# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>March 16, 2001 |
| v | No. 221310<br>Jackson Circuit Court<br>Family Division |
| MARTEZ DEMARIO STEWART,<br><br>Defendant-Appellant. | LC No. 98-88206 DL |

Before: Saad, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Defendant, who was thirteen years old at the time, was charged with open murder, MCL 750.316; MSA 28.548, in connection with the stabbing death of fourteen-year-old Stacy Davis. He pleaded guilty of that offense, leaving it to the family court to determine the degree of murder. Following a two day bench trial, the family court found defendant guilty of second-degree murder, MCL 750.317; MSA 28.549, and defendant pleaded guilty of that offense. At the disposition hearing, the court determined that it would sentence defendant as an adult, rejecting the defense's request for a delayed or blended sentence. The court sentenced defendant to parolable life imprisonment.[1] Defendant appeals as on leave granted. We affirm.

I

Defendant first argues that the trial court clearly erred in its factual determinations and abused its discretion when it sentenced him as an adult. Defendant argues that he should have received a blended sentence, that no evidence was presented that he planned this crime or of previous juvenile delinquency. Defendant argues that although he was learning impaired, he was in the appropriate grade for his age at school before the offense, and that he excelled academically at the youth home while awaiting disposition for the instant offense. Defendant argues he had a history of responding well to mental health treatment, and because of his young age is malleable and more capable of permanently modifying his behavior.

[1] Defendant's appellate brief mistakenly argues defendant's sentence was for non-parolable life imprisonment. See MCL 791.234(6); MSA 28.2304(6).

The prosecution argues that defendant consciously chose to commit the crime and did so alone. It argues that defendant's admission demonstrated that he "hunted down" the victim in her own house and prevented her escape. The prosecution argues that defendant had engaged in prior criminal behavior by committing thefts from stores, homes and automobiles and that defendant had a history of repeated school suspensions beginning in third grade for fighting, refusing to do school work, and intimidating female students. The prosecution argues that defendant was involved in several incidents while in the youth home awaiting sentencing for the instant matter and that sentencing defendant as a juvenile would be an entirely inadequate punishment. The prosecution argues that, contrary to defendant's assertions, a delayed or blended sentence would provide no closure to the victim's family and would not meet a primary goal of sentencing, punishment.

A

This Court's review of a trial court's determination to sentence a minor as a juvenile or an adult is bifurcated. *People v Thenghkam*, 240 Mich App 29, 41-42; 610 NW2d 571 (2000); MCL 712A.18(1)(n); MSA 27.3178(598.18)(1)(n). We review the factual findings supporting the court's determination regarding each statutory factor for clear error, focusing on whether the court made a required finding of fact and whether the record supports that relevant finding. *Thenghkam,* supra at 41-42. "[T]he absence of a required finding of fact or a factual finding without support in the record constitutes clear error." *Id.* at 42. Our review of the ultimate decision whether to sentence the minor as a juvenile or as an adult is for abuse of discretion. This second part of the analysis scrutinizes how the court weighed its factual findings to come to the ultimate sentencing decision. *Id.* at 42.

The prosecution has the burden of establishing by a preponderance of the evidence that the best interests of the juvenile and the public would be served by imposing a sentence as though the juvenile were an adult offender. MCR 6.931(E)(2). MCL 712A.18(1)(n); MSA 27.3178(598.18)(1)(n) provides:

> (1) If the court finds that a juvenile concerning whom a petition is filed is not within this chapter, the court shall enter an order dismissing the petition. Except as otherwise provided in subsection (10), if the court finds that a juvenile is within this chapter, the court may enter any of the following orders of disposition that are appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained:
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> * * *
>
> (n) If the court entered a judgment of conviction under section 2d of this chapter, enter any disposition under this section or, if the court determines that the best interests of he public would be served, impose any sentence upon the juvenile that could be imposed upon an adult convicted of the offense for which the juvenile was convicted. . . . The court may delay imposing a sentence of imprisonment under this subdivision for a period not longer than the period during which the court has jurisdiction over the juvenile under this chapter by entering an order of disposition delaying imposition of sentence and placing the juvenile on probation

> upon the terms and conditions it considers appropriate, including any disposition under this section. If the court delays imposing sentence under this section, section 18i of this chapter applies. If the court imposes sentence, it shall enter a judgment of sentence. If the court imposes a sentence of imprisonment, the juvenile shall receive credit against the sentence for time served before sentencing. In determining whether to enter an order of disposition or impose a sentence under this subdivision, the court shall consider all of the following factors, giving greater weight to the seriousness of the offense and the juvenile's prior record:
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> (i) The seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm or other dangerous weapon, and the impact on any victim.
>
> (ii) The juvenile's culpability in committing the alleged offense, including, but not limited to, the level of the juvenile's participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines.
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> (iii) The juvenile's prior record of delinquency including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior.
>
> (iv) The juvenile's programming history, including, but not limited to, the juvenile's past willingness to participate meaningfully in available programming.
>
> (v) The adequacy of the punishment or programming available in the juvenile justice system.
>
> (vi) The dispositional options available to the juvenile. [MCL 769.1(3); MSA 28.1072(3). See also MCR 6.931(E)(3).]

