

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH J. WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

January 29, 2004

No. 232255

Wayne Circuit Court

LC No. 00-000326

ON REMAND

Before: Smolenski, P.J., and Neff and White, JJ.

PER CURIAM.

On October 3, 2003, the Michigan Supreme Court issued an order vacating this Court's opinion dated May 21, 2002, and remanding for reconsideration in light of *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003). Although the broad language of the remand order suggests that this Court's opinion is vacated in its entirety, the Supreme Court could not have intended such a result given the limited purpose of the remand. Therefore, except for the sentencing issue affected by *Babcock*,¹ our prior opinion shall stand as written.² As to that sentencing issue, we hold that the trial court erred in finding substantial and compelling reasons to depart from the recommended sentencing guidelines range, and thus, defendant is entitled to resentencing.

Addressing defendant's sentencing issues in our prior opinion, we stated:

Because the instant offenses occurred on October 3, 1999, defendant's sentence is governed by the legislative sentencing guidelines. MCL 769.34. As calculated by the trial court, the guidelines called for a minimum sentence of 225 to 375 months or life imprisonment [for defendant's second-degree murder conviction.] The trial court sentenced defendant to a term of 40 to 85 years, which equates to a term of 480 to 1,020 months. Because the court did not impose a life sentence,

¹ Unless otherwise noted, all citations to *Babcock* refer to our Supreme Court's decision issued July 31, 2003.

² Therefore, defendant's conviction is affirmed and he is not entitled to resentencing based on his argument that the trial court relied on inaccurate information in sentencing defendant.

but imposed a term-of-years sentence whose minimum exceeds the 375-month limitation, the sentence constitutes an upward departure from the guidelines. *People v Johnson*, 202 Mich App 281, 291; 508 NW2d 509 (1993).

A sentencing court may depart from the recommended sentence only when it has “substantial and compelling” reasons for that departure, and states on the record the reasons for departure. MCL 769.34(3). Further, the court may not base a departure on an offense or offender characteristic already accounted for in the guidelines, unless the court finds from the facts contained in the record that the guidelines have given the characteristic inadequate or disproportionate weight. MCL 769.34(3)(b). When reviewing an upward departure from the applicable guidelines range, the existence of a particular factor is a factual issue subject to review for clear error; the determination that a factor is objective and verifiable is reviewed as a matter of law; the determination that the factors constituted substantial and compelling reasons for departure is reviewed for abuse of discretion. *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000), quoting *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995).

In its *Babcock* decision, our Supreme Court affirmed these standards of review. *Babcock, supra* at 272-274. The Court also clarified that an abuse of discretion occurs in this context “when the trial court chooses an outcome falling outside the permissible principled range of outcomes.” *Id.* at 274.

Defendant contends that the trial court’s articulated reasons for exceeding the guidelines range were neither substantial nor compelling and were already taken into consideration in the guidelines. Defendant further argues that his sentence was not proportional. The evidence in this case indicated that the victim’s family took defendant in and provided him with a place to live, as an act of charity. When the victim told defendant that he had to move out, defendant left the room, obtained a rifle, and shot the victim once. Defendant ignored the pleas of his brother to refrain from committing this murder, and he apparently shot the victim in front of the victim’s family members. Those family members stated that they were not in need of formal counseling. Defendant denied responsibility for his actions, stating that he shot the victim because the victim had “jumped” defendant while he was asleep.

During sentencing, the trial court explained that it was departing upward from the guidelines because of: (1) the cold-blooded nature of defendant’s actions, (2) the need to punish and rehabilitate defendant, and (3) the need to protect society from such a dangerous person as defendant. A substantial and compelling reason must (1) be objective and verifiable; (2) keenly or irresistibly grab our attention; (3) be of considerable worth in deciding the length of a sentence; and (4) exist in only exceptional cases. *Id.* at 257-258. The taking of a life is always a tragedy. We agree that defendant’s apparent matter-of-fact demeanor in killing the victim and his lack of remorse are chilling, actions for which he should be punished, but find that the guidelines already adequately take into consideration the need for punishment and rehabilitation. And neither of these factors are objective or verifiable. Additionally, from neither defendant’s behavior nor his prior criminal history can we discern any special need to protect society beyond that which is accomplished by sentencing defendant within the guidelines. Compare to *People v Armstrong*, 247 Mich App 423; 636 NW2d 785 (2001) (upward sentencing departure warranted

because of special need to protect society's children from pedophile who was "irresistibly attracted to boys").

Cognizant of our Supreme Court's instruction that a substantial and compelling reason exist only in "exceptional" cases, *Babcock, supra* at 274, we can not support the court's conclusion that the facts and circumstances of this case place it in this special category. Therefore, we find that the trial court abused its discretion in concluding that these factors constituted substantial and compelling reasons to depart from the sentencing guidelines range. To clarify, we are not suggesting that substantial and compelling reasons to depart from the sentencing guidelines do not exist. Our opinion is limited to a review of the reasons articulated by the trial court. On remand, the trial court must sentence defendant within the guidelines range or specifically identify a substantial and compelling reason or reasons that is/are objective and verifiable, and which sufficiently distinguishes this case from other similar ones to justify an upward sentencing departure.

Accordingly, we affirm defendant's conviction for the reasons stated in our prior opinion dated May 21, 2002, vacate defendant's sentence, and remand for resentencing in accordance with the rules outlined in *Babcock, supra*, and this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Janet T. Neff
/s/ Helene N. White