

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMETRIUS BENJAMIN POSEY,

Defendant-Appellant.

FOR PUBLICATION

November 30, 2023

9:00 a.m.

Nos. 345491

Wayne Circuit Court

LC No. 18-000074-01-FC

ON REMAND

Before: BOONSTRA, P.J., and MARKEY and RICK, JJ.¹

MARKEY, J.

Defendant, Dametrius Posey, was convicted of multiple offenses, including, in pertinent part, two counts of assault with intent to commit murder (AWIM), MCL 750.83, and he was sentenced as a third-offense habitual offender, MCL 769.11, to concurrent prison terms of 22 to 40 years for the AWIM convictions. The 22-year minimum sentence was well within the minimum sentence guidelines range of 14 years and 3 months to 35 years and 7 months’ imprisonment. We previously affirmed defendant’s convictions and sentences. *People v Posey*, 334 Mich App 338, 344-345; 964 NW2d 862 (2020). Our Supreme Court affirmed in part, vacated in part, reversed in part, and remanded the case to us for a reasonableness review of defendant’s within-guidelines AWIM sentences. *People v Posey*, ___ Mich ___, ___; ___ NW2d ___ (2023) (Docket No. 162373) (lead opinion by BOLDEN, J., joined by BERNSTEIN, J.); slip op at 3-5, (CAVANAGH, J., concurring in part and concurring in the judgment); slip op at 2, and (WELCH, J., concurring in part, dissenting in part, and concurring in the judgment); slip op at 1. We affirm defendant’s sentences.

¹ We note that Judge RICK did not sit on the panel at the time the original opinion was issued. She was subsequently drawn as a substitute after the passing of Judge FORT HOOD.

The first sentence of MCL 769.34(10) provides that “[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.” We previously held, in part, that “[b]ecause MCL 769.34(10) precludes appellate review of [defendant’s] AWIM sentences and he does not raise a viable constitutional challenge to the sentences, we affirm those sentences.” *Posey*, 334 Mich App at 359. Supreme Court Justices BOLDEN, BERNSTEIN, CAVANAGH, and WELCH agreed that the opening sentence of MCL 769.34(10) is unconstitutional, although Justice WELCH offered a different constitutional analysis. *Posey*, ___ Mich at ___ (BOLDEN, J.); slip op at 29-30, (CAVANAGH, J.); slip op at 1, and (WELCH, J.); slip op at 2. Furthermore, the latter three Justices agreed with Justice BOLDEN’s pronouncements in her lead opinion that “within-guidelines sentences are to be reviewed for reasonableness,” that reasonableness review requires a determination whether a sentence was proportionate, that there is a nonbinding presumption of proportionality, meaning that a within-guidelines sentence is not binding on the Court of Appeals,² that “the defendant bears the burden of demonstrating that their within-guidelines sentence is unreasonable or disproportionate,” and that “a within-guidelines sentence may indeed be disproportionate or unreasonable.” *Id.* at ___ (BOLDEN, J.); slip op at 36, (CAVANAGH, J.); slip op at 1, and (WELCH, J.); slip op at 2. The Supreme Court remanded this case to us “for a reasonableness review of defendant’s sentence.” *Id.* at ___; slip op at 5.³

In *People v Steanhouse*, 500 Mich 453, 459-460; 902 NW2d 327 (2017), the Michigan Supreme Court observed:

[T]he proper inquiry 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 sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.”

“An appropriate sentence should give consideration to the reformation of the offender, the protection of society, the discipline of the offender, and the deterrence of others from committing the same offense.” *People v Boykin*, 510 Mich 171, 183; 987 NW2d 58 (2022). With respect to

² Our dissenting colleague appears to believe that *Posey* discarded the presumption of proportionality with respect to within-guidelines sentences, noting that “[u]ntil *Posey* was issued, all within-guidelines sentences were presumed to be reasonable.” But, although the presumption is now nonbinding on this Court under *Posey*, a presumption of reasonableness, i.e., proportionality, nevertheless continues to exist pursuant to *Posey*.

³ We note that as part of our prior extensive analysis, we concluded that “the AWIM sentences were not disproportionate” and “that the 22-year minimum sentence was proportionate to the seriousness of the circumstances surrounding the offense and the offender.” *Posey*, 334 Mich App at 358. Nevertheless, we will again address the issue as we have been so directed by our Supreme Court.

sentencing and the guidelines, the key test is not whether a sentence departs from or adheres to the guidelines range. *Steanhouse*, 500 Mich at 472. The key test is whether the sentence is proportionate to the seriousness of the matter. *Id.* In regard to proportionality, the *Milbourn* Court “observed that the Legislature has determined to visit the stiffest punishment against persons who have demonstrated an unwillingness to obey the law after prior encounters with the criminal justice system.” *Milbourn*, 435 Mich at 668. “The premise of our system of criminal justice is that, everything else being equal, the more egregious the offense, and the more recidivist the criminal, the greater the punishment.” *People v Babcock*, 469 Mich 247, 263; 666 NW2d 231 (2003).