Michigan law permits delayed sentencing for juveniles tried as adults in "designated cases." *Thenghkam, supra* at 40 n 12, citing MCL 712A.18(1)(n); MSA 27.3178(598.18)(1)(n). The delayed or blended sentencing option permits the family court to delay sentencing of a juvenile until the juvenile becomes an adult. While the juvenile is still a minor, the court imposes probation, but may attach any term that could be imposed as a disposition. *Id.*

B

Defendant was thirteen years old on the day in question, and the neighbor of victim Stacy Davis. Testimony established that on the day of the murder, Stacy and a friend walked home from school at approximately 3:30 p.m., stopping to buy pop at a party store. The friend left Stacy at her house and recalled that Stacy was carrying her book bag, clarinet, and her can of pop.

Defendant's statement to Liane Morgan, the Youth Services Director for the Jackson Family Court, included the following:

> Planned to break in and steal something. Went in back door - followed Stacy in. She came in back door, surprised to see Martez. Stacy said something to Martez. She dropped her things trying to get back out the door. She fell down basement stairs. She got up and tried to run past Martez on the landing. Martez head back to door. Martez put feet against door blocking it. She ran into kitchen and Martez caught up with her. Stacy knocked over the knife holder - some fell on floor and some in sink. She grabbed one of the knives and Martez grabbed it and it got bent. Martez took a different knife and stabbed her. She was trying to get away and he stabbed her in the back. Stabbed her several times after that happened fast. Can't remember stabbing her after she fell. Don't know how knife got in garbage. Can't remember if he used another knife. Don't remember any conversation between the two of them. Stacy was still breathing when he left. Didn't clean anything up and didn't steal anything. Left out back door and went home and changed clothes in bedroom. Hid shorts in basement and boxer shorts in back of garage. Went to see friends after that. Don't know how telephone got knocked off the wall. Don't remember Stacy trying to call anyone.

Laurence Furnas testified that Stacy's younger brother, Travis Davis, ran over to the Furnas home after going in his own house and observing blood on the floor. Furnas went to the Davis home with Travis and observed that the back door was wide open and Stacy's clarinet case and keys were lying on the floor. Furnas stayed with Travis outside the home until Stacy's father, Ricky Davis, arrived and called 9-1-1. Furnas testified that he observed defendant that afternoon and that he appeared "calm and collected."

Ricky Davis testified that he arrived home and found Stacy's body in a pool of blood. After calling 9-1-1, he was instructed on how to perform CPR, which he did until paramedics arrived. Paramedics were unable to help Stacy and she was pronounced dead. Mr. Davis testified that he observed defendant sitting on his front porch with his mother and stepfather, and that defendant was looking at him but appeared "calm." He explained that almost a year earlier defendant had been banned from the Davis home after he got into a shoving match with Travis during a basketball game. Mr. Davis stated that nothing had been stolen from the home.

Dale Markiewicz, an evidence technician with the Jackson Police Department, testified that a knife was found in a garbage can, a broken knife handle was found on the kitchen counter, and another knife handle was found on the stove. Bloody footprints surrounded Stacy's body. A ring on Stacy's right hand and her sunglasses were broken and she was missing an earring. The knives found were determined to have been from the knife block on the kitchen counter.

Police officer Maurice R. Crawford testified that while interviewing students at Stacy's school, he noticed that defendant's tennis shoes appeared to have the same pattern observed at the crime scene. A search warrant was obtained and defendant's shoes were examined. The shoes matched the pattern found in blood at the crime scene. DNA testing confirmed that blood found on the tennis shoes belonged to Stacy. A search warrant was subsequently obtained for

defendant's home and a pair of defendant's shorts covered in blood were found in the basement. A pair of defendant's underwear was found in the garbage outside of defendant's home and also contained blood. In addition, defendant's fingerprint and palmprint were found on the knives removed from the crime scene. Stacy's blood was also found on the knives.

Forensic Pathologist Ruben Ortiz Reyes conducted the autopsy and concluded that Stacy had been stabbed thirty-three times in the chest, left arm, and back. The stab wounds were consistent with the knives recovered by police. The majority of the wounds were directed at the heart and lungs. Ortiz Reyes concluded that Stacy did not die immediately because blood was found in her lungs, indicating that she continued to breathe while sustaining the injuries. The stab wounds were found to be the cause of death.

The family court found defendant guilty of second-degree murder, finding no evidence of premeditation or deliberation, and defendant entered a guilty plea to that offense.

