

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TROY A. WASHINGTON,

Defendant-Appellee.

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UNPUBLISHED  
February 10, 2004

No. 235241  
Wayne Circuit Court  
LC No. 00-013624-01

ON REMAND

Before: Jansen, P.J., and Griffin, and Meter, JJ.

PER CURIAM.

On October 16, 2003, the Michigan Supreme Court issued an order vacating this Court's opinion dated April 30, 2002, and remanding for reconsideration based on *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003). Because the remand order is for reconsideration based on *Babcock, supra*, which is related to the sentencing issue, we adopt our prior opinion affirming defendant's convictions (*People v Washington*, unpublished opinion per curiam of the Court of Appeals, issued March 25, 2003 (Docket Nos. 235241 and 235593)),<sup>1</sup> with regard to all issues except the sentencing issue.<sup>2</sup>

Following a jury trial, defendant was convicted of assault with intent to murder, MCL 750.83, assault with a deadly weapon (felonious assault), MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant's minimum sentencing guidelines range was 126 to 210 months' imprisonment for the assault with intent to murder conviction. The trial court departed downward and sentenced defendant to three to fifteen years' imprisonment, and the prosecution sought resentencing on appeal. In our previous opinion we affirmed the trial court's downward departure from the minimum

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<sup>1</sup> We note that Docket Nos. 235241 and 235593 were consolidated to effectively advance the administration of the appellate process. On November 21, 2003, we entered an order that disconsolidated the cases to allow Docket No. 235241 (the prosecution's appeal) to proceed separately on remand.

<sup>2</sup> On remand, Judge Meter has been substituted for Judge Holbrook, Jr. who sat on the original panel and has since retired.

sentencing guidelines range. Upon reconsideration in light of *Babcock, supra*, we again affirm defendant's sentence.

The trial court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is otherwise permitted. MCL 769.34(2); *Babcock, supra* at 259 n 13, 272. A court may depart from the legislative sentencing guidelines range if it has a substantial and compelling reason to do so, and it states on the record the reasons for departure. MCL 769.34(3), *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). A court may not depart from a sentencing guidelines range based on an offense characteristic or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3); *Babcock, supra* at 258 n 12. Factors meriting departure must be objective and verifiable, must "keenly" attract and "irresistibly" hold the court's attention, and must be of "considerable worth." *Babcock, supra* at 257-258. A substantial and compelling reason "exists only in exceptional cases." *Id.* at 258, quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

A departure from the guidelines range must render the sentence proportionate to the seriousness of the defendant's conduct and his criminal history. *Babcock, supra* at 264. If the sentence constituted a departure from the guidelines range and the reasons were not articulated, this Court may not independently determine that a sufficient reason exists, but must remand for rearticulation or resentencing. *Id.* at 258-259. If the reasons articulated by the trial court are partially invalid and this Court cannot determine whether the trial court would have departed from the guidelines range to the same extent regardless of the invalid factors, it must remand for rearticulation or resentencing. *Id.* at 260.

In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination by the trial court subject to review for clear error, the determination that the factor is objective and verifiable is reviewed de novo as a matter of law, the determination that the factor or factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion, and the extent of the departure is reviewed for an abuse of discretion. *Id.* at 264-265; *Abramski, supra* at 74. In terms of sentencing departure review, "[a]n abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Babcock, supra* at 269. In ascertaining whether the departure was proper, this Court must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Id.* at 270.

In sentencing defendant, the trial court departed downward from the sentencing guidelines and was reminded by the prosecution that he needed to state his reasons for departing on the record. The trial court, then, stated that it was departing based on a letter it received from the victim, which requested leniency for defendant.<sup>3</sup> The trial court further stated that it was

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<sup>3</sup> The victim in this case submitted a letter that provided, in part:

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trying to comply with what the victim wanted. The trial court also noted there were other individuals vouching for defendant and that there was no likelihood that the behavior will continue, but again noted that the reason for departing was the victim's request.

