

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LAMPHONE THENGHKAM,

Defendant-Appellee.

UNPUBLISHED

June 13, 1997

No. 182588

Recorder's Court

LC No. 93 012638

Before: Young, P.J., and Taylor and R.C. Livo*, JJ.

PER CURIAM.

The prosecution appeals by leave granted the court's decision to sentence defendant as a juvenile. 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).¹ The court sentenced defendant, who was sixteen years old at the time of the shooting,² as a juvenile. We reverse and remand.

According to the Presentence Investigation Report (PSIR), defendant and four friends were walking in defendant's neighborhood at approximately 9:00 p.m. on October 15, 1993. Three young men, including the decedent, were approaching defendant's group from the opposite direction. A member of defendant's group shouted at the decedent's group. There was no response after which another member of defendant's group shouted at the decedent's group. Defendant then drew his rifle and fired. Six bullets struck the decedent in the back, killing him. The decedent was unarmed and eyewitnesses reported that the decedent was running away when defendant shot him.

Defendant reported that he previously had been shot at in his neighborhood and that he feared being shot. He had been carrying a two-foot-long rifle in his pants for about a week before the shooting. Defendant claimed that during this incident one of the young men in the decedent's group pointed a shiny object towards him that he thought was a gun. Defendant explained that he was not aiming at the decedent and the others but just pulled the trigger to scare them away and started running.

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

At defendant's dispositional hearing, four individuals testified regarding the propriety of adult or juvenile placement.³ These included: (1) Gloria Singleton, a DSS/FIA social worker; (2) Deborah Starr, a clinical psychologist; (3) Ardyn Early, the presentence investigator; and (4) Anthony Keeling, the Recorder's Court Psychiatric Clinic examiner. Singleton and Starr recommended that the court sentence defendant as a juvenile; Early and Keeling recommended an adult sentence for defendant.

Singleton noted that defendant had over 250 absences from school; nonetheless, he obtained passing grades in all courses because he is a "smart kid." Also relevant to Singleton was the fact that defendant had conformed to routines at the youth home, except for one small altercation when he first was admitted. At home, defendant did not cause problems and worked to help support the family. Defendant's employer praised him as a quiet young man with good manners. Starr believed that the homicide was an "isolated incident". She did not believe that defendant posed a danger to society. She stated that defendant's behavior was indicative of the neighborhood, which was dangerous and plagued by gangs. Starr felt that the juvenile system could provide defendant with supervision, education, therapy and coping skills. Starr thus concluded that defendant should be sentenced as a juvenile.

In contrast, Early recommended an adult sentence because defendant shot the victim in the back as the victim turned to run. Early opined that defendant displayed a callous disregard for human life. Early acknowledged, however, that defendant would not disrupt the rehabilitation of others at the juvenile facility. In her opinion, defendant did not pose a danger to the community; nevertheless, she advised sentencing as an adult given the seriousness of the crime. Keeling⁴ felt that defendant lacked good judgment and decision-making skills. Keeling characterized defendant as having a behavior problem and as being rebellious. Keeling speculated that defendant might be involved in gang activity; however, the youth bureau had no knowledge of an Asian gang in defendant's neighborhood. Keeling felt that defendant was intelligent, but associated with people who got into trouble, and had difficulty accepting authority. Thus, Keeling concluded that defendant should be sentenced as an adult.

The prosecution raises a single issue on appeal: whether the trial court abused its discretion in sentencing defendant as a juvenile. We apply bifurcated appellate review of the trial court's decision to sentence a minor as a juvenile or as an adult. *People v Perry*, 218 Mich App 520, 540; 554 NW2d 362 (1996); *People v Passeno*, 195 Mich App 91, 103; 489 NW2d 152 (1992). We first review the trial court's findings on the factors enumerated in MCL 769.1(3); MSA 28.1072(3) under the "clearly erroneous" standard of MCR 2.613(C). Findings of fact are clearly erroneous if, after review of the entire record, this Court is left with a definite and firm conviction that a mistake was made. *Passeno*, *supra*, 195 Mich App at 103. Next, we review the ultimate decision to sentence the minor as a juvenile or adult and the sentence itself for an abuse of discretion, using the same standard applied in reviewing adult sentencing decisions. *Id.* at 103-104. We will order reversal if the sentence imposed violated the principle of proportionality outlined in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). *Passeno*, *supra*, 195 Mich App at 104.