C

At the July 15, 1999 disposition hearing, Don Venema, a probation agent with the Department of Corrections who prepared defendant's presentence report, recommended that defendant be sentenced as an adult, to a term of 430 to 650 months. Venema testified that defendant's strengths were that he had no prior substance abuse history, no prior criminal record, no major health problems, and was continuing with his education. Defendant's weaknesses were that he did not have strong family support, and had almost nothing in the way of community support. Venema testified that he believed the 430 to 650 month sentence was appropriate because the DOC's goal was to protect society, and Venema believed that society could best be protected "by putting this individual away for a long period of time with the hope that there was some reform on his part once he's let back into society." Venema testified that he had considered the goals of punishment, deterrence, protection of the community and rehabilitation, in arriving at his recommendation regarding defendant and that he did not believe that the court's foremost concern should be rehabilitation because of the violence involved in this case. Venema testified on cross-examination that the DOC would not offer the treatment and services available in the juvenile facility.

Luella Burke, warden of the Michigan Youth Correctional Facility, testified that it was a brand new facility opening the following week and would house juveniles sentenced as adults until they reached age twenty. Depending on their sentence, after age twenty, they would go to a Department of Corrections facility. Burke testified that the facility was state of the art, had a school with ten classrooms, staff for both academic and vocational programming, computers, large general and law library, a gymnasium, yard, had one housing unit with double-celled prisoners and another housing unit that would house prisoners individually. She testified that educational programming will include adult basic education, special education, pre-GED and GED education, and food technology and building maintenance classes. Burke testified that classes will take place daily all year long. The facility will have approximately 450 beds and Burke expected that it would house inmates from age thirteen through nineteen. Burke testified that the facility will have case managers headed by a clinical psychologist, and will have the ability to do outpatient mental health programming. Burke also testified:

> It's our intent to use a program called cognitive restructuring, and I guess most simply put is, it's a way of working with an individual and all levels of staff. It's a program that you use not only with treatment staff, but you also have the corrections officers who have probably as much contact with a prisoner as anyone involved in the program. And probably a term that's more familiar might be behavior modification, in the sense that it's real important for anyone to learn how to do time that's important for anyone to learn how to do time that's going to be in prison, and the opportunities for programing [sic] are there.
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> On the other hand, we have a need to protect prisoners when they're inside and staff as well. So the intent of the program is to work on a very individualized basis with prisoners, to have them recognize behavior problems that are causing them to get in trouble.
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> Now, in our case, within the prison environment, they're already in our system. We're beyond the crime itself. Now it's, you know, managing – managing their time so that hopefully they can learn some of the things that got them in trouble in the past and correct that behavior.

Burke testified that the facility is a maximum security prison equipped with sixteen-foot fences and wire. She testified that if defendant were sentenced as an adult he would definitely be placed at the new facility. She testified that fewer than one hundred juveniles had been sentenced as adults in Michigan, thus defendant's placement at the new facility would be assured.

Karen Johns, a social worker with the Family Independence Agency, recommended that the trial court sentence defendant as a juvenile and to a medium security facility. Johns testified that she was not in a position to evaluate the new youth correctional facility Burke testified about because she knew little about it. Johns testified that defendant did not fall into the category of offenders with severe mental health issues, medications or sexual predator type behavior. Johns testified that defendant had been involved in several serious incidents at the youth center, but that did not cause her concern regarding his ability to adjust to a juvenile facility because other juveniles she had worked with had had more severe problems. Johns testified that if sentenced as a juvenile, defendant would most likely go to the Maxey facility, which has a medium security campus and a maximum security campus called Green Oaks. She testified that Maxey's primary goal is rehabilitation and that a juvenile not successfully rehabilitated could be required to repeat the program before release. Johns testified that part of the rehabilitation process requires a defendant to discuss the commission of the offense and its impact on the victim's family. Further, the facility offers substance abuse programs, which Johns testified were helpful even if the juvenile had no prior problems in that area. On cross-examination, Johns testified that defendant's adjustment to the Youth Center had been erratic, but that he had displayed good behavior as well as bad. She testified that she believed that the Maxey facility was fully equipped to deal with children like defendant and that she knew of several young residents there that had committed murder. As to Green Oaks, Johns testified that it was a maximum security, locked facility, surrounded by high fences where the juveniles are not allowed to be anywhere without staff present.

Dr. Lynne Schwartz, a consulting forensic examiner for the Center for Forensic Psychiatry, testified that defendant was referred to her three times, once for competency, once for criminal responsibility and the third time for a special diagnostic evaluation for use at defendant's sentencing. She recommended that defendant be sentenced as a juvenile, to the Maxey Green Oaks facility.

