

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALAN LEE FIDDLER,

Defendant-Appellant.

UNPUBLISHED

May 3, 1996

No. 184942

LC No. 94-069064-FH;

94-070342-FH

Before: Taylor, P.J., and Fitzgerald and P. D. Houk,* JJ.

PER CURIAM.

In lower court no. 94-69064, defendant pleaded guilty to breaking and entering a building with the intent to commit a larceny, MCL 750.110; MSA 28.305, possession of a prescription form not validly obtained, MCL 333.7403(2)(f); MSA 14.15(7403)(2)(f), and habitual offender, second offense, MCL 769.10; MSA 28.1082. In lower court no. 94-70342, defendant pleaded guilty to first-degree retail fraud, MCL 750.356(C), MSA 28.588(3). Defendant received a ten to fifteen year prison sentence for the breaking and entering conviction, to be served concurrently with a twelve-month sentence regarding the possession of prescription forms conviction, and consecutively to a one to two year sentence for the first-degree retail fraud conviction. He now appeals as of right, and we affirm.

Defendant argues that the ten to fifteen year sentence he received for the breaking and entering conviction was disproportionately harsh where the sentencing guidelines' range for this conviction was twelve to thirty-six months, i.e., the sentence is more than three times the sentencing guidelines' maximum minimum sentence. We disagree.

At the outset, we note that the sentencing guidelines are not directly applicable where defendant was sentenced as an habitual offender. *People v Cervantes*, 448 Mich 620; 632 NW2d 831 (1995). Moreover, in the trilogy of *Cervantes, supra*; *People v Houston*, 448 Mich 312; 532 NW2d 508 (1995); and *People v Merriweather*, 447 Mich 799; 527 NW2d 460 (1994), the Supreme Court

*Circuit judge, sitting on the Court of Appeals by assignment.

counseled this Court against employing a mathematical approach to determine the proportionality of a given sentence: “Neither the grids nor Milbourn dictate that a departure from guidelines is to be arithmetically measured to determine the propriety of a given sentence.” *Merriweather, supra* at 808. “The Court of Appeals erred . . . in trying to create a mathematical formula to determine whether the sentence imposed on defendant was proper.” *Cervantes, supra* at 626. Thus, defendant’s reference to a threefold departure does not satisfy his burden of proof that his sentence is disproportionate. The key test of proportionality is not whether a sentence departs from the recommended range of the guidelines, but whether the sentence reflects the seriousness of the matter. *Houston, supra* at 320.

The breaking and entering conviction was defendant’s seventh felony conviction and the possession of prescription forms conviction was defendant’s eighth misdemeanor conviction. Defendant was on bond for the breaking and entering charge when he was arrested for retail fraud. The instant sentences constitute the fourth or fifth time that defendant has been sent to prison.

While none of defendant’s prior convictions were assaultive in nature, we find that defendant’s ten to fifteen year sentence was proportionate given defendant’s prior record. The court did not abuse its discretion in sentencing defendant. *Cervantes, supra; Houston, supra.*

Affirmed.

/s/ Clifford W. Taylor
/s/ E. Thomas Fitzgerald
/s/ Peter D. Houk