

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DAWN MARIE DIXON-BEY,

Defendant-Appellee.

Supreme Court No. 156746

Court of Appeals No. 331499

Jackson Circuit Court
No. 15-004596-FC

**BRIEF OF ATTORNEY GENERAL BILL SCHUETTE AS AMICUS CURIAE
IN SUPPORT OF THE PEOPLE OF MICHIGAN**

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

B. Eric Restuccia (P49550)
Chief Legal Counsel

Linus Banghart-Linn (P73230)
Assistant Attorney General
Attorneys for Amicus Curiae
Attorney General
Criminal Appellate Division
P.O. Box 30217
Lansing, MI 48909
517-373-4875

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TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| Index of Authorities | ii |
| Counter-Statement of Questions Presented..... | iv |
| Statutes Involved..... | v |
| Introduction | 1 |
| Statement of Facts and Proceedings..... | 2 |
| Argument | 2 |
| I. When a sentence can be overturned for falling outside the sentencing guidelines, the guidelines are not truly advisory. | 2 |
| II. The role of the sentencing court includes considering all of the evidence and finding facts by a preponderance standard. | 7 |
| A. MCL 777.36(2) does not require trial courts to ignore the evidence of a murderer’s mens rea in sentencing, only when scoring the guidelines..... | 8 |
| B. There is no prohibition on considering acquitted conduct in setting a sentence..... | 9 |
| Conclusion and Relief Requested..... | 11 |

INDEX OF AUTHORITIES

Cases

| | |
|---|---------|
| <i>People v Ellen</i> , unpublished opinion per curiam of the Court of Appeals, issued February 1, 2018 (Docket No. 325627) | 3 |
| <i>People v Gailey</i> , unpublished opinion per curiam of the Court of Appeals, issued May 22, 2018 (Docket No. 333811) | 3 |
| <i>People v Lee</i> , unpublished opinion per curiam of the Court of Appeals, issued April 5, 2018 (Docket No. 316110) | 3 |
| <i>People v Lockridge</i> , 498 Mich 358 (2015) | passim |
| <i>People v Milbourn</i> , 435 Mich 630 (1990) | 3, 5, 6 |
| <i>People v Rumpf</i> , unpublished opinion per curiam of the Court of Appeals, issued January 30, 2018 (No. 333544) | 3 |
| <i>People v Schwander</i> , unpublished opinion per curiam of the Court of Appeals, issued May 22, 2018 (Docket No. 320768) | 3 |
| <i>People v Sleeper</i> , unpublished opinion per curiam of the Court of Appeals, issued April 19, 2018 (Docket No. 337069) | 3 |
| <i>People v Smith</i> , unpublished opinion per curiam of the Court of Appeals, issued March 6, 2018 (Docket No. 328736) | 3 |
| <i>People v Steanhouse</i> , 322 Mich App 233 (2017) | 3, 5 |
| <i>People v Steanhouse</i> , 500 Mich 453 (2017) | 3, 5, 6 |

People v Zarn,
unpublished opinion per curiam of the Court of Appeals, issued March 27,
2018 (Docket No. 323280) 3

United States v Watts,
519 US 148 (1997) 9

Statutes

MCL 769.34 8

MCL 777.36 8

Constitutional Provisions

Const 1963, art 4, § 45 4

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. In *People v Lockridge*, 498 Mich 358 (2015), this Court declared the sentencing guidelines advisory only, a holding that was reiterated in *People v Steanhouse*, 500 Mich 453 (2017). Under an advisory guidelines regime, may the Court of Appeals reverse a sentence because the trial court has departed from the guidelines without adequately setting forth extraordinary circumstances justifying the departure?

Appellant's answer: No.

Appellee's answer: Yes.

Trial court's answer: Did not answer.

Court of Appeals' answer: Yes.

Amicus's answer: No.

2. In scoring the guidelines and in imposing a sentence, the trial court is required to review all the record evidence, find facts on a preponderance standard, and sentence based on those findings. Did the trial court abuse its discretion in finding that the murder in this case was especially heinous, justifying a long term-of-years sentence?

Appellant's answer: No.

Appellee's answer: Yes.

Trial court's answer: No.

Court of Appeals' answer: Yes.

Amicus's answer: No.

STATUTES INVOLVED

MCL 777.36 provides in part:

(1) Offense variable 6 is the offender's intent to kill or injure another individual. . . .

* * *

(2) All of the following apply to scoring offense variable 6.

(a) The sentencing judge shall score this variable consistent with a jury verdict unless the judge has information that was not presented to the jury.