Dr. Schwartz testified that she met with defendant five times for approximately twelve or thirteen hours, and prepared a report after consulting with a number of persons regarding juvenile programming. Defendant reported to Dr. Schwartz that he had stolen from stores, broken into cars and had broken into a house with several peers. Defendant told her that he stopped doing so and was "trying to be good" after he participated in a diversion program. Dr. Schwartz opined that defendant could be rehabilitated, but that it would be impossible to predict how long it would take to treat an individual such as defendant and that there were no guarantees. She opined that "a program that is geared to individuals with the kinds of problems and deficits that Martez had done intensely in this critical period, which I think this is a critical period when adolescents can begin to form identity, not just based on the family, but with peers, to have an opportunity to participate in a program that emphasizes pro-social values, empathy, concern for others, at this point when his character is still in formation." Dr. Schwartz opined that defendant had problems with anger and with controlling his behavior. He also had problems with impulsivity, and Dr. Schwartz opined that he would particularly benefit from programs developed to stop thinking in many different ways. Dr. Schwartz testified that defendant was several years behind what would be expected for his age in terms of his judgment and psychosocial development. She testified that she did not have an opportunity to really evaluate his past and that for some reason defendant did not feel very good about himself, and that was exacerbated by the act of killing Stacy. Dr. Schwartz testified that looking at defendant's whole record, there was a consistent pattern of a young man exhibiting signs of depression and low self-esteem, and that in some ways she was more concerned about him hurting himself than others. Dr. Schwartz testified that defendant was in early adolescence, which is a critical period in which a big cognitive shift occurs. During adolescence, more is expected in terms of abstract thinking, and Dr. Schwartz testified that she did not believe defendant was at that point, that he still "thinks concretely," and that he does not bring in a lot of different perspectives when he makes decisions. She testified that the period of the next three or four years were going to be critical for defendant. She testified that she "did not see evidence of persistent characterlogical [sic] ways of relating to the world that seems so entrenched or so ingrained, I think that this is a time period when he is open susceptible to the kind of pro-social change that would be critical."

Dr. Schwartz testified that when he was nine years old, defendant had made effective use of treatment that was offered and available (from November 1994 to February 1995):

> When it was offered and available to him. I mean, in some ways the records showed that he was having problems in school; again, walking out of class, being somewhat defiant, talking in class, and he was fighting, getting into trouble in school, and he, in the last three weeks of his treatment, he showed that he was – there was a marked reduction, according to the school, according to the mother, and according to Martez, who was feeling better about being successful.

He was using play therapy effectively, from my interpretation of the records. They weren't greatly detailed, but he was using the treatment to talk about his feelings or play or act out his feelings so that they could be explored, and he was using the therapist appropriately to test out the limits of his behavior, which has been a consistent problem for him, and to adapt to limits when they were set, which I saw that he was able to do with me also in our interviews.

When asked what other factors she considered in making the determination that there was a possibility that defendant could be rehabilitated, Dr. Schwartz testified:

Well, the fact that he hasn't had treatment, except for this one time. The fact that out of all the records that I reviewed, I did not see the kind of history that would support a – I didn't see anything that led me with a – to explore the hypothesis any further that he was the kind of child that other people saw as chronically, persistently, severely, behaviorally disordered.

Q Just didn't see it?

A In school he was assessed for learning problems. He was assessed with emotional impairment, which many kids that do have the kinds of problems that Martez has are put into emotionally impaired classes.

At times, I've read reports where at the end of the report they say this youngster doesn't fit the emotionally impaired classroom, but they are seen as socially maladapted, and that's why they're not going to get special ed services.

None of that was put in there with Martez. He wasn't seen as exhibiting the kinds of problems that that kind of interventions that would be given to a child like that were put into place. He was turned down for services or wasn't felt to be qualified for services. He doesn't have a long history of offenses that came in front of the court. He hasn't had an opportunity, therefore, to have other sanctions imposed that one would have been able to look to see how he benefited from those sanctions. So there is a lot, you know, that it not known because these behaviors were not seen as problematic.

One thing about Martez, and it goes to the story that, as I said, he is only at the very beginning stages, in my opinion, of being able to accept full responsibility. I mean, he – he says he did this act, and he takes responsibility for it. I think that the quality of his general way that he presents himself, which is to sort of blame other people and externalize responsibility, remarkably I felt he did not do that in talking about the murder.

Q Okay.

A While it was very difficult for him to talk about it, at no time did he blame Stacy for his behavior, did he say he was – which is what I hear at the forensic center, I was provoked, it was her fault, she did something, he did this, and

therefore. There was none of that [,] which I thought was promising, although there were many troubling signs, that was a promising, optimistic sign.

Q When you talked with him, did you get into him about his feelings, as far as remorse or lack of remorse is concerned?

A Yes, I did.

Q What did you come away with from that?

A Martez feels – what Martez feels is difficult to get to. That is – that's clear. He expressed sorrow for his act.

He talked about it in a – in my report, I mentioned that he felt helpless, in terms of how to show it, how to say he was sorry, how one could do that, and he articulated that there's nothing that anybody could say. There's nothing that he could say that would make up for what he did, essentially.

Dr. Schwartz testified that there was nothing in her evaluation that suggested that defendant lacked the capacity for empathy. She concluded that there was a possibility that defendant could be rehabilitated, and that he "would require a highly structured, intensive, comprehensive program to ameliorate many of the deficits and problems that he's exhibiting." She opined that Maxey's Green Oaks was highly suitable for defendant and a good match, and that its program is "consistent with other programs around the country that are doing work in re-socialization with youngsters who murder."

