

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY LEE MORRIS,

Defendant-Appellant.

UNPUBLISHED

July 29, 2003

No. 238503

Muskegon Circuit Court

LC No. 99-169595-FC

Before: Zahra, P.J., and Talbot and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from a sentence of thirty to fifty-five years' imposed for a conviction of second-degree murder, MCL 750.317. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In exchange for dismissal of a first-degree murder charge, defendant pleaded guilty to second-degree murder and was sentenced to 37½ to 60 years in prison. The trial court later granted defendant's motion for relief from judgment, MCR 6.502, and resentenced him under the Michigan Sentencing Guidelines (2nd ed, 1988), which set a minimum sentence range of twelve years' to twenty-five years' or life imprisonment.

Defendant first contends that the trial court erred in scoring offense variables (OV) 3, 4 and 25. Because defendant does not contend that the factual bases for the court's scoring of OV 3 and OV 4 was false or unsupported, but simply challenges "the judge's calculation of the sentencing variable on the basis of his discretionary interpretation of the unchallenged facts," he has not stated a claim for relief. *People v Mitchell*, 454 Mich 145, 176; 560 NW2d 600 (1997). Although defendant does challenge the factual basis underlying the court's scoring of OV 25, we find no merit to his contention. The defendant's statements at the plea proceeding and the information in the presentence report indicated that, in addition to committing murder, defendant conspired to commit breaking and entering an occupied dwelling, conspired to commit robbery, and committed both a breaking and entering and a robbery. Thus, the trial court did not err in finding that defendant had committed three or more contemporaneous criminal acts.

Defendant next contends that the trial court imposed a disproportionate sentence when it elected to depart upwards from the sentencing guidelines. This Court's review is limited to determining whether the trial court abused its discretion by violating the principle of proportionality. *People v St John*, 230 Mich App 644, 649; 585 NW2d 849 (1998). An abuse of

discretion will be found “where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender.” *People v Castillo*, 230 Mich App 442, 447; 584 NW2d 606 (1998).

A sentence must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *St. John, supra* at 649. “The crucial test for proportionality is not whether the sentence departs from, or adheres to, the recommended range under the sentencing guidelines, but whether it reflects the seriousness of the matter.” *Castillo, supra* at 447-448. The court may depart from the guidelines where there are legitimate factors not considered by the guidelines, where there are factors considered but inadequately weighed by the guidelines, or where the recommended sentencing range is disproportionate to the seriousness of the offense. *Id.* at 448; *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994).

Various factors supported the trial court’s decision to depart from the guidelines, including the fact that this was a particularly brutal crime in which a defenseless elderly man died from a severe beating, *People v Haywood*, 209 Mich App 217, 233; 530 NW2d 497 (1995), that defendant pleaded guilty to a lesser charge in exchange for dismissal of the first-degree murder charge, *People v Brzezinski (After Remand)*, 196 Mich App 253, 256; 492 NW2d 781 (1992), that defendant had 11 misconduct citations while in prison, *People v Watkins*, 209 Mich App 1, 6; 530 NW2d 111 (1995), and that defendant’s score of 105 for the offense variables was more than double the fifty points necessary to reach the highest offense severity level, *People v Sarah Stewart*, 442 Mich 937; 505 NW2d 576 (1993). Under the circumstances, the trial court did not abuse its discretion by departing upwards from the guidelines by five years.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Donald S. Owens