

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UNPUBLISHED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. 182199C

LC No. 94 5898

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

Sosnick, J. (concurring)

After reviewing both the majority opinion and the dissent in this matter as well as the appellate briefs, and the pre-sentence report, I concur with the majority opinion.

Defendant was sixteen years of age when he committed the instant offense. He was sentenced as an adult to two years for felony firearm, and three concurrent terms of sixty months to ten years for his three convictions of assault with intent to do great bodily harm less than murder. At sentencing, the court considered the factors mandated by MCR 6.931(E)(3). The majority opinion rules that the sentencing judge erred with respect to four of those factors. I agree and it is my opinion, based on the presentence report, that the defendant should be sentenced as a juvenile. MCR 6.931(E)(3)(c) provides:

whether the offense is part of a repetitive pattern of offenses which would lead to the determination

(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.

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

The sentencing judge concluded defendant would likely disrupt the rehabilitation of others in a juvenile program because he was involved in “fighting incidents” the juvenile facility. The prosecution contends that defendant had ten incidents in the youth facility involving fighting, unwillingness to follow directions, threatening staff and trying to incite a riot. The presentence report, however, describes defendant as “not a major management problem”, with “no repetitive pattern of assaultive behavior”. He had no prior criminal record. His high school teacher stated that he presented no discipline problems, except that he was often truant, and was “very respectful to authority. I believe the sentencing judge erred in this finding.

MCR 6.931(E)(3)(d) provides:

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.

In this respect, the trial court noted the tendency at the juvenile facility to recommend early discharge, and found the defendant’s release would jeopardize the public if he were released too soon. I believe the court erred in speculating that defendant would be released early, rather than concentrating on the language of the factor which requires a determination of the likelihood of his being dangerous at age twenty-one. In fact, defendant cannot be released without a court hearing and could be held until his twenty-first birthday. Defendant is described now, by personnel of the Wayne County Youth Detention Facility, as “silly and immature,” but not a discipline problem. I believe the court’s finding that he would probably be released early, and would probably be a danger when released, were both erroneous.

MCR 6.931(E)(3)(e) provides:

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.

As noted above, defendant has been described as immature, silly, a follower. He has no gang involvement and no prior criminal record. Since being detained at the youth home, his attitude toward school work has “improved greatly” – “he is very interested in his school work and is a good citizen.” Defendant’s grades are now A’s and B’s, whereas his GPA in high school was 0.66. He is further described by youth detention personnel as “secure, well-liked, friendly and pleasant in class . . . he feels responsibilities and obligations toward the group.” Given the progress defendant seems to be making academically and socially in the juvenile setting, I believe it is erroneous to conclude, as the trial court did, that defendant is more likely to be rehabilitated in an adult setting. The court said “the adult facilities would allow him to be disciplined and rehabilitated in a manner that would teach him that violent . . . behavior will not be tolerated.” Based on the record, however, the opposite appears to be true.

MCR 6.931(E)(3)(f) provides:

what is in the best interest of the public welfare and the protection of the public security.

The trial court ruled that it was in the best interest of the public to sentence defendant as an adult. Given the conclusions I have reached with regard to the factors above, I cannot agree with this conclusion. Defendant was sixteen when he committed the offense. The PSIR notes that regardless of whether defendant is placed in a juvenile or adult setting, he will likely be paroled or released by age twenty-one. He appears to be making progress academically and socially that he was not able to accomplish on the outside. If this trend continues, he would be much less a threat to public security than by spending the next five years in an adult prison setting. I agree that defendant should be resentenced as a juvenile.

/s/ Edward. Sosnick