In this case, we hold that the trial court did not abuse its discretion by imposing a 22-year minimum sentence for each of the two AWIM convictions. Defendant committed the crimes after he had been released from prison and while he was on parole for, in part, an earlier unrelated AWIM conviction. Thus, after previously assaulting a person with an actual intent to kill, which, had he been successful, would have made the killing murder, *People v Brown*, 267 Mich App 141, 147-148, 703 NW2d 230 (2005), defendant again acted with an intent to kill, directing his conduct at the two victims in this case. Moreover, defendant’s actions set off a gunfight in a public space outside a supermarket. Defendant is fortunate that he is not sitting in a prison cell serving a life sentence for first-degree murder. We find that the 22-year concurrent minimum sentences for the AWIM convictions serve to (1) protect society from a patently dangerous individual, (2) appropriately discipline defendant for his egregious conduct, and (3) deter others from engaging in similar criminal behavior.

Contrary to defendant’s argument, the trial court did consider defendant’s rehabilitative potential, astutely concluding that while defendant may have made some attitudinal improvements during his previous prison stint, “it doesn’t change the fact that these offenses were committed while he was on parole after having previously served time for a similar offense[.]” On contemplation of the factor concerning reformation of the offender, we deem the fashioned sentences legally sound.

Further, we reject defendant’s contention that the 22-year minimum sentences were inherently unreasonable because the trial court did not deviate from those sentences after the guidelines range had been lowered by the court. At defendant’s original sentencing, the guidelines range was calculated at 18 years and 9 months to 46 years and 10 months’ imprisonment for the AWIM convictions. And he was sentenced to 22 to 40 years in prison for those convictions. Subsequently, the trial court rescored the guidelines pursuant to an order entered by this Court in *People v Posey*, unpublished order of the Court of Appeals, entered July 5, 2019 (Docket No. 345491). The trial court then lowered the minimum sentence guidelines range to 14 years and 3 months to 35 years and 7 months’ imprisonment. The trial court, however, imposed the same 22-to-40-year prison terms.

There is no supporting legal authority for the proposition that if a guidelines range is lowered, a trial court is mandated to also lower the minimum sentence on resentencing to render the sentence reasonable. The guidelines are *advisory* only. *People v Lockridge*, 498 Mich 358, 399; 870 NW2d 502 (2015). And, in this case, the trial court determined that a 22-year minimum sentence, which fell within the lower half of the guidelines range, was reasonable regardless of the change in the guidelines range. This reasonable and principled determination did not constitute an abuse of discretion. See *People v Johnson*, 502 Mich 541, 564; 918 NW2d 676 (2018). Indeed,

given the nature of the offenses and defendant's criminal history, a minimum sentence toward the top end of the guidelines range would not have offended the rule of proportionality. Defendant fails to articulate an argument that overcomes the presumption that the sentences were proportional.

The dissent recognizes but fails to apply defendant's burden to demonstrate that the sentences were unreasonable and disproportionate, instead faulting the trial court for not adequately explaining why it was sentencing defendant to a minimum prison term of 22 years. We respectfully disagree with the dissent that it was necessary for the trial court to provide further elaboration for its sentencing decision. We note that the trial court at the original sentencing hearing emphasized that defendant had committed the same crime for which he was on parole and that he had used a firearm. The court essentially repeated these facts at the subsequent sentencing hearing. This was a powerful reason for imposing a minimum sentence of 22 years' imprisonment given the patently serious nature of the AWIM offenses. There was no requirement or need for the trial court to expand on the discussion. Moreover, there is nothing in *Posey* suggesting that a sentencing court needs to expressly explain why a within-guidelines sentence is reasonable and proportionate.

In sum, we once again hold that defendant's sentences were reasonable because they were "proportionate to the seriousness of the circumstances surrounding the offense[s] and the offender." *Posey*, 334 Mich App at 358. Reversal is unwarranted.

We affirm.

/s/ Jane E. Markey
/s/ Mark T. Boonstra

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Before: BOONSTRA, P.J., and MARKEY and RICK, JJ.

RICK, J. (*dissenting*)

I respectfully dissent from the majority’s decision to affirm defendant’s sentences. In light of our Supreme Court’s pronouncement that this Court shall now review within-guidelines sentences for reasonableness, see *People v Posey*, ___ Mich ___, ___; ___ NW2d ___ (2023) (Docket No. 162373), it is my opinion that the trial court did not give adequate reasons for resentencing defendant. Accordingly, I would vacate defendant’s sentences and remand for resentencing.

In *Posey*, *supra* at ___; slip op at 26, our Supreme Court overruled the portion of *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016), and MCL 769.34(10), requiring appellate courts to affirm within-guidelines sentences. The Court found that the portion of MCL 769.34(10) requiring an appellate court to automatically affirm a within-guidelines sentence violates a defendant’s Sixth Amendment rights because doing so “would necessarily render the guidelines mandatory.” *Id.*; slip op at 30. Thus, this Court is now at liberty to fully review defendant’s within-guidelines sentences. The majority would find that the trial court’s rationale was sufficient to support sentencing defendant to concurrent terms of 22 to 40 years’ imprisonment for his convictions of assault with intent to commit murder, MCL 750.83. Upon review of the record, I disagree. In setting forth its rationale at defendant’s resentencing, the trial court stated:

While [defendant] may have had some improvement while he was in prison in his attitudes and his outlook on life, it doesn’t change the fact that these offenses

were committed while he was on parole after having previously served time for a similar offense, and the Court is not convinced that his sentence should be any different than what was imposed before. The prior sentences were well within the guidelines.