* * *

INTRODUCTION

Michigan's trial courts are receiving mixed messages from the appellate courts. On the one hand, in *Lockridge* and *Steanhouse*, this Court has told trial courts that they must score the sentencing guidelines and consider them in imposing a sentence, but that the guidelines are only advisory and that they are free to depart from them as long as the sentence imposed is reasonable. On the other hand, the Michigan Court of Appeals has repeatedly reversed trial courts and vacated sentences not because it has found that the sentences imposed were unreasonable, but because it has found that trial courts have failed to adequately justify their decision to depart from the guidelines range.

A sentencing system under which a reasonable sentence can be reversed because it departs from the guidelines range without sufficient justification looks very much like the mandatory-guidelines system this Court held unconstitutional in *Lockridge*. If the guidelines are to be advisory in more than name only, this Court should make clear that review of out-of-guidelines sentences must be deferential, and that failure to comply with the advisory guidelines must not be a basis for reversal.

This Court should also hold that any relevant facts the trial judge finds by a preponderance standard and that are supported by evidence can, and should, be used to help the trial court select a proportionate sentence. The role of the trial judge at sentencing is to tailor an appropriate sentence based on the seriousness of the offense and the offender. If the trial judge is required to ignore relevant facts that have been established to the appropriate standard simply because they have

not been established up to a higher standard, the result will be less proportionate sentences. Only by allowing sentencing courts to examine all relevant facts and circumstances about the offense and the offender will proportionate sentencing be achieved.

STATEMENT OF FACTS AND PROCEEDINGS

The Attorney General accepts the People's statement of facts.

ARGUMENT

I. When a sentence can be overturned for falling outside the sentencing guidelines, the guidelines are not truly advisory.

The Legislature imposed the sentencing guidelines to restrain the discretion of sentencing courts. The statute as enacted required courts to sentence within the guidelines except when extraordinary circumstances justified a higher or lower sentence. In *People v Lockridge*, this Court held that such restraint, when imposed using judge-found facts, violated the Sixth Amendment. 498 Mich 358, 364 (2015). As a remedy, *Lockridge* declared that the guidelines would henceforth be advisory only. *Id.* at 365. *Lockridge* also invalidated the guideline provision that required trial courts to provide substantial and compelling reasons for sentences that depart from the guidelines range. *Id.* at 364–365.

In spite of this, since *Lockridge* the Michigan Court of Appeals has repeatedly vacated out-of-guidelines sentences because it believes that the trial court has not

satisfactorily justified its decision not to sentence within the guidelines.¹ This Court should reverse the decision below to make clear that sentencing outside the guidelines—or insufficiently explaining a decision to sentence outside the guidelines—cannot alone be a basis for reversing a sentence. Rather, as *Lockridge* held and *People v Steanhouse* reiterated, the Michigan Court of Appeals may review out-of-guidelines sentences for reasonableness. *Lockridge*, 498 Mich at 392; *Steanhouse*, 500 Mich 453, 471 (2017). That is, the question on review must be whether the *sentence* is reasonable, not whether the *departure* is reasonable.

This is not to say the guidelines should play *no* role in reviewing an out-of-guidelines sentence. As this Court held in *People v Milbourn*, a departure from the guidelines “should alert the appellate court to the *possibility* that the trial court has violated the principle of proportionality and thus abused its sentencing discretion.”

¹ See, e.g. *People v Gailey*, unpublished opinion per curiam of the Court of Appeals, issued May 22, 2018 (Docket No. 333811); *People v Schwander*, unpublished opinion per curiam of the Court of Appeals, issued May 22, 2018 (Docket No. 320768) (“A departure’s extent is also subject to reasonableness review. . . . [W]hen imposing a departure sentence, a court must justify why the sentence imposed is more proportionate than a lesser sentence would have been.”); *People v Lee*, unpublished opinion per curiam of the Court of Appeals, issued April 5, 2018 (Docket No. 316110); *People v Smith*, unpublished opinion per curiam of the Court of Appeals, issued March 6, 2018 (Docket No. 328736); *People v Ellen*, unpublished opinion per curiam of the Court of Appeals, issued February 1, 2018 (Docket No. 325627) (“While the trial court may have articulated sufficient reasons for a sentencing departure, it also had a duty to explain why the *extent* of the departure is warranted.”); *People v Rumpf*, unpublished opinion per curiam of the Court of Appeals, issued January 30, 2018 (No. 333544); *People v Steanhouse*, 322 Mich App 233 (2017) (*Steanhouse III*). Even in cases affirming out-of-guidelines sentences, the Court of Appeals has applied the too exacting standard. See, e.g., *People v Sleeper*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2018 (Docket No. 337069); *People v Zarn*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2018 (Docket No. 323280).

435 Mich 630, 660 (1990) (emphasis added). The guidelines reflect the considered view of the Legislature as to what type of sentence is appropriate under a particular set of circumstances. Our Constitution houses sentencing authority in the Legislature. Const 1963, art 4, § 45. Even when the commands of the Legislature are rendered mere suggestions, they ought to hold some sway.

