

* * * FOR COURT USE ONLY * * *

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

No. 172504

-v-

Delayed Application
for Leave to Appeal

TEDDY WILLIAM STEPHENS,

Defendant-Appellant.

TO: Judges
FROM: Allan Falk
DATE: April 7, 1994; for submission April 19, 1994.

COMMISSIONER'S REPORT

FACTS:

Defendant has filed a delayed application for leave to appeal from an August 26, 1993 opinion and order of the Macomb County Circuit Court, Hon. Michael D. Schwartz presiding, denying defendant's motion for relief from judgment.

In 1985, following a jury trial before the Hon. Lawrence P. Zatkoff, defendant was convicted of second-degree murder in the shooting death of his wife. Although the First Edition of the Sentence Guidelines recommended a sentence of 1 to 7 years imprisonment, Judge Zatkoff departed from the guidelines and imposed a sentence of 15 to 30 years. Judge Zatkoff gave as his principal reasons for departure his belief that the First Edition of the Guidelines was out of kilter with respect to sentencing for homicide offenses generally and second-degree murder in particular. He expressed himself as believing that

the guidelines would send the wrong message to society by indicating that life could be taken for a penalty as cheap as 1 to 7 years of imprisonment.

On appeal of right, defendant raised a number of issues concerning the propriety of his conviction, and also challenged the sentence as not being individualized. This Court reversed on an evidentiary issue, but the matter was remanded by the Supreme Court for reconsideration. Again, this Court reversed and ordered a new trial, and did not reach the sentencing issue in consequence. This time, the Supreme Court reinstated defendant's conviction, and defendant now claims the sentencing issue was never addressed, although defendant did not file a motion for reconsideration with the Supreme Court to point out this oversight and request a remand to this Court for evaluation of that now important issue. Instead, after the Supreme Court's decision, defendant filed a motion for relief from judgment, leading to the present application.

Defendant states the issue for review as follows:

ISSUE:

"DID THE TRIAL COURT ERR IN FAILING TO GRANT DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT WHERE THE SENTENCING COURT ORIGINALLY SENTENCED DEFENDANT TO TWICE THE GUIDELINE RECOMMENDATION BECAUSE HE DISAGREED WITH THE GUIDELINES AND FAILED TO INDIVIDUALLY TAILOR DEFENDANT'S SENTENCE TO THE PARTICULAR CIRCUMSTANCES INVOLVING THE PRESENT OFFENSE AND OFFENDER?"

ANALYSIS:

The delayed application for leave to appeal should be denied.

Defendant begins by citing People v Milbourn, 435 Mich 630 (1990), for its rule of proportionality, although in closing argument

before Judge Schwartz, defense counsel reiterated that he was arguing only failure to individualize the sentence, and not lack of proportionality. All that notwithstanding, Milbourn by its terms is not retroactive, but if it were its first principle is that the Second Edition of the Sentencing Guidelines provides the starting point for a proportionality analysis. A sentence within the Second Edition Guideline Range is presumed to be proportionate, and either the defendant or the prosecutor has a heavy burden of establishing that a sentence within such range is disproportionate.

Under the Second Edition of the Guideline range, translating defendant's sentence information report scores from the First to the Second Edition, defendant receives 25 points for offense variable 3, unpremeditated intent to kill, exactly equivalent to the 2 points he received under OV 3 under the First Edition. Those 25 points place him at Level A-III, where the guideline range is 8 to 25 years imprisonment.

Thus, under a proportionality analysis, defendant's sentence is within the guideline range and, there being no contention that a sentence within the range is disproportionate, or any reason to believe that there are unusual factors about defendant which would make such a sentence inappropriate, any contention of disproportionality, irrespective of the fact that the rule does not benefit defendant because of its lack of retroactivity, must fail.

More than that, however, the Second Edition Guideline range shows that Judge Zatkoff was prescient in evaluating the First Edition Guideline ranges as wholly inadequate. In fact, the Second Edition shows that the First Edition Guideline range was far too lenient,

since the identical range now begins at 8 years instead of 1 and extends up to 25 years instead of to only 7.

Bearing in mind that defendant was sentenced before Milbourn, the applicable review principle is that, under the First Edition of the Guidelines, the trial court was not only free to depart from the guideline range, but encouraged to do so, the sole limitation being that it state reasons on the record justifying the departure. So long as those reasons are legally cognizable, and here the reasons given, protection of society and deterrence of others, are specifically deemed appropriate, the abuse of discretion review standard precludes appellate relief unless the sentence is one which "far exceeds what all reasonable persons would perceive to be an appropriate social response to the crime committed and the criminal who committed it." People v Richard Johnson, 146 Mich App 809, 811 (1985), quoting People v Coles, 417 Mich 523, 542-543 (1983). In these circumstances, this Court will afford relief only if it finds the trial court abused its discretion to the extent the sentence shocks the Court's judicial conscience. People v Clardy, 172 Mich App 666, 668 (1988).

It might also be noted that, if defendant were to be granted resentencing, any such resentencing would be under the Second Edition of the Guidelines, so his guideline range would now be 8 to 25 years instead of 1 to 7 years. Instead of needing to justify a sentence of 15 to 30 years, the court would need to justify a sentence as low as 1 to 7 years. Even if there was error, it was harmless, particularly when it is recognized that Judge Schwartz, who would conduct any such resentencing, after taking the matter under advisement, sees no reason

to adjust defendant's sentence. People v Watroba, 89 Mich App 718, 725 (1979). It is a waste of scarce judicial resources to direct a resentencing when an equivalent result is a foregone conclusion.

RECOMMENDATION:

The delayed application for leave to appeal should be denied. A proposed order has been prepared for the Court's consideration.

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Court of Appeals, State of Michigan

ORDER

People v Teddy William Stephens

Presiding Judge

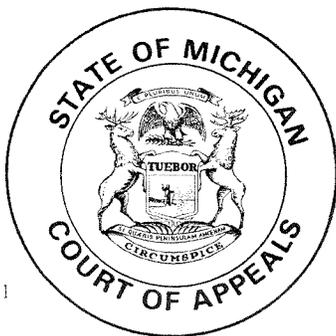
Docket # 172504

L. C. # 85-454-FC

Judges

The Court orders that the delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

A true copy entered and certified by Ella Williams, Chief Clerk, on



_____ Date

Ella Williams

Chief Clerk