

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

QUAWN Q. GREEN,

Defendant-Appellant.

UNPUBLISHED

June 29, 2004

No. 246363

Oakland Circuit Court

LC No. 1999-169380-FC

Before: Saad, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

This case was previously remanded to the trial court for resentencing. On defendant's first appeal, this Court found error with the trial court's rationale for the original scoring of OV 6 as well as the fact that the judgment of sentence need be corrected because it erroneously stated that defendant was convicted of assault with intent to commit murder when the jury convicted him of assault with intent to do great bodily harm less than murder.¹ On his second appeal to this Court, defendant asserts that the trial court erred by resentencing him to the same term of imprisonment (35 to 70 years) as previously ordered by the trial court. We affirm the trial court's sentence, however we remand for the sole purpose of correction of defendant's judgment of sentence.

Defendant first argues that the trial court erred in scoring fifty points for OV 6. Defendant states that the evidence relied on by the trial court failed to demonstrate that the defendant acted with premeditation. We review a trial court's determination of the existence of a sentencing factor for clear error, and scoring decisions supported by any evidence will be upheld. *People v Witherspoon*, 257 Mich App 329, 335; 670 NW2d 434 (2003), citing *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

¹ The original judgment of sentence correctly stated that defendant was also convicted of second-degree murder, but also had him convicted of assault with intent to murder. Following this Court's instruction to correct the error, the trial court, instead of correcting its original error, introduced a new error into the judgment of sentence by changing defendant's conviction of second-degree murder to that of first-degree murder. We again remand to the trial court for correction of defendant's judgment of sentence.

Pursuant to MCL 777.36(1)(a), OV 6 may be scored fifty points where “[t]he offender had a premeditated intent to kill.” In this case, the trial court relied upon recordings and statements admitted in the separate trial of a co-defendant. The trial court used this evidence to find that defendant’s actions were premeditated. Predicated upon the trial court’s use of this objective and verifiable evidence in scoring OV 6, its decision was not clearly erroneous. *Witherspoon, supra*.

Defendant next argues that the trial court’s sentence violates the principle of proportionality. We review a trial court’s sentencing for an abuse of discretion. See *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003). Defendant offers no argument or case to prove that defendant’s sentence was not proportionate. Rather, defendant merely asserts that the trial court departed from the recommended sentencing range. Defendant seemingly asserts that a departure from the guidelines is evidence of a disproportionate sentence. We disagree. MCL 769.34(3) provides:

A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. All of the following apply to a departure:

(a) The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.

(b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

The trial court articulated its reasons for the upward departure of sentence by finding the following:

1. The shooting was accomplished in a hail of bullets during a planned drive-by shooting.
2. The shooting was a drug-related “hit” as evidenced by an admission of another defendant.

In *Babcock, supra* at 258, our Supreme Court defined substantial and compelling reasons as those that are objectively verifiable and that keenly or irresistibly grab at the court’s attention. In exceptional cases where such reasons are present, a court may depart from the guidelines, as

long as the overall sentence is proportionate to the offense. *Id.* at 264. The trial courts correctly stated that these factors were objectively verifiable and are not taken into consideration by the sentencing guidelines. Additionally, as pointed out in *Babcock, supra*² it was proper for the trial court to take into consideration the “hail of bullets” brought on by this premeditated drug “hit.” OV 6 only provides for the fact that the crime was premeditated. None of the offense variables OV 6, OV 1 or OV 2 take into consideration the fact that this was a drug-related “hit” where the evidence clearly demonstrated that several shots were fired. *Babcock* at 258, n 12.

The trial court possesses the unique ability to hear the evidence and examine all the factors before passing sentence. In this case, the trial court was rightly “irresistibly attracted” to the factors that prompted the shooting as well as the actual shooting being described as a “hail of bullets.” Thus we find that the trial court’s reasons for departure were substantial and compelling. Furthermore, because we find that the trial court took into consideration factors which the guidelines do not give adequate weight to, we find the sentence to be proportionate to the nature of the crime.

We affirm the judgment of sentence and remand solely for the ministerial task of correcting the judgment of sentence to reflect that defendant was convicted of second-degree murder and assault with intent to commit great bodily harm less than murder.

/s/ Henry William Saad

/s/ Michael J. Talbot

/s/ Stephen L. Borrello

² 469 Mich 247 at 258, n 12 states: For instance, if a defendant convicted of armed robbery is scored 25 points under offense variable one because he stabbed his victim, see MCL 777.31, that the defendant stabbed his victim probably could not constitute a substantial and compelling reason to justify a departure because the Legislature has already determined what effect should be given to the fact that a defendant has stabbed his victim and the courts must abide by this determination. However, if the defendant stabbed his victim multiple times, or in a manner designed to inflict maximum harm, that might constitute a substantial and compelling reason for a departure because these characteristics may have been given inadequate weight in determining the guidelines range.