

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JNO PERRY KIMBLER,

Defendant-Appellee.

UNPUBLISHED

April 22, 2004

No. 245995

Eaton Circuit Court

LC No. 02-020029-FH

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

PER CURIAM.

The prosecutor appeals as of right from defendant's sentence following his jury conviction of manslaughter, MCL 750.321, and his plea-based convictions of operating a motor vehicle with a suspended license, MCL 257.904(3)(a), and minor in possession of alcohol, MCL 436.1703(1)(a), with a third offense enhancement, MCL 436.1703(1)(c). The trial court departed downward from the 43 to 86 months' minimum sentence calculated by the legislative sentencing guidelines, MCL 769.34, and sentenced defendant to five years' probation with the first year in jail. We reverse and remand for "resentencing or rearticulation" under *People v Babcock*, 469 Mich 247, 273; 666 NW2d 231 (2003).

We explained the correct procedure for reviewing sentencing departures under our Supreme Court's decision in *Babcock, supra*, in *People v Lowery*, 258 Mich App 167, 169-170; 673 NW2d 107 (2003):

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 272] A court may depart from the appropriate sentence range if it has substantial and compelling reasons for that departure and states those reasons on the record. MCL 769.34(3); . . . *People v Hegwood*, 465 Mich 432; 636 NW2d 127 (2001). Substantial and compelling reasons only exist in exceptional circumstances, and the reasons justifying departure should keenly or irresistibly grab the court's attention and be recognized as having considerable worth in determining the length of a sentence. [*Babcock, supra* at 257, quoting *People v Fields*, 448 Mich 58, 67-68; 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." *People v*

Armstrong, 247 Mich App 423, 425; 636 NW2d 785 (2001), citing MCL 769.34(3)(a), (b).

We review a trial court's determination that a substantial and compelling reason justifies a departure from the legislative sentencing guidelines for an abuse of discretion. *Babcock, supra* at 274. "An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Id.*

In *Babcock, supra* at 258-259, our Supreme Court explained that our review should be restricted to reasons stated on the record:

The statutory sentencing guidelines, MCL 769.34(3), require the trial court to "state[] on the record the reasons for departure." Therefore, it is not enough that there exists some potentially substantial and compelling reason to depart from the guidelines range. Rather, this reason must be articulated by the trial court on the record. Accordingly, on review of the trial court's sentencing decision, the Court of Appeals cannot affirm a sentence on the basis that, even though the trial court did not articulate a substantial and compelling reason for departure, one exists in the judgment of the panel on appeal. Instead, in such a situation, the Court of Appeals must remand the case to the trial court for resentencing or rearticulation.

We conclude that the trial court failed to justify its departure on the record with a substantial and compelling reason, and we therefore remand this case to the trial court for "resentencing or rearticulation." *Babcock, supra* at 259. The trial court's analysis on the record fell short of our Supreme Court's requirements in *Babcock, supra*, in two ways.

First, the trial court failed to consider proportionality. Homicide is a serious criminal offense, no matter whether it is found to be murder or manslaughter. But the court failed to mention the offense at all when it justified its departure. In *Babcock, supra* at 264, our Supreme Court held that a sentencing court "must consider whether its sentence is proportionate to the seriousness of the defendant's conduct and his criminal history because, if it is not, the trial court's departure is necessarily not justified by a substantial and compelling reason." As a result, the trial court erred when it failed to consider proportionality here.

Second, the court failed to mention what aspects of the case justified this particular departure. The court stated that it believed "this situation deserves a departure" but never stated why it believed that this case warranted only a year in jail. In *Babcock, supra* at 260, our Supreme Court held that "the trial court must articulate on the record a substantial and compelling reason to justify the *particular* departure imposed." (Emphasis added.) So the trial court erred when it failed to justify the nature of its actual departure.

Because the trial court failed to consider proportionality or to justify the nature of its departure on the record, we conclude that the court failed to provide a substantial and compelling reason justifying its departure under *Babcock, supra* at 274. We therefore remand for

resentencing or a rearticulation of the trial court's substantial and compelling reasons for departure that satisfies our Supreme Court's requirements.

Reversed and remanded. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald