

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RASHAD D. WOMACK,

Defendant-Appellant.

UNPUBLISHED

September 20, 2002

No. 233776

Wayne Circuit Court

LC No. 00-004971-01

Before: Whitbeck, C.J., and Sawyer and Kelly, JJ.

PER CURIAM.

Defendant was charged with two counts of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. Following a bench trial, he was convicted of one count of assault with intent to commit great bodily harm less than murder, MCL 750.84, and felony-firearm. He appeals as of right from the five-and one-half to ten-year sentence imposed on the assault conviction. We vacate and remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant contends 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 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.

The guidelines established a minimum sentence range of five to twenty-three months'. The court found that a departure was warranted because the guidelines did not adequately reflect the seriousness of the offense, but did not articulate any objective and verifiable facts that led to that conclusion. The court did find that defendant's employment, educational, and substance abuse histories were offender characteristics not given adequate consideration by the guidelines.

Defendant's lack of employment is objective and verifiable and is not considered by the guidelines, but it cannot be used as a basis for departing from the guidelines. MCL 769.34(3)(a). Defendant's substance abuse history and lack of education are objective and verifiable factor not considered by the guidelines, but the court failed to explain how they "related to his current criminal activity or in any way constituted a substantial and compelling reason for departure, i.e., made defendant's case an 'exceptional' one justifying a guidelines departure." *People v Hornsby*, __ Mich App __; __ NW2d __ (Docket No. 227945, issued May 24, 2002), slip op. at 6. Because the court failed to articulate substantial and compelling reasons that warranted a departure from the guidelines, the case must be remanded for resentencing. MCL 768.34(11).

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

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ Kirsten Frank Kelly