STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRENDA L. PEARSON, a/k/a BRENDA JOHNSON,

Defendant-Appellant.

UNPUBLISHED
May 30, 1997

No. 189020
Muskegon Circuit Court
LC No. 95-038086-FH

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

PER CURIAM.

Defendant pleaded guilty to ten counts of delivering less than fifty grams of heroin, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), in exchange for the prosecution's agreement to dismiss thirty-two additional counts involving the same offense. The trial court sentenced defendant to ten consecutive terms of five to twenty years' imprisonment. We affirm the conviction but vacate the sentence and remand for resentencing.

Defendant, a married, forty-two-year-old gainfully employed mother of two children, mailed forty-two packages of heroin from her home in New York to codefendant Debra Brown in Muskegon. Defendant and Brown were friends; they were also heroin addicts. Because Brown could not procure certain heroin locally, she sent defendant money, she asked defendant to purchase the drugs for her in New York, and defendant then mailed the heroin to Brown for Brown's personal consumption. An allegedly anonymous tip alerted police to a package that defendant sent to Brown, and the police intercepted the package at the post office. Further examination of the package revealed thirty-nine packets of heroin with a total combined weight of 1.3 grams. Postal records showed that defendant sent forty-two such packages to Brown over the course of a year.

Defendant had no criminal record in either Michigan or New York, was happily married for over twenty-five years, raised and cared for a family, and held a steady job, despite her addiction. The presentence investigation report recommended a sentence at the lower end of the guidelines for each of the ten drug charges given defendant's age, lack of criminal history, and the effect that her own

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

untreated addiction had on her involvement in the present offense. The minimum sentencing guidelines range was calculated at eighteen to sixty months' incarceration. The trial court sentenced defendant to ten consecutive terms of five to twenty years' imprisonment based upon the following reflections:

> Well, Miss Brown—or Miss Pearson, I can't ignore the seriousness of your offense. The help that you received and the people who have been interested in your situation I think is laudable, and I think that if your conversion is correct, I think that that will stand in you[r] good stead no matter what I do. But I can't ignore what's been done here. You have introduced a more serious drug than has been in this area for many years and a lot of it. I think it totaled up to perhaps 55 grams, which was a lot of heroin, and that causes a lot of destruction, and as you have even seen earlier today even causes death.

Defendant asserts that her sentences are disproportionate to the offense and this offender. We agree.

A sentence must be proportionate to the seriousness of the crime and the defendant. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). A sentence imposed within an applicable sentencing guidelines range is presumed proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Spicer*, 216 Mich App 270, 276; 548 NW2d 245 (1996). Nevertheless, a sentence within a guidelines range can conceivably violate proportionality in unusual circumstances where the sentence within the guidelines range is disproportionately high or low. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995); *Milbourn, supra* at 661. "[T]he key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range" (emphasis added). *Id*. Our Supreme Court in *Milbourn, supra* at 653-654, appropriately recognized that only those offenders who commit the more heinous offenses, as determined on a case-by-case basis, should receive penalties at the highest end of the guidelines range:

> In the course of reviewing thousands of sentences since our decision in *Coles*, we have observed that different sentencing judges often subscribe to markedly different sentencing philosophies. For example, some judges may feel that any commission of a certain felony, *even though the facts surrounding a particular criminal episode clearly do not justify worst-case treatment*, should be answered with the maximum possible sentence. . . . With regard to the principle of proportionality, it is our judgment that the imposition of the maximum possible sentence in the face of compelling mitigating circumstances would run against this principle and the legislative scheme. Such a sentence would represent an abdication—and therefore an abuse—of discretion. The trial court appropriately exercises the discretion left to it by the Legislature *not* by applying its own philosophy of sentencing, but by *determining where, on the continuum from the least to the most serious situations, an individual case falls and by sentencing the offender in accordance with this determination*. [Emphasis supplied in part; footnotes omitted.]

Thus, "[w]here a given case does not present a combination of circumstances placing the offender in either the most serious or least threatening class with respect to the particular crime, then the trial court is not justified in imposing the maximum or minimum penalty, respectively." *Id.* at 654. We are also cognizant that we must review the proportionality of each sentence, not the aggregate impact of the mandatory consecutive sentences. *People v Kennebrew*, 220 Mich App 601, 609; ____NW2d___(1996); *People v Warner*, 190 Mich App 734, 736; 476 NW2d 660 (1991).