While, now they are advisory, you will be sentenced on Charges 1 and 3, assault with intent to commit murder as a third habitual offender to a minimum of twenty-two, to a maximum of forty years in the Michigan Department of Corrections. That's on Charges 1 and 3.

The court gave no further explanation for resentencing defendant as it did. Additionally, in noting that the sentences are "well within the guidelines," the court was operating under the assumption that any within-guidelines sentence is presumptively proportionate and bound to be affirmed on appeal, in accordance with MCL 769.34(10).

After *Posey*, we now know that "the guidelines remain highly relevant to sentencing decisions and that a within-guidelines sentence may indeed be disproportionate or unreasonable." *Posey*, ___ Mich at ___; slip op at 36. Generally, "the defendant bears the burden of demonstrating that their within-guidelines sentence is unreasonable or disproportionate." *Id.* A defendant may do so by "present[ing] unusual circumstances that would render the presumptively proportionate sentence disproportionate." *People v Bowling*, 299 Mich App 552, 558; 830 NW2d 800 (2013) (quotation marks and citation omitted). Notably, defendant was resentenced to the same term of years despite his minimum sentencing guidelines range having been corrected to reflect a decrease from 225 to 562 months to 171 to 427 months. In resentencing defendant, the trial court merely noted that he exhibited some good behavior while in prison, which failed to negate the fact that he committed the charged crimes while on parole for a similar offense. However, at no point did the court explain why this necessarily warranted resentencing defendant to the same term of years. It further failed to explain why this sentence was proportionate to the offense and the offender.

This is not to say that the trial court did a poor job. Defendant's resentencing occurred before *Posey* was issued, and thus the trial court would have had no idea that its within-guidelines sentence would be so closely scrutinized. Regardless, the fact remains that the trial court's rationale is inadequate. Indeed, in my view, the majority's analysis of the trial court's sentencing decision gives far more supporting detail than the trial court's analysis itself. Commendable as that is, our Supreme Court has now given us the task of reviewing within-guidelines sentences as we would departure sentences, and we must undertake to do so to the best of our ability. It is my opinion that the trial court should have explained its sentencing rationale in more thorough detail. Without further clarification from the trial court, its decision to resentence defendant to the same term of years despite a decrease in defendant's overall sentencing guidelines range is the sort of unusual circumstance that could suggest that defendant's sentences are disproportionate or unreasonable, *Bowling*, 299 Mich App at 558. Under the circumstances, and in light of our responsibilities under *Posey*, it certainly merits a remand for further explanation.

The majority notes that the mere fact that defendant was resentenced to the same term of years after a correction to his guidelines range does not mean that he is automatically entitled to a lesser sentence. I agree with the majority on that point, as nothing in our caselaw would support such a conclusion. The sentencing guidelines are indeed advisory, and defendant is not *entitled* to

anything upon resentencing. See *People v Lockridge*, 498 Mich 358, 399; 870 NW2d 502 (2015). Nevertheless, I again reiterate that I find the lack of explanation for the trial court's resentencing decision concerning, and I would direct the trial court to more thoroughly explain why defendant's sentence is reasonable and proportionate on remand.

I also write to express my concern that our Supreme Court's ruling in *Posey* does not offer sufficient guidance to this Court regarding the review of within-guidelines sentences for reasonableness and proportionality. Until *Posey* was issued, all within-guidelines sentences were presumed to be reasonable. Although the guidelines are advisory and any sentence necessarily involves an exercise of the trial court's discretion, departure sentences have historically been subjected to greater appellate scrutiny than within-guidelines sentences, given that MCL 769.34(10) required appellate courts to affirm within-guidelines sentences outright. With the advent of *Posey*, this Court is now being asked to give *every* sentence the same level of scrutiny. It is my fear that without concrete guidance as to how to approach the appellate review of within-guidelines sentences, the inclination will be to sign off on any such sentence as reasonable and proportionate while paying little more than lip service to *Posey*'s mandate.

In *United States v Booker*, 543 US 220, 261; 125 S Ct 738; 160 L Ed 2d 621 (2005), the United States Supreme Court noted that despite rendering the federal sentencing guidelines advisory, "[18 USC] 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable." The factors include the nature and circumstances of the offense; the need to punish the defendant; the protection of the public; deterrence of other offenders; reformation of the defendant; the types of sentences available, and so on. See 18 USC 3553(a). While a nonexhaustive list, these *Booker* factors would certainly aid litigants, trial and the appellate courts in determining whether a within-guidelines sentence is reasonable and proportionate. I would therefore urge our Supreme Court to set forth a similar list of factors or guidelines for this Court to utilize when reviewing within-guidelines sentences for reasonableness on appeal. In lieu of that, however, I would nonetheless vacate defendant's sentences and remand once again for resentencing.

/s/ Michelle M. Rick