

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

IVAN JAY TUCKER,

Defendant-Appellant.

UNPUBLISHED

September 13, 1996

No. 181544

LC No. 91-648-FC

Before: MacKenzie, P.J., and Markey and J.M. Batzer*, JJ.

PER CURIAM.

Defendant pleaded no contest to second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to consecutive prison terms of two years and life. Defendant appealed the sentences by leave granted, and this Court remanded. *People v Tucker*, unpublished opinion per curiam of the Court of Appeals, decided 9/13/94 (Docket No. 167924). On remand, defendant was again sentenced to consecutive terms of two years and life. He now appeals as of right from the sentences imposed on remand. We affirm.

At his prior sentencing, defendant argued that offense variable three (OV 3), which provides for a score of 50 points for a premeditated intent to kill and 25 points for an unpremeditated intent to kill, should be scored 25 points because there was no evidence of premeditation and because his intoxication prevented him from forming the specific intent of premeditation. The trial court did not address the issue of intoxication, but found premeditation based solely on the fact that defendant pointed a gun at the victim and pulled the trigger. This Court concluded that OV 3 had been misscored, stating, “[t]he use of a weapon alone will not support a finding of premeditation.” The panel remanded for resentencing, and also instructed the court to address defendant’s claimed intoxication.

At defendant’s resentencing, the trial court interpreted this Court’s prior opinion as stating that the court could score OV 3 at 50 points if the court provided a basis for the decision other than the

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

mere fact that defendant fired at the victim. The court allowed the prosecution to introduce portions of the transcript from the preliminary examination regarding defendant's intent to kill, and allowed both parties to present evidence concerning defendant's degree of intoxication. The court again assessed 50 points for OV 3, and then resentenced defendant to life for the second-degree murder conviction, to be served consecutively to the two-year sentence for the felony-firearm conviction.

Defendant first argues that, according to our previous opinion in this case, the trial court on remand was required to score OV 3 at 25 points. We disagree. That opinion stated that OV 3 should be scored at 25 points because the basis articulated by the trial court was an improper basis for a 50-point score. However, we did not state that there were no other available facts that would justify a score of 50 points. Further, we also directed the trial court to address whether defendant's intoxication would affect the scoring. Thus, the issue of premeditation, which affects the scoring of OV 3, was left open.

Defendant next argues that there was insufficient evidence to support a score of 50 points for OV 3 because of his intoxication. He further contends that the trial court did not articulate sufficient facts regarding intoxication. We find no error. Appellate review of guidelines calculations is very limited. *People v Daniels*, 192 Mich App 658, 674; 482 NW2d 176 (1992). A sentencing court has discretion in determining the number of points to be scored provided that there is evidence on the record that adequately supports a particular score. *Id.* A trial court's scoring of the sentencing guidelines will be upheld if there is evidence to support the score. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993). We have reviewed the record and conclude that the trial court sufficiently articulated its reasons regarding defendant's intoxication to support the score of 50 points for OV 3.

Defendant also argues that his sentence, which was within the guidelines' recommended range, violates the principle of proportionality. A sentence must be proportional to the seriousness of the circumstances of the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). A sentence within the sentencing guidelines range is presumptively neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1978). Although a sentence within the guidelines can conceivably violate proportionality in unusual circumstances, *Milbourn, supra*, p 661, the factors raised by defendant -- his good work record and lack of major misconduct tickets while in prison -- are not circumstances so unusual that they overcome the presumption of proportionality.

Affirmed.

/s/ Barbara B. MacKenzie

/s/ Jane E. Markey

/s/ James M. Batzer