

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TONIA RENEE SMITH,

Defendant-Appellant.

UNPUBLISHED

February 28, 1997

No. 188741

Macomb Circuit Court

LC No. 87-000788-FC

Before: Corrigan, C.J., and Doctoroff and R.R. Lamb,* JJ.

PER CURIAM.

In 1988, a jury convicted defendant of second-degree murder, MCL 750.317; MSA 28.549, and the court sentenced her to a term of imprisonment of forty to seventy years. In defendant's prior appeal, this Court affirmed her conviction, but remanded for reconsideration of her sentence in light of *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). *People v Tonia Renee Smith*, unpublished opinion per curiam of the Court of Appeals, issued May 9, 1994 (Docket No. 112434). On remand, the trial court granted defendant's request for resentencing. Upon considering the second edition of the sentencing guidelines,¹ updated information about defendant's prison conduct, and the principle of proportionality announced in *Milbourn, supra*, the trial court again imposed a term of forty to seventy years. Defendant appeals by right from the 1995 resentence, seeking resentencing before a different judge. We affirm.

This Court may not overturn a sentence unless it is disproportionate or otherwise invalid. *In re Dana Jenkins*, 438 Mich 364, 369 n 3; 475 NW2d 279 (1991). Defendant has not established that her sentence is invalid in the three issues she raises on appeal.

First, the trial court relied upon appropriate factors to exceed the recommended range of the sentencing guidelines. Unlike *People v Fisher (After Remand)*, 176 Mich App 316; 439 NW2d 343

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

(1989),² which defendant cites, the trial court here did not rely upon an “age of violence” characteristic to exceed the guidelines, but gave appropriate consideration to individual factors affecting defendant’s potential for reformation, as well as the circumstances of the offense. See *People v Nantelle*, 215 Mich App 77, 83-84; 544 NW2d 667 (1996); *People v McKernan*, 185 Mich App 780, 782-783; 462 NW2d 843 (1990).

Second, defendant’s reliance on the “shock the conscience” standard in *People v Coles*, 417 Mich 523; 339 NW2d 440 (1983), is misplaced inasmuch as that standard has been superseded by *Milbourn, supra*, which requires that the trial court impose a sentence that is proportionate to the seriousness of the circumstances surrounding both the offense and the offender. *Milbourn, supra* at 636. Also, this Court’s holding in the prior appeal is dispositive of defendant’s argument that her sentence is invalid because her codefendant received a minimum sentence of only ten years. The court was not required to consider the sentence of her codefendant when imposing sentence for this defendant. *In re Dana Jenkins, supra*, at 376. Defendant has failed to demonstrate that the disparity between the sentences renders her sentence invalid. *Id.* at 369 n 3.

Third, the trial court did not abuse its discretion in sentencing defendant to a term of imprisonment of forty to seventy years. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995); *People v Merriweather*, 447 Mich 799, 806-808; 527 NW2d 460 (1994). That the codefendant received a lesser sentence does not demonstrate a violation of the principle of proportionality. Considering the circumstances of both the offense and the offender, the trial court imposed a proportionate sentence. *Milbourn, supra*.

Defendant’s prior record reflects a criminal history that began when defendant was eighteen years old and includes her guilty pleas to the following offenses: (1) misdemeanor larceny in 1977, (2) entry without breaking with intent in 1979, (3) fraudulent procurement of narcotics in 1981, and (4) attempted aggravated assault.³ At one point, defendant escaped from prison, but was never charged with this offense. In 1987, defendant committed the instant offense.

The circumstances of the murder support defendant’s sentence. Defendant stabbed the victim in his neck because he would not replenish the cocaine he had supplied two hours earlier to defendant and her codefendant. The victim lived for about thirty minutes after the stabbing. Defendant’s brother was at the apartment during the murder, and initially fled in fear for his life, but returned to look after his twelve year old cousin, who also was at the apartment, and who had heard the victim tell defendant to stop.

Defendant’s maladaptive behavior in prison similarly supports her sentence. Defendant has admitted to smuggling cocaine and marijuana into the prison; she has confessed to continued drug abuse. Her record reflects numerous misconduct citations: (1) five for substance abuse/cocaine, (2) eight for possession of marijuana, (3) one for dangerous contraband, (4) seven for being out of place, (5) two for insolence, (6) ten for disobeying a direct order, and (7) three

for having two subjects in a cell. Defendant's conduct demonstrates that she has no intention of reforming.

Affirmed.

/s/ Maura D. Corrigan
/s/ Martin M. Doctoroff
/s/ Richard Ryan Lamb

¹ The court previously had referred to the first edition of the sentencing guidelines.

² This case was remanded again and ultimately was reversed. *People v Fisher (After Second Remand)*, 190 Mich App 598; 475 NW2d 762 (1991), reversed 442 Mich 560; 503 NW2d 80 (1993).

³ The victim of this assault was defendant's eleven-year-old daughter, one of defendant's five children.