

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN LEE HOOVER,

Defendant-Appellant.

UNPUBLISHED

July 19, 2002

No. 238068

Genesee Circuit Court

LC No. 00-006951-FH

Before: Talbot, P.J., and Cooper and D.P. Ryan*, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from a forty-to-sixty-month sentence imposed for a conviction of attempted third-degree criminal sexual conduct, MCL 750.91; MCL 750.520d(1)(a). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant contends that the trial court erred in departing from the legislative 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.*

The court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is permitted. MCL 769.34(2). 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). Substantial and compelling reasons will be found "to exist only in exceptional cases." *People v Fields*, 448 Mich 58, 68; 528 NW2d 176 (1995).

The court may depart from the guidelines for nondiscriminatory reasons where there are legitimate 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); *People v*

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

Armstrong, 247 Mich App 423, 425; 636 NW2d 785 (2001). 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. In addition, the substantial and compelling factors relied upon by the trial court must justify the particular departure at issue. *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001).

In this case, the guidelines established a minimum sentence range of fourteen to twenty-nine months. The court exceeded the upper limit by eleven months, and included in its reasons defendant's prior record and the fact that the plea bargain affected the guidelines.

Defendant's prior convictions were taken into account by prior record variables 1-5, MCL 777.51-777.55. Not taken into account were two pending felony drug offenses and various prior felony and misdemeanor offenses that were dismissed or were not subject to the guidelines. These are factors not considered under the guidelines. *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994). Therefore, the court did not err in finding that this factor warranted a departure.

The court also found that the plea agreement resulted in the guidelines being lower than they should be. Although the dismissed charge was taken into account by offense variable 11, MCL 777.41, and the guidelines are scored as if the offense were a completed act, MCL 777.21(5), the sentencing grid for the completed offense, MCL 777.63, set a minimum sentence range of 84 to 140 months, which differs significantly from the sentence range for the attempt. The fact that charges were reduced or dismissed pursuant to a plea bargain is a factor that the court can consider in determining whether a departure is warranted. *Armstrong*, *supra* at 426. Therefore, the court did not err in finding that this factor warranted a departure.

The court found two factors not wholly considered by the guidelines that warranted a departure. Those factors, which were based on defendant's prior criminal conduct and the circumstances of the instant offense as detailed in the presentence report, were objective and verifiable. Given defendant's recidivism and his failure to benefit from alternatives to incarceration, the trial court did not abuse its discretion in finding that a departure from the guidelines was warranted in this case. Given the nature of the factors that warranted a departure, the extent of the departure was not disproportionate. *People v Babcock*, __ Mich App __; __ NW2d __ (2002).

Affirmed.

/s/ Michael J. Talbot

/s/ Jessica R. Cooper

/s/ Daniel P. Ryan