

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

ANTONIO DARNELL ARMSTEAD,

Defendant-Appellant.

UNPUBLISHED

July 9, 2002

No. 237933

Genesee Circuit Court

LC No. 01-007875-FH

Before: Hood, P.J., and Saad and E. M. Thomas,*JJ

PER CURIAM.

Defendant appeals by delayed leave granted from a sentence of three and one-half to ten years for a plea-based conviction of breaking and entering, MCL 750.110. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sentence departed from the recommended intermediate sanction and exceeded the minimum sentence range established by the statutory guidelines. The trial court's determination regarding the existence of a reason or factor warranting departure 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. *People v Babcock*, 244 Mich App 64, 76; 624 NW2d 479 (2000). 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.*

Because the upper end of the guidelines was less than eighteen months', the court was required to impose an intermediate sanction, which could include no more than one year in jail, unless it found "a substantial and compelling reason" to sentence defendant to prison. MCL 769.34(4)(a). Defendant had numerous prior convictions and had been sentenced to jail a dozen times, including once for violating his probation, yet persisted in reoffending. Therefore, the court did not abuse its discretion in finding a substantial and compelling reason for sentencing defendant to prison.

Besides imposing a prison sentence, the court also departed from the guidelines. The court may depart from the guidelines for nondiscriminatory reasons where there are legitimate

* Circuit judge, sitting on the Court of Appeals by assignment.

factors not considered by the guidelines or where factors considered by the guidelines have been given inadequate or disproportionate weight. MCL 769.34(3)(a), (b). “[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. *Babcock*, *supra* at 75.

Defendant’s criminal history is covered by the prior record variables. The fact that he had two prior felony convictions is covered by prior record variable (PRV) 2. PRV 5 considers prior misdemeanor convictions, but its upper limit is seven or more. Given that defendant had at least thirteen misdemeanor convictions plus four other misdemeanor charges that were dismissed, the court could find that PRV 5 was not given adequate weight. In addition, several of defendant’s prior offenses were related to substance abuse and despite the fact that several sentences included substance abuse treatment, defendant persisted in using controlled substances and tested positive for cocaine at his presentence interview. This aspect of defendant’s recidivistic behavior is not considered by the guidelines. Therefore, we find that the trial court did not abuse its discretion in finding substantial and compelling reasons for departure from the guidelines. We further find that the extent of the departure was not disproportionate. *People v Babcock*, __ Mich App __; __ NW2d __ (Docket No. 235518, issued March 19, 2002), slip op. at 3-4.

Affirmed.

/s/ Harold Hood
/s/ Henry William Saad
/s/ Edward M. Thomas