Here, the facts of this case and the particular criminal episode in which defendant was involved "clearly do not justify worst-case treatment." *Milbourn, supra* at 653. Our review of the record leads us to conclude that the trial court considered only the general seriousness of the crime. It considered only that defendant delivered heroin and, in fact, appears to categorize defendant as a typical drug dealer. It did not consider the highly unusual, specific facts of this particular delivery offense, nor did it consider the offender herself in light of the mitigating factors present in this case.[1] See *People v Moseler*, 202 Mich App 296, 301-303; 508 NW2d 192 (1993) (Griffin, J., concurring in part and dissenting in part). Defendant, age forty-two, has her high school diploma, has attended business school, has maintained steady employment with a securities firm, has raised two children, one who is in college and one who is in high school, with her husband of twenty-five years, and had no prior criminal history. These factors, coupled with the fact that defendant was convicted of delivery of a total of thirteen grams of heroin, which is near the low end of the range prohibited in §7401(2)(a)(iv), do not justify her receiving the highest possible minimum sentence within the guidelines. See *People v Antolovich*, 207 Mich App 714, 721-722; 525 NW2d 513 (1994); *People v Scott*, 197 Mich App 28, 30-31; 494 NW2d 765 (1992).

Moreover, although the trial court stated that defendant introduced heroin into the community at large, that factual conclusion is not supported by the evidence.[2] As defendant repeatedly affirmed, she bought the heroin at Brown's behest with Brown's money believing that it was solely for Brown's own use. In short, she did not purchase and deliver the heroin to Brown as a means of earning a profit, which is the usual motive behind selling and delivering drugs. See *Scott, supra*. Her crime was a grossly misguided attempt to help a fellow heroin addict, for which she gained nothing. See *Antotovich, supra*. Indeed, we do not believe that defendant can be placed in the most serious class of drug offenders given the mitigating circumstance present in this case.[3] Her sentence does not "fit as precisely as possible the particular offender and the particular offense, taking into account all permissible factors." *People v Rushlow*, 437 Mich 149, 156; 468 NW2d 487 (1991). Consequently, defendant should not receive the five-year maximum sentence under the guidelines for each offense. *Milbourn, supra* at 654. For these reasons, we find that defendant's sentence of five to twenty years' imprisonment for each of ten counts of violating MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv) was disproportionate to both the offense and this offender. Accordingly, defendant must be resentenced. *Scott, supra* at 31.

Defendant also challenges the trial court's refusal to permit her to withdraw her plea. We originally granted defendant's motion to remand to the trial court for further proceedings. Pursuant to an October 7, 1996 hearing, the trial court[4] denied the motion after determining that no promise was made to defendant about the sentence that she would receive sufficient to warrant the withdrawal of her plea. We review the trial court's ruling on a motion to withdraw a plea for a clear abuse of discretion resulting

in a miscarriage of justice because there is no absolute right to

withdraw a plea after the trial court has accepted it. *People v Eloby (After Remand)*, 215 Mich App 472, 474-476; 547 NW2d 48 (1996). Upon reviewing the transcript from the hearing on remand, we find that an unbiased person would be unable to conclude that there was no justification or excuse for the court's denial of the motion to withdraw the plea. See *Kennebrew*, *supra* at 605-606. Defendant testified that no promises were made to her by the court or her counsel, and counsel admitted that he only told defendant his impression of how the trial court reacted when counsel discussed possible sentencing options with the court, given counsel's history of dealing with the trial court.

We also note that the trial court was aware of our Supreme Court's holding in *In re Valle*, 364 Mich 471, 477-478; 110 NW2d 673 (1961): "If the evidence establishes that the prosecutor or the judge has made a statement which fairly interpreted by the defendant . . . is a promise of leniency, and the assurance is unfulfilled, the plea may be withdrawn and the case proceed to trial." Our review of the hearing transcript regarding defendant's motion to withdraw discloses no evidence that either the prosecutor or the judge made any statements defendant could fairly interpret as promises of leniency. Indeed, defendant's counsel repeatedly denied that the court made any promises or comments regarding sentencing, and the court told defendant the same when she entered her plea. *People v Haynes*, ___ Mich App ___; ___ NW2d ___ (Docket Nos. 190360-190361, 190366, issued 2/14/97), slip op at 3, 6. Accordingly, we find no abuse of discretion resulting in manifest injustice that requires the withdrawal of defendant's guilty plea. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996); *Eloby, supra*.

Conviction affirmed; sentence vacated and remanded for resentencing consistent with this Court's opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Anthony A. Monton

[1] Although this is not a case where the court departed upward or downward from the guidelines, the cases that discuss what the sentencing court may do when the guidelines' consideration of a particular factor is "not adequate" are helpful in keeping the entire sentencing process in perspective. See *Houston, supra* at 320-323, 327 n 11, 328-330 (explaining how dramatically different offenders who commit the same underlying offense but with varying degrees of violence can receive the same guidelines range for purposes of sentencing).

[2] The presentence investigation report only states that "[t]he heroin sent to Muskegon appears to have been partially used by Ms. Brown and partially sold to support her habit." This was not confirmed by either defendant or Brown. Notably, Brown received a sentence of two to twenty years' imprisonment for her involvement in this criminal venture.

[3] Rather, we agree that the trial court could easily have followed the recommendation in the presentence investigation report that defendant should be sentenced at the low end of the guidelines range.

[4] Judge Timothy G. Hicks heard the motion to withdraw the guilty plea as he was appointed to replace the retiring Judge R. Max Daniels during the pendency of this case.