MCL 769.1(3); MSA 28.1072(3)⁵ provides, in part, that the court must consider the following criteria when deciding whether to sentence a defendant as a juvenile or an adult:

- (a) The prior record and character of the juvenile, his or her physical and mental maturity, and his or her pattern of living.
- (b) The seriousness and the circumstances of the offense.
- (c) Whether the offense is part of a repetitive pattern of offenses which would lead to 1 of the following determinations:
 - (i) The juvenile is not amenable to treatment.
 - (ii) That despite the juvenile's potential for treatment, the nature of the juvenile's delinquent behavior is likely to disrupt the rehabilitation of other juveniles in the treatment program.
- (d) Whether, despite the juvenile's potential for treatment, the nature of the juvenile's delinquent behavior is likely to render the juvenile dangerous to the public if released at the age of 21.
- (e) Whether the juvenile is more likely to be rehabilitated by the services and facilities available in adult programs and procedures than in juvenile programs and procedures.
- (f) What is in the best interests of the public welfare and the protection of the public security.

The prosecution must prove by a preponderance of the evidence that the best interests of the juvenile and the public would be served by sentencing the juvenile as an adult. MCR 6.931(E)(2); *People v Lyons (On Remand)*, 203 Mich App 465, 469; 513 NW2d 170 (1994). The trial court must make factual findings and conclusions of law in its determination of whether to sentence the minor defendant as a juvenile or as an adult. MCL 769.1(5); MSA 28.1072(5)⁶; MCR 6.931(E)(4).

The court first considered defendant's juvenile record, which consisted of two charges outside the instant offense. The first, breaking and entering, MCL 750.110; MSA 28.305, arose from defendant's presence after hours with several friends in a restaurant where his friend worked. Police found two paring knives in defendant's pockets. Defendant was warned and released. The second charge, carrying a concealed weapon, MCL 750.227; MSA 28.424, occurred *just six days after* defendant committed the homicide. School security guards discovered defendant carrying a flare gun loaded with one shotgun shell and another shell in his pocket. That charge ultimately was dismissed. At the hearing, the trial judge stated that he was "not really that swayed" by defendant's record.

The court observed that defendant's behavior did not appear to be part of a repetitive pattern of offenses which rendered defendant untreatable or incapable of rehabilitation. In making this observation, the court found that defendant had experienced a chaotic pattern of living. The court recognized that defendant and his family emigrated to this country from Laos when defendant was five

years old. Defendant's father died soon thereafter from a heart attack and his older brother was murdered. His mother has required dialysis treatment since 1991 and collects SSI benefits. Defendant's twenty-one year old sister is not only her siblings' primary caretaker, but also supports the family with her job as a hostess in a restaurant. The court then contrasted these circumstances with the fact that since defendant has been in a structured environment in the youth home, absent one altercation, defendant has had no problems and his grades were improving.

The judge concluded that defendant would not be a danger upon release at age twenty-one, that defendant could be rehabilitated and that rehabilitation was more likely to be accomplished in the juvenile facilities. The judge further stated that defendant would not obstruct the rehabilitation of the other youths at the facility. Finally, the court concluded that it was in the best interests of the public welfare and the protection of society that defendant be placed in the juvenile system.

After reviewing the testimony presented at the juvenile sentence hearing and the court's findings of fact, we hold that the trial court's findings were inadequate to support its decision to sentence defendant as a juvenile. The court understood which factors to consider, but gave positive factors ample consideration and negative factors short shrift or no consideration. Painfully absent from its findings are the facts surrounding the homicide and the fact that *just six days after* the shooting occurred defendant brought a loaded weapon to school. Regarding the seriousness of the offense, the court stated that "first"-degree murder⁷ was a serious offense under Michigan law. He sympathized with the decedent's mother and lamented the plague of easy access to guns among today's youth. But without further articulation, he summarily and surprisingly concluded that sending defendant to prison would not accomplish "anything". Such statements do not give each criteria weight as appropriate to the circumstances. MCL 769.1(3); MSA 28.1072(3); MCR 6.931(E)(3). Not only was insufficient consideration given to the seriousness and circumstances of the crime, but also, we find inadequate the court's findings regarding defendant's character and physical and mental capacity, defendant's potential for safe release at age twenty-one, the best system in which to accomplish rehabilitation, and the best interests of the public welfare and protection of the public security.

Most striking is the absence of findings discussing the disturbing facts of the homicide. The decedent was shot in the back **SIX** times. Members of defendant's group made provocative and offensive comments towards the members of the decedent's group. Although defendant stated that he thought a member of the decedent's group pulled out something shiny, defendant's perception of danger is contradicted by the uncontested fact that the decedent and his companions were unarmed. Defendant also claims that he fired shots to scare decedent and others in the decedent's group because he himself was scared and running away. The court never addresses the incongruity of the defendant's statement that he hit a running target six times in the back while defendant was also running away. In focusing on these facts, however, we do not summarily discount defendant's claim that he acted out of fear. Instead, we hold that the absence of these factors from the court's consideration leave this Court with no information of what impact, if any, these facts had on the court's decision.

