

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD DUDLEY,

Defendant-Appellant.

UNPUBLISHED

December 18, 1998

No. 206960

Recorder's Court

LC No. 94-012209

Before: Murphy, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Defendant was originally charged with first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Following a bench trial, defendant was convicted of voluntary manslaughter, MCL 750.321; MSA 28.553, and felony-firearm. He was sentenced to ten to fifteen years' imprisonment on the voluntary manslaughter conviction, to be served consecutively to two years' imprisonment on the felony-firearm conviction. This Court subsequently remanded the case for resentencing because the trial court had utilized an incorrect sentencing guideline. *People v Dudley*, unpublished opinion per curiam of the Court of Appeals, issued June 27, 1997 (Docket No. 190974). On remand, defendant was again sentenced to ten to fifteen years' imprisonment on the voluntary manslaughter conviction, to be served consecutively to two years' imprisonment on the felony-firearm conviction. Defendant appeals as of right from this resentencing. We affirm.

Defendant first contends that the trial judge misinterpreted and misscored the applicable sentencing guidelines. The Michigan Supreme Court's sentencing guidelines do not have the force of law. *People v Mitchell*, 454 Mich 145, 175; 560 NW2d 600 (1997). Therefore, it is not a legal error if a sentencing judge miscalculates a variable. *Id.* Nor does legal error exist when a defendant claims on appeal that the guidelines were misapplied because there was an insufficient factual foundation for the score given, or because the sentencing judge misinterpreted the instructions. *Id.* at 173. Relief from scoring and misinterpretation errors is thus not available from this Court, *id.* at 176, and we reject defendant's various arguments that the trial court misscored offense variables 3, 9 and 13.

Defendant also suggests that the trial court relied on incorrect factual assumptions in resentencing him. A defendant's due process right to be sentenced on correct information is implicated only when the sentence is based on an extensively and materially false foundation. *Id.* at 173 (quoting

Townsend v Burke, 334 US 736, 741; 68 S Ct 1252; 92 L Ed 1690 (1948)). In discussing the senseless nature of the shooting, the trial judge stated, “The deceased was escorted out of a home, I think, after some damage to your [defendant’s] vehicle,” when the evidence indicated that the vehicle the victim damaged belonged to the him, not to defendant. Our review of the record reveals that the trial judge did not, however, rely on the property status of the vehicle in resentencing defendant, and we conclude that this minor factual misstatement did not render the factual foundation underlying the sentence “extensively and materially false.” *Mitchell, supra*.

Next, defendant argues that on resentencing the trial judge imposed a disproportionate sentence. Sentencing decisions are subject to review under an abuse of discretion standard. *People v Milbourn*, 435 Mich 630, 634-636, 461 NW2d 1 (1990). An abuse of discretion exists if the sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* at 636. The 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. *Id.* at 661. A sentencing court may depart from the guidelines in either direction whenever the guidelines recommend a range that the court believes is disproportionate to the seriousness of the crime, *id.* at 657, but should not depart from the guidelines without articulating reasoning for the decision that is not reflected adequately in the guidelines themselves. *Id.* at 659. The sentencing court may also depart from the guidelines based on factors that are already considered in the guidelines, but such decisions should be made cautiously. *Id.* at 660 n 27. It is not an abuse of discretion to impose the maximum sentence allowed by the Legislature when compelling aggravating factors exist. *People v Merriweather*, 447 Mich 799, 807; 527 NW2d 460 (1994).

The trial court did not abuse its discretion in imposing a ten to fifteen year sentence for defendant’s voluntary manslaughter conviction. This Court previously determined that twenty-four to eighty-four months constituted the applicable minimum guidelines range. *Dudley, supra* at slip op p 2. However, the guideline offense variables applied in calculating defendant’s recommended sentence range did not take into account the particularly senseless nature of this crime, which involved defendant shooting the victim in the back of the head, apparently in response to the victim’s damage of personal property, specifically a vehicle. The senseless nature of the crime was properly taken into account by the trial court. *People v Hunter*, 176 Mich App 319, 320-321; 439 NW2d 334 (1989). Nor did the guidelines contemplate that almost three years after the incident and after almost two years in prison defendant would still lack remorse for his actions, as the trial court appropriately considered in resentencing defendant. *Id.* Nor did the guidelines take into account defendant’s misconduct while in prison, as the trial court also properly considered. *People v Watkins*, 209 Mich App 1, 6; 530 NW2d 111 (1995). Therefore, we conclude that the trial court adequately explained its decision to exceed the sentencing guidelines, and that the term of incarceration imposed on resentencing was not disproportionate to the offense or the offender.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Hilda .R. Gage