

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL FREEMAN,

Defendant-Appellant.

UNPUBLISHED

February 28, 1997

No. 194678

Kalamazoo Circuit Court

LC No. 93-001187-FH

Before: Murphy, P.J., and Markey and A.A. Monton,* JJ.

PER CURIAM.

Defendant pleaded guilty to possession of a controlled substance less than 25 grams, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), and to being a second habitual offender, MCL 769.10; MSA 28.1082. The trial court sentenced defendant to serve thirty-six to seventy-two months' imprisonment. Defendant appeals as of right. We affirm.

Defendant's sole issue on appeal is that his sentence is disproportionate in violation of *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). We disagree.

A sentence must be proportionate to the seriousness of the crime and defendant's prior record. *Id. Milbourn* does not address the unique sentencing situation that arises, however, when a defendant pleads guilty to a charge in exchange for dismissal of other or greater charges. *People v Brzezinski (After Remand)*, 196 Mich App 253, 256; 492 NW2d 781 (1992). "Such pleas will invariably present the sentencing judge with important factors that may not be adequately embodied in the guideline variables," *People v Duprey*, 186 Mich App 313, 318; 463 NW2d 240 (1990), so departure from the guidelines is often justified on this basis, *People v Butts*, 144 Mich App 637, 640-641; 376 NW2d 176 (1985). Moreover, the sentencing guidelines do not apply to habitual offender convictions, nor is it appropriate to use a mathematical formula to determine whether a sentence is proportionate. *People v Cervantes*, 448 Mich 620, 622, 625-630; 532 NW2d 831 (1995); *People v Edgett*, ___ Mich App ___; ___ NW2d ___ (Docket No. 180885, issued December 27, 1996), slip op at 2-4. Thus, when reviewing the sentence of an habitual offender, this Court should determine

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

whether the trial court abused its discretion in imposing the sentence. *Cervantes, supra* at 626-630, 636-637; *Edgett, supra* at 4; *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996).

Here, we find no abuse of discretion. See *People v Broden*, 428 Mich 343, 350; 408 NW2d 789 (1987). A review of defendant's record reveals that he has had a long history of drug addiction and drug-related offenses. He has repeatedly violated probation. He has failed to seek drug rehabilitation despite a delayed sentence in 1994 on the instant drug offense that was granted for this very purpose. He failed to appear for sentencing in 1994 after the court-approved delay had ended. He subsequently committed and pleaded guilty to second-degree retail fraud and attempting to provide false information to a police officer. He struck a female security guard in the face with the shoplifted item in an attempt to escape. He failed to attend AA or NA meetings while incarcerated, and he has continued to test positive for controlled substances. Accordingly, we believe that defendant's sentence is proportionate to the seriousness of the crime and defendant's prior record, *Milbourn, supra*, and that the trial court did not abuse its discretion in sentencing defendant, *Cervantes, supra*.

Affirmed.

/s/ William B. Murphy

/s/ Jane E. Markey

/s/ Anthony A. Monton