Where there are no facts that take a case outside the mine run of a particular offense, that should indicate both to the trial court and to a reviewing court that a sentence within the range the Legislature deemed appropriate is a more proportionate sentence than one outside the guidelines. And accordingly, when a court sentences outside the guidelines, it ought to point to some fact that makes the crime it is sentencing less serious or more serious than a typical case of that type might be. But a trial judge's failure to point to some such fact should not be automatic cause for reversal. The question for the reviewing court must be whether the sentence is reasonable. If the reviewing court can tell that the sentence is reasonable even without an adequate explanation from the trial judge, it should affirm. Only where it appears the sentence may be unreasonable should the reviewing court remand to the trial court so that the judge may provide a fuller explanation.

Beyond that, however, reviewing courts should take a light touch in using the guidelines to review out-of-guidelines sentences. When the Court of Appeals reverses trial courts for failing to justify their departure sentences, it is enforcing the mandatory-guidelines regime this Court tried to strike down in *Lockridge*.

The court below erred both in treating the out-of-guidelines sentence as presumptively unreasonable and in reviewing the departure, rather than the sentence itself, for reasonableness. On the latter point, this Court expressly stated in *Steanhouse* that reasonableness review must focus on the sentence itself, not on the departure: “Rather than impermissibly measuring proportionality by reference to deviations from the guidelines, our principle of proportionality requires ‘sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.’” *Steanhouse*, 500 Mich at 474, quoting *Milbourn*, 435 Mich at 636. Yet despite this express rule, the court below explicitly began its analysis by saying, “It is our view that the 15-year upward departure was unreasonable, . . .” (Op. at 18.) But after *Lockridge* and *Steanhouse*, the Court of Appeals should not be deciding whether a departure is reasonable, but whether a sentence is reasonable. Later, the court below said, “Of the various factors discussed by the trial court, none provided reasonable grounds for the departure.” (Op. at 19.) Again, the trial court does not need to justify the departure, but the *sentence*.

The court below concluded that the upward departure was unreasonable because “the trial court did not adequately explain why a minimum sentence of 35 years was more proportionate than a different sentence within the guidelines would have been.” (Op. 19.) This approach incorrectly treats proportionality as addressing uniformity across offenders, contrary to this Court’s instruction that proportionality must focus on the specific circumstances at hand—on “the

seriousness of the circumstances surrounding the offense and the offender.’ ”

Steanhouse, 500 Mich at 474, quoting *Millbourn*, 453 Mich at 636. Instead, the Court of Appeals should have affirmed the sentence in this case because the trial court correctly scored the guidelines, took the guidelines into account, but decided based on the facts and circumstances of this specific crime, that a minimum sentence of 20 years (the top of the scored guidelines range) was too lenient and that a 35-year minimum sentence was more proportionate. The facts justifying the 35-year minimum sentence (not the 15-year departure) were laid out well by the dissenting judge below:

[The trial court] noted what it saw as a heightened level of depravity underlying this particular murder, its ‘cold calculated nature,’ the fact that defendant stabbed the victim in the heart not once but twice, the fact that she had stabbed the victim in the past and that she had told a third party that she could stab the victim in the chest and then claim self-defense (precisely as she later did in this case), the fact that she disposed of the murder weapon after the killing, and the fact that her relatively young age necessitated a lengthy sentence to adequately secure the protection of the public. [Dissenting Op. at 5.]

The Court of Appeals majority reached a contrary conclusion because the majority was asking the wrong questions. The question for the reviewing court should *not* be whether each of these facts was accounted for in the sentencing guidelines, whether each of these facts was *adequately* accounted for in the sentencing guidelines, whether the trial court satisfactorily *explained* whether each of these facts was adequately accounted for in the sentencing guidelines, whether the trial court’s explanation of these facts was sufficient to explain why an upward departure was appropriate, or whether the trial court’s explanation of these facts was sufficient to explain why a sentence 15 years above the guidelines was

appropriate. Instead, the question should be much simpler: was the sentence proportionate to the circumstances of the offense and the offender.

When reviewing courts flyspeck a trial court's decision to sentence above the guidelines in this way, with an eye to reversing, they are treating the guidelines as mandatory. The question for the reviewing court should be whether the trial court abused its discretion in deciding that a woman who stabs her boyfriend to death in cold blood must spend 35 years in prison before being considered for parole. It did not, and this Court should reverse.

II. The role of the sentencing court includes considering all of the evidence and finding facts by a preponderance standard.