The court asked Dr. Schwartz a number of questions:

Q I think it was asked, but maybe not in this exact way: Do you know what, about Martez's psychological makeup, caused him to do what he did.

A I agonized over trying to put the pieces together, and it would be highly speculative of me to render an answer to that that would be meaningful.

I have some hypotheses, but that's as far as I could go with it. I think his problem-solving skills, obviously, are not – are not great. I think that he gets overwhelmed in situations that involve a lot of affect.

My sense is that the beginning of the act may have occurred out of being consistent with his sort of defiance, bending the rules a little bit. He wasn't allowed to go over to the property, to the house, and as tragic as it sounds, it may have begun in that way. That's about – once it got started, I can't really say how it would relate to anything in his background. I don't think this was – anything that I saw in his background would not have predicted this act.

Q I guess given that answer, is there any way at some point in the future then of this Court making a determination as to what the risk of him doing such a thing again.

A I think that the information is being gathered now for these very questions because we're just beginning to have data on children who commit these acts.

I feel, as I said in my report, this did not feel like an act of someone who was hardened, who had criminal sophistication, who planned this out, who thought it through, and those are the kinds of behaviors and the kinds of thinking that need to be altered, obviously, in treatment, and that kind of treatment has been shown to be successful.

I wasn't able to get very much data from Maxey, but I did from a similar program in California, the Capital Offenders Program in Texas – excuse me, in Texas, and they have a low recidivism rate. I think there were 85 – in the latest statistics, 85 juveniles who were convicted of murder and went through their program. One committed another violent crime, it wasn't another murder, and the rest of the kids, there were few crimes of any type, so we don't –we're just beginning to look at risk factors in juveniles.

The problem with juveniles, as opposed to adults, is that we don't have the same kind of character, the entrenchment of the character as an early adolescent, even a mid-adolescent.

The personality disorders that would be most related to high risk can't even be diagnosed before an individual is eighteen because there is this normative period where some of Martez's behaviors are part of being adolescent, and then, of course, some are his particular problems.

So it's difficult to say now. At some point later down the road where people have had much more time to work with Martez and to – I think that would be a time when these questions could be answered.

THE COURT: Thank you.

Laura Quinn, defendant's remedial math teacher at Parkside Middle School, testified that defendant had not been labeled as needing special education. She taught in the regular education program, but had a degree and years of teaching emotionally impaired students. Quinn testified regarding defendant's behavior that female students complained to her that defendant was hitting, pushing, intimidating, and threatening them, and that the girls were scared to come forward but also scared not to. Quinn testified that defendant did not disrupt class during class time. However, she testified that another student of hers had been convicted of murder, and that she believed that the type of behavior defendant manifested in school was more serious than what she witnessed of the other student convicted of murder. She testified that Stacy had been one of her students and that she was "a beautiful, talented young lady that I liked a lot. I felt special feelings for her." Quinn testified that there was nothing in Stacy's behavior to suggest that she would have provoked defendant.

Liane Morgan, youth services director for the Jackson County Family Court, testified that she assigned herself to be defendant's caseworker because she knew it was going to be a very

difficult case and because the probation officers she supervised felt they would have a conflict of interest if they kept the case. Morgan testified that she supervised the weekly visits from defendant's mother and grandmother while defendant was at the Youth Center over ten months or so. She testified that defendant refused to discuss the murder with his mother and was reluctant and vague when Morgan questioned him about details of the murder. Morgan testified that defendant had had ups and downs at the Youth Center and that defendant was involved in various incidents there, including a verbal confrontation with another resident during which defendant told the youth he was going to kill him, and defendant had to be restrained by staff. Another incident occurred when defendant was ordered to return to his room after he refused to do his school work and displayed a poor attitude. Once in his room, defendant began swearing, threatening staff, and pounding on the walls with his fists. Morgan stated that defendant had to be removed by four adults and taken to the "max room." Another incident occurred when a female staff member checked on defendant while he was in his room. Morgan testified that defendant had written a sexually obscene note and placed it on the door saying, "When can I f___ you, Patty?" Another sexually explicit note was found on another occasion, stating "I want to f___ you in the ass now." Morgan stated that defendant continually had difficulty following directions and completing schoolwork, and repeatedly had difficulty with authority. She recommended that the trial court sentence defendant as an adult:

> After much consideration and angst, I feel that Martez should be sentenced as an adult. I think we have to weigh all the factors.
>
> Q Do you have concerns about his ability to be successful in the juvenile system in terms of being rehabilitated?
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> A I think rehabilitation should be a primary goal. I think he's very vulnerable. He definitely needs treatment, but I'm hopeful that the new prison facility would be able to offer him that.

On cross-examination, Morgan conceded that in the ten months defendant had been at the Youth Center there had only been four incidents, and none of them had involved an assault. She also testified that defendant had reached the advanced level at the Center several times.

