court to impose a minimum sentence of 126 months' imprisonment for each of the CSC-I convictions. See *People v Kowalski*, 489 Mich 488, 505; 803 NW2d 200 (2011) (counsel cannot harbor error in the lower court and then use that error as an appellate parachute); *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (waiver is the intentional relinquishment of a known right; one who waives his rights may not then seek appellate review of a claimed deprivation of those rights because the waiver has extinguished any error).

Furthermore, "[i]f 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." MCL 769.34(10). In *People v Lockridge*, 498 Mich 358, 364-365; 870 NW2d 502 (2015), our Supreme Court held that Michigan's sentencing guidelines violated the Sixth Amendment right to a jury trial, and it remedied the constitutional infringement by declaring the guidelines advisory only. In *People v Schrauben*, 314 Mich App 181, 196 n 1; 886 NW2d 173 (2016), this Court held that the decision in "*Lockridge* did not alter or diminish MCL 769.34(10)." Therefore, "[w]hen a trial court does not depart from the recommended minimum sentencing range, the minimum sentence must be affirmed unless there was an error in scoring or the trial court relied on inaccurate information." *Schrauben*, 314 Mich App at 196. In this case, defendant does not claim any error in scoring the guidelines, nor does he contend that the trial court relied on inaccurate information in imposing sentence. Accordingly, the 126-month minimum sentences are not subject to appellate review.[2]

Additionally, even without either the waiver or the application of MCL 769.34(10), the 126-month minimum sentences were reasonable because they were proportionate to the circumstances surrounding the offenses and the offender. See *People v Steanhouse*, 500 Mich 453, 472; 902 NW2d 327 (2017). Although defendant has no criminal history, this case entailed a

[1] Defense counsel stated, "Uh, I, I would ask the court to give [defendant] 126 months to 30 years."

[2] We note that defendant does not argue that the minimum sentences constitute cruel and/or unusual punishment, which argument, had it been made, would have required review for purposes of MCL 769.34(10). 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, such as cruel and 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.").

particularly brutal and horrific rape with multiple perpetrators. We also note that when a sentence falls within the guidelines range, it is presumed to be proportionate, *People v Odom*, 327 Mich App 297, 315; 933 NW2d 719 (2019), and defendant has not come close to overcoming the presumption.

The minimum sentences for the CSC-I convictions not only fell within the guidelines range, they were also at the lowest end of the range; consequently, defendant is effectively seeking a downward departure from the guidelines range. But his arguments in support of resentencing lack merit and do not justify a downward departure. With respect to the absence of a juvenile or adult criminal record, we note that defendant already received the benefit of a low prior-record-variable score that kept the guidelines range down. See *People v Steanhouse*, 313 Mich App 1, 46; 880 NW2d 297 (2015) (a departure may be justified when a factor is inadequately or not considered by the guidelines), aff'd in part, rev'd in part on other grounds 500 Mich 453 (2017). In regard to his alleged "stellar" prison history, we take issue: the record reveals that he has received 13 major misconduct citations, evidencing far from stellar conduct. Also, defendant has provided no evidence establishing his claimed participation in "many programs" in prison. Lastly, although defendant complains that the trial court failed to provide an explanation for the sentences it imposed, we note that when a court imposes a sentence within the guidelines range, the court's expressed reliance on the guidelines is explanation enough. *People v Broden*, 428 Mich 343, 346; 408 NW2d 789 (1987). In sum, we find no basis whatsoever to reverse the minimum sentences the trial court imposed for the CSC-I convictions. Instead, as explained above, we find that defendant's challenge fails on multiple levels.

We affirm.

/s/ Brock A. Swartzle
/s/ Jane E. Markey
/s/ Jonathan Tukel