

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHELLE LYNN MCCLUNG,

Defendant-Appellant.

UNPUBLISHED

May 27, 2021

No. 353371

Jackson Circuit Court

LC Nos. 18-004414-FH; 18-
004674-FH

Before: SHAPIRO, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM.

Defendant appeals her sentences for operating while intoxicated, third offense (OWI-third), MCL 257.625(1) and (9)(c), and OWI causing serious injury (OWI-injury), MCL 257.625(5)(a). The trial court sentenced defendant to 40 to 60 months' imprisonment for the OWI-third conviction and 36 to 60 months' imprisonment for the OWI-injury conviction, to be served consecutively. On appeal, defendant argues that the trial court erred by imposing upward departure sentences and consecutive sentences. For the reasons stated in this opinion, we reverse and remand to the trial court for resentencing.

I. BACKGROUND

In a two-day span, defendant was twice arrested for driving while intoxicated, with the second incident causing serious injury to another driver. Lower court Case No. 18-004414-FH arose on April 14, 2018, when officers observed defendant perform two traffic infractions, including driving onto the yellow dividing line. Defendant was arrested for driving while intoxicated and released on a personal recognizance bond. Lower court Case No. 18-004674-FH arose two day later, on April 16, 2018, when defendant again drove while intoxicated, rear-ended one vehicle, and then crashed head-on into an oncoming pickup truck, seriously injuring the driver of the pickup truck.

In Case No. 18-004414-FH, defendant pleaded guilty to OWI-third. In Case No. 18-004674-FH, she pleaded *nolo contendere* to OWI-injury. At the sentencing hearing, the victim spoke about the ongoing injuries he suffered in the accident and how he was forced to close the business that he had operated for 20 years. The prosecution requested that the trial court sentence

defendant at the high end of the guidelines for each offense and exercise its discretion to impose a consecutive sentence. For OWI-third, defendant's minimum sentence guidelines range was 7 to 23 months' imprisonment. For OWI-injury, the guidelines range was 14 to 29 months' imprisonment.

Before sentencing defendant, the trial court noted defendant's criminal history, which included 13 misdemeanors, and that the court had thoroughly reviewed the presentence information report (PSIR). The court found the chronology of events important, noting that after being arrested on the OWI-third offense and released on bond, within two days defendant was again drunk driving, which caused the OWI-injury offense. After reading parts of the PSIR into the record, the court departed from the guidelines range and sentenced defendant to 40 to 60 months' imprisonment for OWI-third. The court then imposed a consecutive sentence of 36 to 60 months' imprisonment for OWI-injury. This appeal followed.

II. ANALYSIS

We will first address defendant's argument that the trial court did not articulate an adequate justification for imposing a consecutive sentence.¹

"In Michigan, concurrent sentencing is the norm, and a consecutive sentence may be imposed only if specifically authorized by statute." *People v Ryan*, 295 Mich App 388, 401; 819 NW2d 55 (2012) (quotation marks and citation omitted). In cases where the trial court has discretion to impose a consecutive sentence and chooses to exercise that discretion, the court must provide "particularized reasons" supporting that decision with references to the specific offenses and the defendant. *People v Norfleet*, 317 Mich App 649, 666; 897 NW2d 195 (2016).

As an initial matter, it is unclear from the record that the trial court understood that imposition of consecutive sentences in this case was discretionary, not mandatory, in light of the court's statement that it was imposing a "mandatorily consecutive" sentence.² But even assuming the court understood it had discretion to impose concurrent rather than consecutive sentences, we agree with defendant that the court failed to clearly set forth its reasons for imposing consecutive sentences. The court was presumably relying on its general discussion of the crimes and the reasons it gave for imposing departure sentences. But each consecutive sentence must be justified to "help ensure that the 'strong medicine' of consecutive sentences is reserved for those situations in which so drastic a deviation from the norm is justified." *Id.* at 665. Accordingly, we vacate the imposition of consecutive sentences. On remand, if the court exercises its discretion to impose

¹ We review a trial court's decision to impose a consecutive sentence when it is not mandatory for an abuse of discretion. *People v Norfleet*, 317 Mich App 649, 654; 897 NW2d 195 (2016). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

² At oral argument, the prosecutor conceded that the trial court's statement referring to a mandatory consecutive sentence required resentencing.

consecutive sentences, it shall identify specific aspects of the offenses and offender supporting that decision.

