

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER DAVID SANDOVAL,

Defendant-Appellant.

UNPUBLISHED
February 17, 2004

No. 244566
Saginaw Circuit Court
LC No. 02-021203-FC

Before: Sawyer, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

A jury convicted defendant of two counts of operating a motor vehicle under the influence of intoxicating liquor (OUIL) causing death, MCL 257.625(4), and one count of OUIL causing serious injury, MCL 257.625(5). The trial court sentenced defendant as a second habitual offender to 175 to 270 months in prison for each OUIL causing death conviction and 3 to 7 years in prison for the OUIL causing serious injury conviction. Defendant appeals his sentence, and we affirm.

I. Standard of Review and Applicable Law

Defendant contends that the trial court abused its discretion by basing its sentencing departure on an independent finding that defendant is guilty of second-degree murder. The prosecutor charged defendant with second-degree murder or, in the alternative, OUIL causing death and, as noted, the jury convicted defendant of OUIL causing death. Defendant's minimum sentence range for this conviction was 58 to 142 months in prison. The statutory sentencing guidelines provide:

A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in [MCL 777.1 *et seq.*] if the court has a substantial and compelling reason for that departure and states on the record the reasons for the departure. [MCL 769.34(3).]

In *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003), our Supreme Court reiterated our standard of review for sentence departures:

“[T]he existence or nonexistence of a particular [sentencing] factor is a factual determination for the sentencing court to determine, and should therefore

be reviewed by an appellate court for clear error. The determination that a particular factor is objective and verifiable should be reviewed by the appellate court as a matter of law. A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion." [Quoting *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).]

As defendant correctly observes, "[a] trial judge is not entitled to make an independent finding of a defendant's guilt on another charge and assert that as a basis justifying sentence, especially where a defendant was found not guilty of that charge." *People v Glover*, 154 Mich App 22, 45; 397 NW2d 199 (1986). However, this Court has also held that if "there is record support that a greater offense has been committed by a defendant, it may constitute an aggravating factor to be considered by the judge at sentencing" *People v Purcell*, 174 Mich App 126, 130; 435 NW2d 782 (1989). In *People v Shavers*, 448 Mich 389, 393-394; 531 NW2d 165 (1995), our Supreme Court reiterated this important distinction between an independent finding of guilt on a greater charge and the mere consideration of evidence in the record as an aggravating factor in deciding an appropriate sentence. See also *People v Gould*, 225 Mich App 79, 89; 570 NW2d 140 (1997); *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1999) ("[a]lthough a trial court may not make an independent finding of guilt with respect to a crime for which a defendant has been acquitted, and then sentence the defendant on the basis of that finding, the court in fashioning an appropriate sentence may consider the evidence offered at trial, . . . including other criminal activities established even though the defendant was acquitted of the charges" (citations omitted)).

II. Analysis

The trial court did not make an independent finding that defendant is guilty of second-degree murder. To support its departure decision, the trial court cited evidence from the record and articulated the following factors: (1) defendant bought alcohol as a minor; (2) he knowingly chose to drive while he was intoxicated, and ignored the pleas of his passenger to allow her to drive; (3) before killing the two victims, defendant nearly collided with another vehicle on the road; (4) thereafter, defendant continued down the wrong side of the road and forced another vehicle off the road; (5) despite these two near-accidents, defendant continued to drive and accelerated to between 83 and 102 miles per hour in a 35 mile per hour zone; (6) he killed two young sisters when he ignored and drove through a red light at an intersection; (7) defendant acted with "total and complete recklessness bordering on intent to injure or kill . . .;" and (8) defendant's blood alcohol level was significantly elevated when he killed the two victims.

Defendant does not challenge the accuracy of these departure factors, he makes no assertion that the factors are not objective and verifiable, and he does not argue that the factors cited by the trial court were already taken into account by the offense variables. Rather, defendant simply argues, erroneously, that the trial court's remarks regarding defendant's recklessness constitute a finding of guilt on a charge for which he was acquitted.

The trial court judge did not state that he believes defendant is guilty of second-degree murder or that the jury came to the wrong verdict. Rather, as outlined above, the trial court

justified its upward departure on the basis of the evidence presented at trial and the circumstances of the case. While the trial court noted defendant's numerous, deliberate choices at various points leading up to the victims' deaths, the judge's remarks at sentencing do not reveal an independent conclusion that defendant committed second-degree murder or that he should be sentenced for that crime. Again, "where there is record support that a greater offense has been committed by a defendant, it may constitute an aggravating factor to be considered by the judge at sentencing" *People v Fleming*, 428 Mich 408, 418, 410 NW2d 266 (1987); *Shavers, supra*; *Purcell, supra*.¹ Here, after a thorough review of the record and an analysis of the trial court's reasoning, we conclude that the court's comments simply did not rise to the level of an independent finding of guilt or an imposition of a sentence based on a higher charge. Because defendant does not challenge his sentence on any other basis, we affirm.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Richard A. Bandstra

¹ We reject defendant's argument in his reply brief that this rule does not apply to cases involving a jury verdict. See *Compagnari, supra* and *Gould, supra*.