This Court has also asked the parties to address the factual findings a trial court is permitted to rely on in imposing an appropriate sentence. This Court's order asks whether the trial court abused its discretion in departing upward if it "sentenced the defendant according to an independent finding that [Dixon-Bey] committed first-degree murder," and whether the trial court abused its discretion by "depart[ing] upward based on facts established by a preponderance of the evidence that the jury did not find were established beyond a reasonable doubt." (5/4/18 Mich Sup Ct Order.)

It is not immediately clear what the difference between these two questions is. The particular "fact[] established by a preponderance of the evidence" that the court relied on here is its "independent finding that [Dixon-Bey] committed first-degree murder." It appears the Court is asking (as Dixon-Bey argues in her

supplemental brief) *first*, whether the trial court abused its discretion in consider her guilty of first-degree murder because MCL 777.36(2) bars such a consideration, and *second*, whether more generally courts must not consider acquitted conduct in passing a sentence. The trial court did not abuse its discretion for either reason.

A. MCL 777.36(2) does not require trial courts to ignore the evidence of a murderer’s mens rea in sentencing, only when scoring the guidelines.

Offense variable 6, MCL 777.36, is “the offender’s intent to kill or injure another individual.” The available scores correspond to the mental states of first-degree murder (50 points), second-degree murder (25 points), and voluntary manslaughter (10 points). MCL 777.36(1)(a), (b), & (c), (respectively). MCL 777.36(2)(a) requires the trial court to score OV 6 “consistent with a jury verdict unless the judge has information that was not presented to the jury.” And so, because Dixon-Bey was convicted of second-degree murder, the trial court properly scored OV 6 at 25 points.

The Legislature has also set forth a list of facts that may not be considered in imposing a departure sentence: a sentencing court may not impose a departure sentence based on “an individual’s gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion[.]” MCL 769.34(3)(a). Absent from this list of forbidden considerations, of course, is the mens rea the defendant possessed when committing the crime.

Thus, although the Legislature has barred trial courts from using a defendant's mental state established by a preponderance standard in scoring the sentencing guidelines, it has chosen not to forbid such a consideration altogether. The majority below was "highly skeptical" of the trial court's ability to consider Dixon-Bey's mens rea under a preponderance standard in setting the sentence. But this Court should hold that trial courts are not only allowed to, but required to consider *all* relevant evidence that has been proven to a preponderance standard. The best way to achieve proportionate sentences is to ensure that courts have access to as much relevant information as possible.

B. There is no prohibition on considering acquitted conduct in setting a sentence.

A not-guilty verdict is not a finding of innocence. Because of the different standards involved, there is no contradiction in the jury's finding that premeditation and deliberation were not proven beyond a reasonable doubt, and the trial court's finding that premeditation and deliberation *were* found by a preponderance standard. The United States Supreme Court has squarely held that a court may consider acquitted conduct in choosing a sentence. *United States v Watts*, 519 US 148, 149 (1997) (per curiam).

Dixon-Bey cannot argue that this Court should overrule *Watts*, so she attempts to distinguish *Watts* by arguing that it was based on a Fifth Amendment challenge rather than a Sixth Amendment challenge. But the consideration of acquitted conduct (or any other judge-found fact) in setting a sentence within an

available range does not implicate the Sixth Amendment. The Sixth Amendment problem this Court identified in *Lockridge* was in using judge-found facts to set a guidelines range, not to choose a sentence *within* a guidelines range. Or, as *Lockridge* succinctly put it, “[U]nrestrained judicial discretion within a broad range is in; legislative constraints on that discretion that increase a sentence . . . beyond that authorized by the jury’s verdict are out.” 498 Mich at 375.

When the trial court in this case considered the fact that Dixon-Bey’s murder of her boyfriend was premeditated, deliberate, and done in cold blood, that fact was not used to elevate the guidelines range or to exceed the statutory maximum the Legislature authorized for second-degree murder. That fact did not make any lower sentence unavailable to the trial court, nor did it make any higher sentence available that would not have been available without the finding. This was simply a fact that the trial court relied on in choosing a sentence from within the permissible range. As such, it presents no *Lockridge* problem.

CONCLUSION AND RELIEF REQUESTED

This Court should grant leave and reverse the Court of Appeals, or peremptorily reverse, and hold that reviewing courts should no longer reverse valid sentences for straying outside the guidelines. In the alternative, this Court should at a minimum remand to the Court of Appeals to review the sentence (not the departure) using an analysis that is compatible with an advisory guidelines system.

This Court should further hold that a sentencing court may and should consider all relevant information that has been proven to a preponderance standard, in order to set a fully informed and proportionate sentence.

Respectfully submitted,

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

B. Eric Restuccia (P49550)
Chief Legal Counsel

s/Linus Banghart-Linn

Assistant Attorney General
Attorneys for Amicus Curiae
State of Michigan
Criminal Appellate Division
P.O. Box 30217
Lansing, MI 48909
517-373-4875
P73230

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