Defendant also argues that the trial court failed to adequately justify the two departure sentences.³

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 Walden*, 319 Mich App 344, 351-352; 901 NW2d 142 (2017) (quotation marks and citation omitted). Although the sentencing guidelines are now advisory, the sentencing court still must determine the applicable guidelines and consider the guidelines when imposing a sentence. *Id.* at 351. If the trial court finds that a guideline sentence is not proportional, the court must “justify the sentence imposed in order to facilitate appellate review.” *People v Steanhouse*, 500 Mich 453, 470; 902 NW2d 327 (2017) (quotation marks and citation omitted).

Review of defendant’s arguments is problematic because in sentencing defendant for the OWI-third conviction, the trial court relied exclusively on the circumstances underlying the other conviction, i.e., OWI-injury. The court stated:

I’m obviously exceeding the sentencing guidelines on the OUIL third in particular with the fact that you were out on bond, the fact that you were consuming alcohol . . . in violation . . . of a bond condition, and moreover you were operating on a . . . suspended license virtually two days from your release by the District Court on a \$3,000.00 personal recognizance bond.

OWI-third was the first offense that led to the initial arrest and defendant being released on bond, not the offense that occurred while defendant was out on bond. Therefore, the court’s explanation for exceeding the guidelines appears to be relevant to the second offense in time, i.e., OWI-injury, rather than the earlier OWI-third. Given this, it is unclear whether the trial court was relying on defendant’s post-offense conduct in sentencing her for OWI-third, or if the court simply confused the two sentencing offenses. And the court’s imposition of a higher sentence for OWI-third than for OWI-injury, despite the latter’s higher recommended sentencing range, also suggests that the court may have confused the two offenses. Considering that we are remanding on the consecutive sentencing issue, the prudent course of action is to also vacate the underlying sentences. If the court again concludes that a departure sentence for either conviction is warranted, it must articulate supporting reasons and explain why a departure sentence is more proportionate to the offense and offender than a sentence within the guidelines range. The court should consider whether there are factors not adequately accounted for by the sentencing guidelines, see *People v*

³ “A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness.” *People v Dixon-Bey*, 321 Mich App 490, 520; 909 NW2d 458 (2017) (quotation marks and citation omitted). This Court reviews the reasonableness of a sentence for an abuse of discretion. *Id.* “A sentence is unreasonable—and therefore an abuse of discretion—if the trial court failed to adhere to the principle of proportionality in imposing its sentence on a defendant.” *People v Lampe*, 327 Mich App 104, 125; 933 NW2d 314 (2019).

Dixon-Bey, 321 Mich App 490, 525; 909 NW2d 458 (2017), and justify the extent of any departure sentence, see *Steanhouse*, 500 Mich at 471.

Reversed and remanded for resentencing. We retain jurisdiction.

/s/ Douglas B. Shapiro

/s/ Kathleen Jansen

/s/ Jane M. Beckering

Court of Appeals, State of Michigan

ORDER

People of MI v Michelle Lynn McClung

Docket No. 353371

LC No. 18-004414-FH

Douglas B. Shapiro
Presiding Judge

Kathleen Jansen

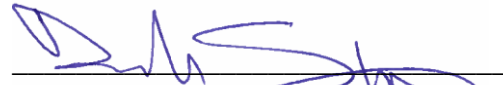
Jane M. Beckering
Judges

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 28 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, remand shall be limited to resentencing.

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

May 27, 2021
Date


Chief Clerk