

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FONDA TERRELL LEWIS,

Defendant-Appellant.

UNPUBLISHED

June 18, 1996

No. 182199

LC No. 182199

Before: Michael J. Kelly, P.J., and Reilly and E. Sosnick,* JJ.

PER CURIAM.

Defendant was convicted of three counts of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279 and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Following a juvenile sentencing hearing, the sixteen-year-old defendant was sentenced to two years of imprisonment for the felony firearm conviction to be followed by three concurrent terms of sixty months to ten years for the assault convictions. He appeals his sentence as of right. We reverse and remand for sentencing as a juvenile.

Defendant's conviction arises out of his firing of a gun from a car in the direction of a group of people. One of the group was struck in the buttocks. Defendant admitted firing the gun, but contended that he was aiming at the ground, that one of the group had a gun and a few minutes before had shot at and hit the car in which defendant was riding. The court found that defendant pointed the weapon at the group, that "the other shooting does not justify, mitigate or excuse" defendant's actions and that "his actions indicate a specific intent to cause the natural result of his actions, which would be, at a minimum, great bodily harm."

Defendant contends that he should be resentenced as a juvenile because the sentence he received is "shocking and disproportionate." The law concerning the burden of proof and standard of review of a trial court's decision to sentence a minor as an adult or as a juvenile is set forth in *People v Lyons (On Remand)*, 203 Mich App 465; 513 NW2d 170 (1994):

The prosecutor has the burden of proving by a preponderance of the evidence that the best interests of the juvenile and the public would be served by sentencing the juvenile as an adult offender. MCR 6.931(E)(2). The trial court must make factual findings and conclusions of law in determining whether to sentence the minor as a juvenile offender or as an adult offender. MCL 769.1(5); MSA 28.1072(5); MCR 6.931(E)(4). [*Id.* at 469.]

The standard of review of a trial court's decision to sentence as a juvenile or as an adult is a bifurcated one. First, the trial court's factual findings supporting its determination regarding each factor enumerated in MCL 769.1(3); MSA 28.1072(3) are reviewed under the clearly erroneous standard. The court's factual findings are clearly erroneous if, after review of the record, this Court is left with a definite and firm conviction that a mistake has been made. Second, the ultimate decision whether to sentence the minor as a juvenile or as an adult is reviewed for an abuse of discretion. The abuse-of-discretion standard requires the reviewing court to determine whether the sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender. [*Id.* at 467-468.]

The criteria the sentencing court must consider in making its determination are:

- (a) the juvenile's prior record and character, physical and mental maturity, and pattern of living;
- (b) the seriousness and circumstances of the offense;
- (c) whether the offense is part of a repetitive pattern of offenses which would lead to the determination:
 - (i) that the juvenile is not amenable to treatment, or
 - (ii) that, despite the juvenile's potential for treatment, owing to the nature of the delinquent behavior, the juvenile is likely to disrupt the rehabilitation of others in the treatment program owing to the nature of the delinquent behavior;
- (d) whether, despite the juvenile's potential for treatment, the nature of the juvenile's delinquent behavior is likely to render the juvenile dangerous to the public when released at age 21;
- (e) whether the juvenile is more likely to be rehabilitated by the services and facilities available in the adult programs and procedures than in the juvenile programs and procedures; and

(f) what is in the best interests of the public welfare and the protection of the public security. [MCR 6.931(E)(3).]

The trial court made the following factual findings: (a) that defendant was physically mature and "[m]entally, he may be immature. What is difficult in these cases is that a juvenile is, by definition, immature"; (b) that the offense committed was serious; (c) that the offense was not part of a repetitive pattern in terms of convictions, but "fighting incidents" at the juvenile facility made it likely that he would disrupt others in the program. In this regard, the court stated:

I'd have to say that I have a great concern as to his ability to control his behavior, and conform his behavior in a non-aggressive manner. I think he is likely to disrupt the rehabilitation of others in a juvenile setting. and it is certainly clear, by his actions in the youth home, that he is disrupting everything they're trying to do, there, with respect to order;

(d) that there is a tendency at the juvenile facility to recommend early discharge, there is no follow-up by the Department of Social Services and that the court was "extremely concerned that his release would jeopardize the general public, if his release is too soon"; (e) "that the adult facilities would allow him to be disciplined and rehabilitated in a manner that would teach him that violent, aggressive and assaultive behavior will not be tolerated"; (f) that it is in the best interest of the public welfare and protection of public security to sentence defendant as an adult.

