

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

KENNETH DAVIS,

Defendant-Appellant.

UNPUBLISHED

March 22, 2002

No. 228540

Wayne Circuit Court

LC No. 99-010255

Before: Hood, P.J., and Gage and Murray, JJ.

MEMORANDUM.

Defendant appeals as of right his sentence of 32 to 48 months' imprisonment for discharge of a firearm at a dwelling, MCL 750.234b. We affirm.

Defendant appeals his sentence based on a claim of disproportionality notwithstanding this theory is no longer viable under the legislative guidelines in effect at the time defendant committed the offense. *People v Babcock*, 244 Mich App 64, 77-78; 624 NW2d 479 (2000). This Court instead reviews the sentence to determine whether the judge's departure from the guidelines took place under circumstances permitted by the Legislature. *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). A departure from the guidelines is permissible "if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3).

The trial court had objective and verifiable reasons for exceeding the guidelines. At sentencing, the court explained that its upward departure was based on the fact that defendant had shot at two people and could have killed them both. However, even if the stated reasons are substantial and compelling, a sentencing court may not depart from the guidelines on the basis of an offense or offender characteristic already taken into account in determining the appropriate sentencing range unless the court finds from the facts in the record that the characteristic has been given inadequate or disproportionate weight. MCL 769.34(3)(b); *Babcock, supra*.

Here, defendant's offense score took into account the facts that he discharged a firearm at a person and that he caused injury to the victim that required medical treatment. However, the evidence established that defendant's acts were a great deal graver than a typical discharge of a firearm case. Defendant did not merely discharge a firearm into the house. He intentionally pointed the gun and fired multiple times, narrowly missing the male individual with whom he had a history of bad blood, and then intentionally shooting the female at close range on the front

porch causing her serious injury. The defendant's actions clearly reflect a more serious crime. The exceptional nature of these facts and the inadequacy of the guidelines to address defendant's conduct constitute substantial and compelling reasons for exceeding the guidelines. We therefore conclude that the trial court did not abuse its discretion in imposing defendant's sentence.

Affirmed.

/s/ Harold Hood

/s/ Hilda R. Gage

/s/ Christopher M. Murray