In so holding, we acknowledge that the seriousness and the circumstances of an offense is but one of the enumerated factors that the trial court must consider in determining whether to sentence a

minor as a juvenile or as an adult. MCL 769.1(3)(b); MSA 28.1072(3)(b); *People v Cheeks*, 216 Mich App 470, 478-479; 549 NW2d 584 (1996). However, it is imperative that a trial court undertaking this analysis remember that the ultimate goal of sentencing is to protect society through just and certain punishment reasonably calculated to rehabilitate. *Id.* at 479 (citing *People v Schultz*, 435 Mich 517, 532; 460 NW2d 505 (1990)). The public must be protected from dangerous individuals who commit heinous and violent crimes, regardless of whether the individual is a juvenile or an adult. *Id.* To resolve the conflicting tensions between protecting society and rehabilitating the juvenile defendant, the trial court must consider and balance *all of* the factors listed in MCL 769.1(3)(a)-(f); MSA 28.1072(3)(a)-(f). *Id.* The court's failure to address all of these factors, particularly under these troubling facts, hinders proper resolution of this question.

The court's findings also lack information regarding defendant's character and his physical and mental maturity. For example, the court treats defendant's action in carrying a loaded gun to school shortly *after* the shooting as an isolated, unrelated occurrence. With less consideration, the court simply stated that defendant was small in stature, and that defendant's mental maturity should be considered. The statute requires that a defendant's physical and mental *maturity* be considered. MCL 769.1(3)(a); MSA 28.1072(3)(a). We conclude that the court clearly erred in stating that it was required to consider defendant's small *stature*.

Next, we find the trial court's conclusions that defendant had the potential for safe release at age twenty-one and that rehabilitation could be best accomplished within the juvenile system is unsettling given the disparities and absences in the court's factual findings. For example, the court ignored defendant's apparent propensity to change his behavior to conform with the environment he operates within.

Regarding the last statutory factor, i.e., the best interests of the public welfare and the protection of society, MCL 769.1(3)(f); MSA 28.1072(3)(f), the trial court again offers only a conclusory finding that this factor weighs in favor of defendant's placement in the juvenile system, without any elaboration of supporting evidence or reasoning. Again, it is imperative that a sentencing court consider and articulate findings regarding all the statutory factors, to allow for proper resolution of whether society's interest in public protection is adequately balanced against a juvenile defendant's potential for rehabilitation. *Cheeks, supra*, 216 Mich App at 478-479. Therefore, we reverse the trial court's decision to sentence defendant as a juvenile, and remand for reconsideration of factors concerning defendant's character, physical and mental maturity, the seriousness of this offense and surrounding circumstances, defendant's potential for safe release at age twenty-one, the best system in which to accomplish rehabilitation, and the best interests of the public welfare and the protection of the public security.

Although the court's failure to adequately consider these factors may be deemed an abuse of discretion in itself, we hesitate to conclude that the absence of certain findings justifies the automatic conclusion that defendant should be sentenced as an adult. For example, the court made cogent observations that defendant's behavioral patterns could have been reflective of his environment, and it is undisputed that defendant experienced improvement in the structured environment of the youth home.

Consequently, because the court considered some proper factors without apparently considering all of the relevant factors, we reverse the trial court's decision to sentence defendant as a juvenile and remand for reconsideration concerning whether defendant should be sentenced as an adult or a juvenile. Compare *People v Fields*, 448 Mich 58, 80; 528 NW2d 176 (1995).

We reverse and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Robert P. Young, Jr.

/s/ Clifford W. Taylor

/s/ Robert C. Livo

¹ Before taking defendant's plea, the court quashed two counts of assault with intent to murder, MCL 750.83; MSA 28.278.

² Defendant's date of birth was June 4, 1977.

³ The victim's mother also testified. Because her testimony did not involve the statutory criteria to be considered by the court, we do not include it here.

⁴ The prosecution contends that the judge disregarded Keeling's testimony based upon unrecorded conversations that the judge had with psychologist friends. We reject the prosecution's contention on appeal that the trial judge did not consider fairly Keeling's opinion. Viewing the judge's comments in context, the judge was simply questioning the sufficiency of Keeling's consideration of defendant's family problems in Keeling's analysis and opinion. Because the court was presented with conflicting expert testimony as to this issue and the challenged comments are not reflected in his ultimate findings, we conclude that the neither the court's comments nor his questioning of Keeling's testimony were error.

⁵ The statute was recently amended, substantially altering the criteria to be considered at a juvenile dispositional hearing. 1996 PA 247. Because defendant was sentenced in 1994, we review the court's decision based on the factors enumerated in the statute before it was amended.

⁶ In a recent amendment, this section was renumbered as MCL 769.1(6); MSA 28.1072(6). 1996 PA 248.

⁷ Defendant pleaded guilty to second-degree murder. MCL 750.317; MSA 28.549. It is unclear from the record why the court spoke of first-degree murder in articulating his findings regarding the seriousness of the offense.