

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN BURTON,

Defendant-Appellant.

UNPUBLISHED

October 4, 1996

No. 181218

LC No. 89-004415

Before: J.H. Gillis, P.J., and G.S. Allen and J.B. Sullivan, JJ.*

MEMORANDUM.

Defendant pleaded guilty 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). For those respective convictions, he was originally sentenced to life imprisonment and two years' consecutive imprisonment. In a prior appeal, this Court remanded for resentencing on the murder conviction because defendant had been denied his right of allocution at sentencing. On remand, the trial court sentenced defendant to fifty to one hundred years' imprisonment. Defendant appeals as of right. We affirm. This case has been decided without oral argument pursuant to MCR 7.214(A).

Defendant's claim that his plea was induced by a promise of leniency is waived because he failed to raise this issue in his initial appeal. *People v Wolfe*, 156 Mich App 225, 228; 401 NW2d 283 (1986)

Next, none of defendant's assignments of error in support of his claim for resentencing have merit. First, this Court determined in the prior appeal that defendant's admissions could support a first-degree murder conviction. We are bound by that determination. *People v Fisher*, 449 Mich 441, 444-445; 537 NW2d 577 (1995). The trial court was entitled to consider these admissions, and did not err in enhancing defendant's sentence on the basis that he actually committed the greater offense. Second, the trial court adequately articulated reasons for departing from the recommended guidelines'

*Former Court of Appeals judges, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-3.

range. Contrary to defendant's assertion, the sentencing court could base the departure on factors accounted for in the guidelines. *People v Granderson*, 212 Mich App 673, 680; 538 NW2d 471 (1995). Third, we are also bound by this Court's earlier determination that the facts underlying defendant's criminal conduct, which were considered by the trial court, had been established by a preponderance of the evidence. *Fisher, supra*. Fourth, resentencing is not required because of the nondisclosure of two letters written by defendant's ex-wife and son. There is no indication that the letters were intentionally kept from defendant. When the court indicated that it had received the letters, defendant did not request to see them until after the sentence was imposed. A defendant may not allow an error to pass in the trial court and subsequently seek redress in this Court. *People v Buck*, 197 Mich App 404, 423; 496 NW2d 321 (1992). Defendant's failure to immediately object and request the letters mandates that this claim must fail. Fifth, given this Court's earlier determination that defendant's admissions could have supported a first-degree murder charge, the trial court did not err in assessing fifty points for Offense Variable 3 of the sentencing guidelines. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993). Sixth, defendant's sentence does not violate the holding in *People v Moore*, 432 Mich 311; 439 NW2d 684 (1989). Not only has *Moore* been implicitly overruled, see *People v Kelly*, 213 Mich App 8, 15; 539 NW2d 538 (1995), but defendant, who will be eighty-five at the expiration of his minimum term, will be able to actually serve the sentence. *People v Martinez (After Remand)*, 210 Mich App 199, 203; 532 NW2d 863 (1995). Finally, defendant's claim of vindictive sentencing must fail because a long-term indeterminate sentence is a less severe punishment than a term of parolable life. *People v Love (After Remand)*, 214 Mich App 296, 302; 542 NW2d 374 (1995); *People v Lino (After Remand)*, 213 Mich App 89, 98; 539 NW2d 545 (1995).

Affirmed.

/s/ John H. Gillis

/s/ Glenn S. Allen, Jr.

/s/ Joseph B. Sullivan