Ricky Davis and Carolyn Kimbro Davis, Stacy's aunt, both requested that defendant receive life imprisonment because he was impossible to rehabilitate and the victim's family needed closure. Willy Brown, defendant's stepfather, Michelle Powell, defendant's mother, and Donella Edwards spoke on behalf of defendant and asked that counseling and treatment be provided defendant in a juvenile setting.

Defense counsel requested that in light of defendant's age and absence of criminal history, a blended sentence be imposed to afford defendant the opportunity to prove that he can be rehabilitated and become a productive member of a society. He argued to the court that it would risk nothing by imposing such a sentence because defendant would go to Maxey's Green Oaks Center, a high security facility that specialized in treating youths who have committed similar crimes. Defense counsel argued that the court would have opportunity to review defendant's progress annually or sooner, and that if at any time it found that defendant was not progressing, it could bring him back and impose an adult sentence. He argued that defendant's

final evaluation by the court would take place when he reached age twenty-one, and the court could at that time impose an adult sentence if it saw fit.

D

The trial court ruled that defendant would be sentenced as an adult and sentenced him to life imprisonment:

> The factors that the Court is required to look at by statute are six in number. The Court – the prosecuting attorney has the burden of proving by a preponderance of the evidence at this hearing that the best interest of the public dictate [sic]an adult sentencing.
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> The legislature has determined that the Court consider the following six factors, giving greater weight to the seriousness of the offense and the juveniles [sic] prior record.
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> Looking first at the seriousness of the alleged – not alleged offense, the offense of second-degree murder, in terms of community protection and including the impact on any victim:
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> I don't think there's any argument that this is the most serious of offenses. The offense itself is the most serious, and the manner in which this crime occurred makes it more serious.
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> The impact on the victims is also undeniable, and it's very clear to the Court, both from their annunciation [sic] and from the other responses that the Court has received from people that are close to them.
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> The next factor that the Court needs to look at is the culpability of the juvenile in committing the alleged offense. He was the only participant in this offense. There isn't a lot of clear information, in terms of planning. There's not a lot of clear information about exactly what happened, but it is clear that he alone committed the offense.
>
> The third factor is his prior record of delinquency, including, but not limited to, any record of detention, police record, school record, or any other evidence indicating prior delinquent behavior.
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> Martez does not have a record in the juvenile court. He apparently had a petition filed, which was dealt with, according to the evidence, through diversion. He has admitted to criminal delinquent acts of breaking into cars and homes; although, apparently, was never caught or prosecuted for that behavior.
>
> He has a fairly lengthy school record of bad behavior in school, suspensions, and, according to the testimony of his – one of his teachers, a serious problem in the

classroom with assaultive and threatening behaviors towards the female members of the class.

The Court next looks at his programing [sic] history, and there is not a whole lot of history. He apparently was involved in some counseling when he was in the third grade. That was, for some reason, discontinued. He was apparently at some point referred to the diversion system. The Court doesn't have any information on what, if anything, happened with that. He has not had any of the programs available in the juvenile system because he was not petitioned and formally adjudicated for any offenses in the juvenile system.

The Court next looks at the adequacy of punishment and programing [sic] available in the juvenile justice system. Based upon the testimony presented, there does appear to be adequate programing [sic] available in the juvenile justice system, but it does not appear to the Court that there is adequate punishment available in the juvenile justice system. The maximum time that the Court could keep Martez in the juvenile system for punishment would be up to age twenty-one.

The Court also must look at the dispositional options available to the juvenile. The basic option, in terms of disposition as a juvenile, would be his being sent to the Green Oaks Center or the Maxey Training School where he would get treatment and education, and there would be the availability of attempted rehabilitation for him.

The options available to the Court utilizing those three factors, I think, are well known. The Court could give him a juvenile disposition, at which time the Court would be mandated to release him at age twenty-one or sooner.

The Court could delay imposition of an adult sentence, which, if the Court felt at any time he had not been rehabilitated in the juvenile system, could sentence him as an adult. Mr. Dungan indicated that had the Court could do [sic] that adult sentence at any time, but I do believe the requirement is that the Court would have to feel that he had not been rehabilitated; although, there is no time on that. The Court would not have to wait until age twenty-one to make that decision.

The other option is the incarceration as an adult, as recommended by the Probation Department.

Mr. Dungan was correct in terms of the Court not considering sentence as a juvenile. The maximum term of years for punishment, deterrence, and protection of society would be a maximum of seven years, and the Court finds that to be willfully [sic woefully?] inadequate.

