

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

CLEVELAND ROGERS,

Defendant-Appellant.

UNPUBLISHED
February 17, 2004

No. 243046
Wayne Circuit Court
LC No. 01-011094-01

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

PER CURIAM.

Following a nonjury trial, defendant was convicted of third-degree home invasion, MCL 750.110a(4), for which he was sentenced as an habitual offender, second offense, MCL 769.10, to 3 to 7½ years in prison. Defendant appeals his sentence as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

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). 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).

“[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 and verifiable factors may be used to assess whether there are substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *Id.*, 62. A departure is appropriate “if there are substantial and compelling reasons that lead the trial court to believe that a sentence within the guidelines range is not proportionate to the seriousness of the defendant’s conduct and to the seriousness of his criminal history” *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003).

The trial court’s determination regarding the existence of a reason or factor warranting departure is reviewed on appeal under the clearly erroneous standard. The determination that a particular factor is objective and verifiable is reviewed by this Court as a matter of law. 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, which "occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Id.* at 265, 273-274. If the trial court articulates multiple reasons for a departure, some of which are substantial and compelling and some of which are not, this Court must determine whether the trial court would have departed from the guidelines to the same extent had it considered only the substantial and compelling factors. If this Court is unable to make such a determination, it must remand for resentencing or articulation. *Id.* at 271.

The guidelines as scored set a minimum sentence range of nine to twenty-eight months. The trial court elected to exceed the guidelines because defendant had eleven prior felony convictions and was only sentenced as an habitual offender second, many of his offenses were "predatory," the victim was traumatized, defendant was found inside the house lying in wait for the occupants' return, crime was defendant's "line of work," and the court did not believe defendant's expression of remorse.

Defendant's criminal record is accounted for by prior record variables 1, 2, and 5. MCL 777.51(1)(a); MCL 777.52(1)(a); MCL 777.55(1)(e). However, his total number of prior felony convictions exceeded the threshold for both PRV 1 and PRV 2, which indicates that this factor was given inadequate weight and provides a valid basis for exceeding the guidelines. Cf. *People v Sarah Stewart*, 442 Mich 937; 505 NW2d 576 (1993); *People v Cain*, 238 Mich App 95, 132; 605 NW2d 28 (1999).

The trial court also took into account that crime appeared to be defendant's "way of life" and "line of work," given that he hadn't demonstrated "another other job skills or any time spent doing any other job." A defendant's lack of employment is not itself a valid factor for departure. MCL 769.34(3)(a). However, whether a crime is part of a continuing pattern of criminal behavior is an appropriate consideration under the guidelines. MCL 777.43. Due to the passage of time between convictions as a result of incarceration, this factor was not subject to scoring under the guidelines and thus was given adequate consideration by the guidelines. Therefore, the trial court did not err in finding that this was a substantial and compelling factor that warranted a departure.

The other reasons cited by the trial court did not support its decision to depart from the guidelines. The record did not support a finding that the victim, who was not home when defendant committed the offense, was traumatized by the event. Nor did the record support a finding that defendant was lying in wait for the victim's return; although he was found inside the home, that was because the police arrived within minutes after defendant entered. Whether defendant's expression of remorse is sincere "cannot effectively or objectively" be reviewed, *People v Daniel*, 462 Mich 1, 11; 609 NW2d 557 (2000), and thus is not a valid ground for departure.

Here, the trial court cited some objective and verifiable factors which established a substantial and compelling reason for departure and other factors which either were not supported by the record or were not objective and verifiable. In imposing a three-year minimum sentence, the court indicated that "I'd still consider that a break, quite frankly." (S Tr, p 12). From that statement, it is inferred that the court would have departed from the guidelines without consideration of inappropriate factors.

The departure if not great and is proportionate to the crime. An eight month upward departure given that part of defendant's prior criminal record that was not accounted for in the guidelines, PRV axis, is not an abuse of discretion. The only reason that defendant's prior crimes could not be considered as a continuing pattern of criminal behavior on the offense variable axis, OV13, is that the behavior was interrupted by incarceration, and therefore, the court's consideration of this factor as forming a basis for substantial and compelling reason for an upward departure does not constitute an abuse of discretion.

We affirm.

/s/ Pat M. Donofrio

/s/ Richard Allen. Griffin