

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN HAYES GIPSON,

Defendant-Appellant.

UNPUBLISHED

July 15, 1997

No. 191124

Recorder's Court

LC No. 92-004781

Before: Smolenski, P.J., and Michael J. Kelly and Gribbs, JJ.

PER CURIAM.

In August 1992, defendant pleaded guilty to three counts of second-degree murder, MCL 750.317; MSA 28.549, and one count of attempted murder, MCL 750.91; MSA 28.286. At the time of his offenses, defendant was sixteen years old. The trial court sentenced defendant as an adult to four concurrent terms of imprisonment for 22~~1/2~~ to 40 years. A panel of this Court remanded this case for resentencing after determining that the trial court's findings of fact with regard to subsections (a), (c) and (e) of MCL 769.1(3); MSA 28.1072(3) were clearly erroneous. *People v Gipson*, unpublished opinion per curiam of the Court of Appeals, issued January 9, 1995 (Docket No. 162456). On remand, the trial court again sentenced defendant as an adult. We affirm.

We apply a bifurcated standard of review to a trial court's decision to sentence a minor as a juvenile or an adult. *People v Launsbury*, 217 Mich App 358, 362; 551 NW2d 460 (1996). The trial court's factual findings on the criteria enumerated in MCL 769.1(3); MSA 28.1072(3) are reviewed for clear error. Findings of fact are clearly erroneous if, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made. *Id.* After applying the clearly erroneous standard to the trial court's factual findings, we review the ultimate decision whether to sentence the minor as a juvenile or as an adult for an abuse of discretion. *Id.* We will find an abuse of discretion only when, considering the facts upon which the trial court acted, an unprejudiced person would say that there was no justification or excuse for the ruling made. *People v Sawyer*, 222 Mich App 1, 5; ___ NW2d ___ (1997).

Pursuant to the juvenile sentencing statute in effect at the time of defendant's sentencing on remand, 1993 PA 85, MCL 769.1(3); MSA 28.1072(3), the trial court was required to make findings on the following factors to determine whether it was in the best interests of the offender and society to sentence defendant as 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 the 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. [*People v Brown*, 205 Mich App 503, 505; 517 NW2d 806 (1994).]

While under this statutory scheme no single criterion was accorded preeminence over the other juvenile sentencing factors, *id.* at 504, the statute allowed the trial court to give the criteria "weight as appropriate to the circumstances." 1993 PA 85, MCL 769.1(3); MSA 28.1072(3); *People v Perry*, 218 Mich App 520, 543; 554 NW2d 362 (1996) (Batzer, J.).¹

On remand, the trial court reviewed the copious testimony presented at defendant's 1992 sentencing hearing and made findings on each factor enumerated in MCL 769.1(3); MSA 28.1072(3). As to the first statutory factor, the trial court noted, correctly, that it was bound by the law of the case doctrine to this Court's previous determination that the original sentencing judge had erred in finding that defendant had a substantial juvenile record. See *MS Development, Inc v Auto Plaza (After Remand)*, 220 Mich App 540, 548; 560 NW2d 62 (1996) (ruling by appellate court binds appellate court and all lower tribunals with regard to that issue). The trial court found that defendant was physically mature and large for his age, but emotionally and intellectually immature. In accordance with this Court's directive in the original appeal, the trial court refrained from weighing defendant's size and limited intelligence against him in the determination whether to sentence defendant as an adult. The trial

court found, based on evidence presented at the sentencing hearing and in defendant's sentencing information report, that defendant had displayed a poor pattern of living by involving himself in the narcotics trade. Based on our review of the evidence presented to the lower court, we are not left with a definite and firm conviction that the trial court was mistaken when it made these findings.

As to the seriousness of the offense, the trial court determined that defendant had been involved in "one of the most heinous, disgusting, [and] cowardly offenses" that it had ever seen. By defendant's own admission, he had participated in torturing and degrading the victims before they were killed. Additionally, the trial court found that defendant had endangered the lives of many others by pouring gasoline on the victims and setting them ablaze in an apartment building. On review of the record, we find no error with the trial court's finding concerning the seriousness of defendant's offense.

Next, the trial court found that defendant's offense was not part of a repetitive pattern that would lead it to believe that defendant was not amenable to treatment. Indeed, the trial court noted that two qualified witnesses had opined that defendant could benefit by programs offered in the juvenile system. The trial court stated that it would weigh the third statutory criterion in defendant's favor when deciding the sentencing issue. Again, reviewing the record, we are not persuaded that the trial court clearly erred in finding that defendant was potentially amenable to treatment in a juvenile facility.