The blended option or the delayed imposition of adult sentence, the Court has found in the past that – and participated with other judges in formulating that

> option and presenting it to the legislature, and, for a judge, that has a lot of attraction. It gives, obviously, options to the Court for someone of Martez's age.
>
> However, in analyzing the factors for the sentencing hearing, which I have enumerated on the record, and also looking at the four factors for sentencing; that of punishment, deterrence, protection of society, and rehabilitation, the Court finds that that option has severe limitations for the Court.
>
> The Court is unable to be aware today of why this murder occurred, and apparently then have no basis for making a determination between now and age twenty-one of Martez whether he has been rehabilitated and can be safely reentered into society.
>
> In addition, even if it were possible for the Court to anticipate being able to make that decision and prediction, the Court is of the opinion that the crime committed here is of such a nature that seven years is willfully [sic woefully] inadequate punishment, deterrence, or protection of society.

The court then imposed a sentence of life imprisonment:

> The Court has basically enumerated for everyone why the Court is sentencing Martez as an adult. The extreme brutality of the crime, the devastating impact it's had on the family and the community indicate to the Court a need for a sentence which is commensurate with that crime.
>
> The Court is in hope that Martez can get some counseling and other assistance in the system and hopefully at the new facility. The Court is concerned with his eventual rehabilitation, but also feels that the issues of punishment, deterrence, and protection of the community mitigate a lengthy sentence.
>
> It's the sentence of this Court that Martez Stewart serve life in prison for the murder of Stacy Davis. The Court will also order that he pay restitution of $6,013. The Court will recommend that he receive counseling while incarcerated. That he pay $150 assessment for forensic lab tests, and $60 crime victim right's [sic] fee.

E

We find no error in the trial court's conclusion that plaintiff had demonstrated by a preponderance of the evidence that defendant should be sentenced as an adult. The trial court appropriately examined each factor as required by the statute, and its findings are supported by the record.

The trial court rejected the blended or delayed sentencing option, noting that it was unaware of the reason this murder occurred, and stating that it apparently had "no basis for making a determination between now and age twenty-one of Martez whether he has been rehabilitated and can be safely reentered into society." The trial court further concluded that

seven years would provide inadequate punishment under the circumstances, and held that in order to protect society, and provide adequate punishment and deterrence, defendant must be sentenced as an adult. We cannot conclude that the trial court abused its discretion when it determined that an adult sentence was warranted.

II

Defendant next argues that his sentence of life imprisonment constitutes cruel or unusual punishment. He argues that he was thirteen years old and had a prior history of mental health treatment, and had previously been referred to child protective services. Defendant argues that he had no previous contact with a juvenile facility and had demonstrated that he was amenable to treatment. Defendant argues that although he was convicted of murder, a serious offense, the murder occurred during a physical altercation and was not premeditated. Defendant notes that a majority of the other states considering this issue have concluded that life imprisonment for a juvenile is cruel and unusual punishment, which is a higher standard than Michigan's prohibition against cruel or unusual punishment. Defendant argues that the blended or delayed sentencing option, unlike the adult sentence, would have met the goal of rehabilitation, a central purpose behind sentencing, and would have ensured that he have opportunity to rehabilitate and would have also presented the court with the opportunity to ensure that defendant was rehabilitated before he was released.

We review constitutional questions de novo. *People v Conat*, 238 Mich App 134, 144; 605 NW2d 49 (1999). In deciding whether a punishment is cruel or unusual, we look to the gravity of the offense and the harshness of the penalty; compare the penalty to those imposed for other crimes in this state as well as the penalty imposed by other states for the instant offense; and consider the goal of rehabilitation. *People v Launsburry*, 217 Mich App 358, 363; 551 NW2d 460 (1996).

Defendant concedes murder is a serious offense. It is indisputable that life imprisonment is a severe penalty. Defendant concedes that several other crimes are punishable by a life sentence with the possibility of parole, including assault with intent to commit murder, MCL 750.83; MSA 28.278; armed robbery, MCL 750.529; MSA 28.797; possession of more than 650 grams of a controlled substance, MCL 333.7403; MSA 14.15(7403); first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2); kidnapping, MCL 750.349; MSA 28.581; and conspiracy to commit murder, MCL 750.157a; MSA 28.354(1).

Several states have approved sentences of juveniles to life imprisonment for second-degree murder convictions. See *Louisiana v Payne*, 482 So 2d 178, 181-182 (La App, 1986) (life sentence without parole upheld); *Nebraska v Laravie*, 194 Neb 548; 233 NW2d 789 (1975) (life sentence upheld). See also *People v Smith*, 635 NYS2d 824; 217 AD2d 221, 226-227 (1995) (sentence of nine years to life upheld); and *Arizona v Toney*, 113 Ariz 404; 555 P2d 650, 655 (1976) (sentence of sixty years to life upheld).

As this Court recognized in *Launsburry*, the fourth factor, need for rehabilitation, is already taken into consideration when the court determines whether to sentence defendant as an adult. *Launsburry*, *supra* at 364-365.

We conclude that defendant's sentence of parolable life imprisonment does not constitute cruel or unusual punishment. Several other offenses are also punishable in Michigan by life imprisonment and several other states have imposed the penalty of life imprisonment in second-degree murder cases involving juveniles. Finally, the goal of rehabilitation is not foreclosed by defendant's sentence.

