

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN EDDIE BURKS, JR.,

Defendant-Appellant.

UNPUBLISHED

April 4, 1997

No. 180493

Genesee Circuit Court

LC No. 90-043376-FC

Before: D.F. Walsh,* P.J., and R.P. Griffin** and W.P. Cynar,* JJ.

MEMORANDUM.

Defendant pleaded guilty to breaking and entering an occupied dwelling, MCL 750.110; MSA 28.305, and felonious assault, MCL 750.82; MSA 28.277. For those respective convictions, he was sentenced to nine-and-a-half to fifteen years' imprisonment and thirty to forty-eight months' imprisonment. Defendant appealed to this Court, which determined, among other things, that defendant's sentence for the breaking and entering conviction violated the principle of proportionality and so remanded the matter for resentencing. See *People v Burks*, unpublished opinion memorandum of the Court of Appeals, issued July 2, 1993 (Docket No. 90-043376-FC). Thereafter, defendant was sentenced to eight to fifteen years' imprisonment for the breaking and entering conviction and thirty to forty-eight months' imprisonment for the felonious assault conviction. He now appeals as of right. We remand for resentencing. This case has been decided without oral argument pursuant to MCR 7.214(E)(1)(b).

Defendant again challenges his eight-year sentence for breaking and entering with intent to commit larceny, arguing that it is disproportionate. We agree. The eight-year sentence exceeds the recommended range of the sentencing guidelines. Having reviewed the record, we do not believe that

*Former Court of Appeals judges, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.

**Former Supreme Court justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.

the reason given by the court for departure (defendant's misconduct violations committed early in his prison term) justified a departure from the guidelines' range in light of the facts that defendant had not committed any misconduct violations in the eighteen months prior to resentencing, was described by a prison official as being a "model prisoner" during the two years prior to resentencing, was described by another prison official as being a good worker with a good attitude who had made "drastic changes" since being incarcerated, and had completed part of his GED and a yard work program while in prison. Under the circumstances, we again hold that defendant's sentence violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636, 659-660, 667; 461 NW2d 1 (1990). Defendant is entitled to resentencing before a different judge. *People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986).

Remanded for resentencing before a different judge. We do not retain jurisdiction.

/s/ Daniel F. Walsh

/s/ Robert P. Griffin

/s/ Walter P. Cynar