

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ALLAN ASHBAKER,

Defendant-Appellant.

---

UNPUBLISHED

September 28, 2001

No. 232967

Genesee Circuit Court

LC No. 00-006101-FC

Before: Cavanagh, P.J. and Markey and Cooper, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from sentences of 6½ to 22½ years and to three to five years for plea-based convictions of unarmed robbery, MCL 750.530, and felon in possession of a firearm, MCL 750.224f, respectively. We vacate and remand for resentencing. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Because the crimes occurred after January 1, 1999, they were subject to the statutory sentencing guidelines. MCL 769.34(2). The minimum range for defendant's robbery conviction was nineteen to forty-seven months and the minimum range for his firearm conviction was seven to twenty-three months. The court must impose a minimum sentence within the guidelines range unless it finds a substantial and compelling reason to depart from the guidelines. MCL 769.34(2), (3). The court may depart from the guidelines if it "has a substantial and compelling reason for that departure and states on the record the reasons for the departure." MCL 769.34(3).

"[T]he Legislature intended 'substantial and compelling reasons' to exist only in exceptional cases." *People v Fields*, 448 Mich 58, 68; 528 NW2d 176 (1995). Only objective factors that are capable of verification may be used to assess whether there are substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *People v Babcock*, 244 Mich App 64, 75; 624 NW2d 479 (2000). "The determination regarding the existence, or nonexistence, of a particular reason or factor is reviewed on appeal under the clearly erroneous standard." *People v Perry*, 216 Mich App 277, 280; 549 NW2d 42 (1996). The determination that a particular factor is objective and verifiable is reviewed by this Court as a matter of law. *Babcock*, *supra* at 76. The trial court's determination that objective and verifiable factors present a substantial and compelling reason to depart from the statutory minimum sentence is reviewed for an abuse of discretion. *Id.*

The trial court departed from the guidelines because the unarmed robbery conviction did not reflect the fact that defendant had been armed with a gun, because defendant committed the instant offenses only a month after being placed on probation for a prior offense, and because of the need to protect the community. Defendant's use of a weapon is an objective verifiable factor, but was taken into consideration under offense variables 1 and 2. The fact that defendant was on probation for a prior felony is an objective verifiable factor, but is considered by prior record variables 2 and 6. Therefore those factors cannot be used as a basis for departure unless the guidelines gave them inadequate weight. MCL 769.34(3)(b). Given that defendant's scores on OV 1 and OV 2 accounted for the majority of his offense variable points and that defendant's scores on PRV 2 and PRV 6 accounted for nearly half of his prior record variable points, we find that the guidelines gave the facts adequate weight. The need to protect the community is simply a reflection of the defendant's criminal history and recidivism, which are accounted for by the prior record variables and the increase in the upper limit of the guidelines for being an habitual offender. Accordingly, we conclude that the trial court abused its discretion in finding that the factors cited constituted a substantial and compelling reason to depart from the minimum sentence range. We therefore vacate defendant's sentences and remand the case to the trial court for resentencing. MCL 769.34(11).

Vacated and remanded for resentencing. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Jane E. Markey

/s/ Jessica R. Cooper