III

Defendant last argues that his sentence of life imprisonment violates the principle of proportionality. He argues that although the sentence is within the guidelines, it was the maximum sentence possible for this offense and is disproportionate because mitigating factors were present. He notes that he did not plan the murder; rather, it occurred during an altercation.

Our review is limited to whether the sentencing court abused its discretion. *People v Milbourn*, 435 Mich 630, 665-666; 461 NW2d 1 (1990). A trial court abuses its discretion when it violates the principle of proportionality. *People v Bennett*, 241 Mich App 511, 515; 616 NW2d 703 (2000). A sentence must be proportionate to the seriousness of the circumstances surrounding the offense and offender. *Id.*

Defendant's sentence is within the guidelines range of 120 to 300 months or life imprisonment and is therefore presumed proportionate. *People v Lyons (After Remand)*, 222 Mich App 319, 324; 564 NW2d 114 (1997).

Defendant relies on *People v Stone*, 195 Mich App 600, 608-609; 491 NW2d 628 (1992), in which this Court reversed the juvenile defendants' minimum sentences of 7 1/2 years' for their armed robbery convictions on the basis that they were disproportionate. The defendants robbed a bank with a sawed-off shotgun when they were fifteen years old. *Id.* at 602. They were sentenced as adults. The minimum sentencing guidelines for the two defendants were three to eight years and two to six years. This Court, after examining the circumstances surrounding the crime, concluded that "we find nothing in the record before us that makes this particular armed robbery more heinous than others, justifying a departure from the guidelines. Although the victims were scared, none was physically injured, nor did they appear to be harassed." *Id.* at 608.

The same cannot be said in the instant case. Defendant entered Stacy Davis' home uninvited. Defendant prevented Stacy from leaving and stabbed her thirty-three times, using several knives. Defendant then went home, hid his bloody clothes, and went outside to play. We conclude under these circumstances that a life sentence was proportionate to the circumstances surrounding the offense.

The life sentence was also proportionate to the circumstances surrounding defendant, the offender. Defendant seems to argue that his young age and lack of criminal sophistication support that the life sentence is disproportionate. This Court in *People v Piotrowski*, 211 Mich App 527, 532-533; 536 NW2d 293 (1995), considered the seventeen-year-old defendant's argument that her "youth at the time the crime was committed, her lack of a prior record, and the fact that the crime was inartfully perpetrated" required a conclusion that the defendant's five- to twenty-year sentence for her armed robbery conviction was disproportionate. This Court stated:

> With respect to defendant's contention concerning her age, while a sentencing court may, in some, circumstances, consider a defendant's age, it need not do so. With respect to her contention that the court failed to consider her lack of a criminal record, we have previously held that such failure does not constitute an unusual circumstance sufficient to overcome the presumption of proportionality. Last, with respect to her contention that her actions were so inept as to seemingly "be part of a childish script," we respond that "expertly" executed crimes are not punished more severely than those that are committed merely "competently." Neither should ill-devised crimes be rewarded with undeserved clemency. [*Id.* at 532-533; citations omitted.]

We conclude that defendant has not overcome the presumption of proportionality,[2] and that under the circumstances presented here, the trial court did not abuse its discretion in sentencing defendant to parolable life imprisonment.

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra

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[2] Defendant argues that an unpublished opinion of this Court, *People v Perkins*, Docket No. 160177 (issued November 21, 1995), lv den 459 Mich 921-922 (1998), "compels a finding of disproportionality in this case." We disagree.

In *Perkins*, this Court concluded that a juvenile's sentence of fifteen to twenty-five years for second-degree murder violated the principle of proportionality, noting that the minimum sentencing guidelines range was four to fifteen years. This Court held that, even though within the guidelines, the sentence was disproportionate given defendant's age and lack of criminal history. *Id*. Defendant relies on this statement and on our Supreme Court's denial of leave in that case to argue that his sentence is disproportionate.

Under MCR 7.215 "[a]n unpublished opinion is not precedentially binding," and the Supreme Court's denial of leave to appeal, 459 Mich 921-922, is not to be regarded as having precedential value, MCR 7.321. Moreover, the unpublished opinion does not discuss the circumstances surrounding the commission of the offense, thus it is impossible to compare it to the circumstances in the instant case.

# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>March 16, 2001 |
| v | No. 221310<br>Jackson Circuit Court<br>Family Division |
| MARTEZ DEMARIO STEWART,<br><br>Defendant-Appellant. | LC No. 98-88206 DL |

Before: Saad, P.J., and White and Hoekstra, JJ.

WHITE, J. (*dissenting*).

This was, indeed, a brutal, senseless, and tragic murder of an innocent young girl. Nevertheless, I conclude that the family court abused its discretion when it sentenced this thirteen-year-old offender to life imprisonment under the circumstances that there was expert testimony that defendant could be rehabilitated, and the court did not find that he could not be rehabilitated.

/s/ Helene N. White