Our Supreme Court in *Babcock, supra*, provides that, "[a] trial court must articulate on the record a substantial and compelling reason for its particular departure, and explain why this reason justifies that departure." *Id.* at 272, citing MCL 769.34(3) and *People v Daniel*, 462 Mich 1, 9; 609 NW2d 557 (2000). A majority of justices in *Babcock, supra*, also held that "the trial court must go beyond articulating a substantial and compelling reason for some departure. Rather, the trial court can depart from the guidelines range only 'if the court has a substantial and compelling reason for *that* departure. . . .'" *Id.* at 258-259 quoting MCL 769.34(3) (emphasis added by *Babcock, supra*). This Court is responsible for determining whether the trial court articulated a substantial and compelling reason to justify its departure from the guidelines range. *Id.* at 261-262.

We find that the trial court adequately articulated substantial and compelling reasons for its departure and adequately explained its reasons for the particular departure. See *Babcock, supra* at 272. In addition, we are satisfied that the factors articulated by the trial court are objective and verifiable, were not taken into account by the sentencing guidelines, and that the trial court departed to the extent it did based upon these objective and verifiable factors. See *id.* at 258-260, 272.

The trial court states the victim's request in a letter and the victim's wishes as his reason for departing. The victim's request for leniency with regard to defendant is objective and verifiable. In addition, the letter from the victim requesting leniency and the letters of support from other members of the community were objective and verifiable.<sup>4</sup> See *Daniel, supra* at 7;

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(...continued)

I . . . suffered no permanent physical injuries, nor any current identifiable psychological damage. . . . I am not convinced that he is a cold bloodied [sic] perpetrator. I do, however, recognize that he must be punished for what he has done.

My wish is that the Court would be lenient in sentencing, as the sentencing guidelines as I understand them can be devastating.

He, Troy Washington, in my opinion has the potential for rehabilitation, and a strong probability to move on and lead a productive, crime free life.

I am making this request without any coercion, whatsoever. And I have pondered these circumstances constantly over the past few weeks.

I felt obligated to share my thought on this matter, in an effort of encouraging the Court to allow for a future of hope for a young man that has made terrible decisions in his past.

<sup>4</sup> We note that the actual statements made in the letters with regard to defendant may not all be objective and verifiable, but the fact that these individuals, including the victim, made statements  
(continued...)

*Fields, supra* at 77; *People v Shinholster*, 196 Mich App 531, 535; 493 NW2d 502 (1992). Both factors articulated by the trial court, the request of the victim and the support of certain individuals in the community, are objective and verifiable, "keenly" and "irresistibly" grab our attention and are of "considerable worth" in deciding the length of the sentence. *Babcock, supra* at 272. We find that this is one of those "exceptional" cases where a substantial and compelling reason exists for a downward departure. *Id.* at 258 quoting *Fields, supra* at 62.

The trial court's noting that there is no likelihood of the behavior continuing, is not objective and verifiable, but we find that the trial court did not base its departure on this factor as it just noted this factor and then basically indicated that it was departing based upon the victim's request. Regardless, even if the trial court had noted this as a factor, we are convinced that it would have departed to the same extent that it did based on the objective and verifiable factors, namely, the request of the victim.

In applying the *Babcock* standard of review, we conclude that the trial court did not clearly err in its factual determinations, its decision to downwardly depart from the guidelines was based on proper objective and verifiable factors, and these factors constituted substantial and compelling reasons to depart downward from the sentencing guidelines. The objective and verifiable reasons stated by the trial court on the record, given the facts of this case, in particular, the letter from the victim, "keenly" and "irresistibly" grabs our attention and is of "considerable worth" in deciding the length of the sentence. See *id.* Lastly, based on the facts and circumstances of the crime and defendant's lack of a prior criminal record, the sentence was proportionate to defendant's conduct and criminal history. See *id.* at 263-264. The trial court did not abuse its discretion in departing downward from the sentencing guidelines, nor did the extent of the departure amount to an abuse of discretion as the sentence was within the "permissible principled range of outcomes," and represented a principled choice. *Id.* at 269; see also *People v Hicks*, \_\_ Mich App \_\_; \_\_ NW2d \_\_ (Docket No. 239981, issued December 2, 2003) slip op, p 10.

Affirmed.

/s/ Kathleen Jansen  
/s/ Richard Allen Griffin  
/s/ Patrick M. Meter

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(...continued)

in support of defendant is objective and verifiable.