

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH RUSSELL VOSTRIRANCKY,

Defendant-Appellant.

UNPUBLISHED

June 15, 2004

No. 245897

Isabella Circuit Court

LC No. 02-000556-FH

Before: Neff, P.J., and Zahra and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for three counts of second-degree criminal sexual conduct, MCL 750.520c, and one count of accosting a child, MCL 750.145a. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The sentencing guideline range for defendants' criminal sexual conduct convictions was calculated at 43 to 107 months. The court deviated from the guidelines and imposed a sentence of 14 to 22½ years' imprisonment. During sentencing, the trial court articulated the following reasons for its decision to deviate from the sentencing guidelines:

Well, your time for challenging the presentence report is over. It's part of the presentence report, and that's what it says. *There was that post-conviction, post-trial hearing, at a post-trial hearing discussion of your refusal to sign the sexual offender registration form.* The prosecution didn't necessarily want to go through the hoops of charging a criminal offense, and I went the extra step giving you a break. You know, the ability to not incur an additional criminal offense, and signed (sic) an order. *You still haven't signed the sexual offender registration form in spite of the fact I ordered it. You refused to cooperate with the probation officer in the course of her putting together the presentence report.* You know, all of those action tell me that – that along with your merciless attacks on the credibility of the victims in this case, who the jury believe, and who I believe, and who the parents believe, *tell me that rehabilitation for you is not likely; that you're a threat to children in the community.*

* * *

The criteria I've considered in determining your sentence includes your discipline, the protection of society, your potential for reformation and the deterrence of others for like offenses. I've also considered the proportionality of your sentence, taking into account the nature of your offense and your background. I find that your sentence today is proportionate to the seriousness of the matter for which punishment is proposed. I do find it to be a deviation from the Michigan Sentencing Guidelines, *and for the reasons previously stated on the record*, I find that there are substantial and compelling reason to deviate from those guidelines. [Emphasis added.]

The stated reasons for the departure on the written deviation form were defendant's failure to cooperate after conviction, his lack of cooperation in a prior case, and his lack of remorse.

A sentencing court may depart from the appropriate sentence range established under the sentencing guidelines if the court has a substantial and compelling reason for the departure, and states the reason on the record. MCL 769.34(3). The existence of a particular factor is a factual determination reviewed for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). The determination that a factor is objective and verifiable is reviewed as a matter of law. *Id.* The determination that the objective and verifiable factors constitute substantial and compelling reasons to depart from the statutory minimum sentence is reviewed for abuse of discretion. *Id.* at 265.

Substantial and compelling reasons exist only in exceptional cases. 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. *Id.* at 257.

Remorse is a subjective factor that may not be considered in determining whether there are substantial and compelling reasons for a sentencing departure. *People v Daniel*, 462 Mich 1, 8; 609 NW2d 557 (2000). However, we may still affirm the deviation if we conclude that the trial court would have still imposed this particular deviation knowing that remorse was an inappropriate factor. *Id.* at 260-261. Defendant's failure to cooperate after conviction is an objective and verifiable factor here where defendant refused to sign the sex offender registration form, even after being ordered to do so by the trial court. Defendant's lack of cooperation in his prior case is also objective and verifiable, where defendant refused to sign an amended probation order. Further, defendant's recalcitrance in dealing with authorities following his convictions is a factor that can be seen as having considerable worth in determining the length of his sentence. In light of the trial court's thorough discussion of these factors, and its conclusion regarding the proportionality of defendant's sentence, we find it abundantly clear that the trial court would have imposed this same sentence even without its reliance on defendant's lack of remorse.

Affirmed.

/s/ Janet T. Neff
/s/ Brian K. Zahra
/s/ Christopher M. Murray