Having reviewed the record, we conclude that the trial court's findings in regard to criteria (c), (d), (e) and (f) are clearly erroneous.

In regard to criterion (c), the trial court erred when it considered infractions at the youth home as an indication that defendant is likely to disrupt the rehabilitation of others. Defendant had no prior record, and although he was involved in fights at the youth home after the offense, according to the PSIR, group leaders, teachers, and supervisors "all state that the defendant is not a major management problem." The group leader at the youth home recommended defendant be sentenced as a juvenile and stated that despite the nature of the incident reports, defendant "has adjusted well," "is nonetheless respectful to staff," and "overall, [he] is not a discipline problem" His special education teacher at the high school he attended before this offense stated that he presented "no discipline problem" and that he was "very respectful to authority." Progress reports from the Wayne County Youth Detention Center indicate that he "is secure, well-liked, friendly and pleasant in class." Similarly, the Department of Social Services report stated, "[I]t is felt that [defendant] would not be disruptive to the rehabilitation of others in a treatment program." The trial court's finding to the contrary is not supported by the evidence.

In regard to criterion (d), the trial court clearly erred when it considered the likelihood of

early release, rather than whether defendant is likely to be dangerous to the public when released at age twenty-one. According to the youth home staff, defendant is "silly and immature but not violent." The reports indicate that defendant was not involved in gang activity or alcohol or substance abuse. The writer of the DSS report stated that "it is unlikely that this youth will be dangerous to the public when he is released upon completion of his program." Considering the record, we conclude that this criterion also favors sentencing defendant as a juvenile.

The trial court clearly erred when it determined that criterion (e) favored sentencing defendant as an adult. The Recorder's Court psychiatric clinic report states that personality testing revealed that defendant is a "highly immature and dependent individual [who] has feelings of inferiority, inadequacy, and low self-esteem." The report recommended that he be sentenced to a maximum security juvenile facility "for the purposes of discipline, protection of the community, and significant exposure to therapeutic opportunities, including positive peer pressure." The PSIR indicates that defendant "demonstrates a very childlike and immature mentality," "that he is easily influenced and has been labeled a 'follower' by many during the course of our investigation." The PSIR recommends sentencing as a juvenile because "[w]ith the existence of positive peer culture, the defendant would learn to conform his otherwise insolent behavior [and] learn methods of controlling his behavior" Significantly, the DSS report states that defendant is "readily influenced by those around him" and:

It is believed that [defendant's] immature behavior could have significant consequences for his safety and well being if he is placed in an adult facility.

Based on this evidence, we conclude that the trial court's finding that defendant was more likely to be rehabilitated in the adult program was clearly erroneous.

With regard to criterion (f), we conclude that the trial court's finding that a sentence in the adult program was in the best interests of the public welfare and protection of public security was also clearly erroneous. As discussed in the PSIR, whether sentenced as an adult within the guidelines or as a juvenile, it is likely that defendant will return to the community around the age of twenty-one. Considering that defendant has repeatedly been described as a follower who is readily influenced by those around him, it is not in the best interest of the public to place him in the adult system with offenders who have a history of violence and exhibit little potential for rehabilitation. Compare *People v Haynes*, 199 Mich App 593; 502 NW2d 758 (1993); *People v Miller*, 199 Mich App 609; 503 NW2d 89 (1993); *Lyons, supra*.

For the reasons discussed above, we believe the trial court clearly erred in its findings, that the prosecutor did not meet the burden of proof, and that the ultimate decision to sentence defendant within the adult system was an abuse of discretion. The trial court's decision to sentence defendant as an adult is therefore reversed and the case is remanded for sentencing as a juvenile.

Reversed and remanded for further proceedings consistent with this opinion. We do not

retain jurisdiction.

/s/ Maureen Pulte Reilly