The trial court found against defendant on the question whether the nature of his delinquent behavior was likely to render him dangerous to the public if released at age 21. Defendant was seventeen at the time of his original sentencing and, in accordance with the law, would be released from juvenile detention, at the latest, on his twenty-first birthday. When the witnesses who were familiar with defendant and the circumstances of his crime were asked at the sentencing hearing whether he would pose a danger to the public when released from juvenile detention, none were able to say with assurance that defendant could ever be rendered harmless. In light of the heinousness of defendant's offense and defendant's tremendous need for intensive therapy and supervision, we are unable to say that the trial court was mistaken in finding that defendant would pose a threat to the public if he were to be released just four years after the commencement of juvenile detention.

Next, we are compelled to find clear error in the trial court's determination that the adult system would more likely rehabilitate defendant. In the original appeal, this Court plainly stated that the record supported the conclusion that the programs and procedures offered in the juvenile system were more likely to be effective in rehabilitating defendant than those offered in the adult system. This determination is the law of the case, and we are bound to it. *MS Development, supra*. Therefore, we will disregard the trial court's finding as to this statutory criterion and consider the previous panel's determination as dispositive on this issue.

Lastly, the trial court found that the best interests of the public welfare and the protection of public security weighed in favor of sentencing defendant as an adult, based on the type of crime defendant committed and his slim chance of rehabilitation before he reached the age of twenty-one. The evidence showed that defendant had been involved in drug dealing and had a prior criminal record, albeit not a serious history of offenses. His offense was heinous and brutal and evidenced a complete disregard for human dignity and life. Although his behavior in the juvenile detention facility showed

improvement at the time of sentencing, a fortuity that might be explicable for any number of reasons, it is not disputed that defendant had an abnormally large amount of behavioral difficulties at the youth home. None of the witnesses could guarantee that defendant would not pose a threat to the public when released at age twenty-one. Based on the record, we cannot say that the trial court was mistaken in finding that the public welfare and security would best be served by sentencing defendant as an adult.

Clearly indicating that the seriousness of his offense and the need for protection of society weighed heavily against sentencing defendant as a juvenile and acknowledging the extreme difficulty of its task, the trial court decided to sentence defendant as an adult to a 22 ½ to 40-year term of imprisonment. The trial court was presented with a serious offender who, despite having a potential for rehabilitation in the juvenile system, would not likely receive the rehabilitative assistance he desperately needs in four years of juvenile detention. The facts of defendant's case are strikingly similar to the circumstances presented to this Court in *People v Black*, 203 Mich App 428; 513 NW2d 152 (1994). In that case, the juvenile offender had committed first-degree murder and, if sentenced as an adult, would receive a mandatory life sentence of imprisonment. Like defendant, the seventeen-year-old in *Black* also displayed an amenability to juvenile treatment. However, she was not likely to receive adequate treatment before the end of juvenile detention. We wrote of the dilemma that faced sentencing judges in the absence of legislative will to meaningfully address the needs of this type of juvenile offender:

The testimony at the sentencing hearing showed that defendant had a real chance at being rehabilitated. The testimony also showed that she would not be subject to the juvenile system for a period sufficient to accomplish the rehabilitation. This left the trial court with two bad alternatives: sentence defendant as a juvenile and thereby endanger society, or sentence defendant as an adult and condemn a potentially salvageable child to spend the rest of her life in prison. Under the circumstances, we cannot say that the trial court erred in making the choice it made. [*Id.* at 431.]

Accordingly, we find no abuse of discretion here.

Affirmed.

/s/ Michael R. Smolenski
/s/ Michael J. Kelly
/s/ Roman S. Gibbs

¹ 1996 PA 247 and 1996 PA 248, which became effective on January 1, 1997, substantially changed Michigan's juvenile sentencing scheme. Juveniles convicted of second-degree murder, like defendant, are now mandatorily sentenced "in the same manner as an adult." MCL 769.1(1)(h); MSA 28.1072(1)(h). The amendments also revised the juvenile sentencing criteria. The trial court is now to weigh the following criteria in determining whether to sentence the offender as an adult or a juvenile:

- (a) The seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm or other dangerous weapon, and the impact on any victim.
- (b) The culpability of the juvenile in committing the alleged offense, including, but not limited to, the level of the juvenile's participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines.
- (c) The juvenile's prior record of delinquency, including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior.
- (d) The juvenile's programming history, including, but not limited to, the juvenile's past willingness to participate meaningfully in available programming.
- (d) The adequacy of the punishment or programming available in the juvenile justice system.
- (f) The dispositional options available for the juvenile. [MCL 769.1(3)(a)-(f); MSA 28.1072(3)(a)-(f).]

Moreover, the trial court is now required to give "greater weight to the seriousness of the alleged offense and the juvenile's prior record of delinquency." MCL 769.1(3); MSA 28.1072(3).