

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID RIVERA RUIZ,

Defendant-Appellant.

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UNPUBLISHED

August 17, 2004

No. 240604

Berrien Circuit Court

LC No. 00-411855-FH

Before: Hoekstra, P.J., and Cooper and Kelly, JJ.

PER CURIAM.

Defendant pleaded guilty to first-degree home invasion, MCL 750.110a(2), and was sentenced to 80 to 240 months in prison. After this Court denied defendant's delayed application for leave to appeal in Docket No. 235432, the Supreme Court remanded "to consider whether the sentencing court complied with the requirements of MCL 769.34 in departing from the legislative sentencing range." We remand for resentencing.<sup>1</sup> This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The sentencing range under the legislative guidelines was 36 to 60 months. In sentencing defendant to a minimum term of 80 months, the trial court found it significant that approximately three weeks before this offense, defendant had received a one-year delay in sentencing on a cocaine possession charge in Elkhart, Indiana. The court expressed concern that the opportunity presented by the delayed sentencing had made no impact on defendant. Moreover, the court concluded that this fact had not been considered by the guidelines.

MCL 769.34(3) provides that a trial court may depart from the sentence range established under the legislative sentencing guidelines if it has "a substantial and compelling reason" to do

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<sup>1</sup> On remand, defendant also challenges the scoring of the sentencing guidelines and the proportionality of his sentence. The scoring issues will not be addressed since they are beyond the scope of the remand order. While the proportionality of the sentence is tied to whether there were substantial and compelling reasons for departure under MCL 769.34, *People v Babcock*, 469 Mich 247, 261-264; 666 NW2d 231 (2003), and is therefore properly before this Court, we need not reach the issue since we conclude that the trial court did not otherwise provide substantial and compelling reasons for departure.

so. A “substantial and compelling” reason for departure is an objective and verifiable reason that keenly or irresistibly grabs the Court’s attention, is of considerable worth in deciding the length of sentence, and exists only in exceptional cases. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003).

If the sentence is not within the appropriate guidelines range, this Court must determine whether the trial court has articulated a “substantial and compelling” reason for departing from the range. *Babcock, supra* at 255-256. The existence of a particular factor is a factual determination that is reviewed for clear error. The determination that a factor is objective and verifiable is reviewed de novo. The determination that objective and verifiable factors constitute substantial and compelling reasons to depart is reviewed for an abuse of discretion. *Id.* at 264-265. In this context, an abuse of discretion means that when there is more than one reasonable and principled outcome and “the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court’s judgment.” *Id.* at 269.

There was no clear error in the factual determination that defendant had received a deferred sentence for cocaine possession approximately three weeks before engaging in the criminal behavior at issue. Moreover, the fact of this deferred sentence was an objective consideration and capable of being verified. However, we agree with defendant that the perceived lack of appreciation for the opportunity presented by the delayed sentence was subjective, not verifiable, and could not properly be considered. The question thus becomes whether the trial court abused its discretion in determining that the recent deferred sentencing was a substantial and compelling reason for departure.

In addressing whether the timing of the deferred sentencing was a substantial and compelling reason for departure, it is noteworthy that a factor already taken into account by the guidelines cannot be considered unless it “has been given inadequate or disproportionate weight.” MCL 769.34(3)(b). Here, the delayed sentence was considered by the guidelines. Prior Record Variable 6 was scored as 10 points, indicating that defendant was “on parole, probation, or delayed sentence status or on bond awaiting adjudication or sentencing for a felony.” MCL 777.56(1)(c).

While three weeks is a particularly short time after receiving a deferral on a sentence to engage in criminal activity, the statute contemplates temporal proximity. Thus, this was not a sound basis for concluding that the factor was given inadequate or disproportionate weight. Moreover, while the opportunity to “turn things around,” which was presented by the deferred sentence, is worthy of note, it does not “keenly or irresistibly” grab this Court’s attention. Moreover, it is not of *considerable* worth in deciding the length of sentence, and it is not exceptional that a criminal would have recently committed other crimes. Thus, this Court concludes that the trial court failed to articulate a substantial and compelling reason for departing from the guidelines range, and thus abused its discretion in sentencing defendant to an eighty-month minimum term.

Pursuant to MCL 769.34(11), we remand for resentencing. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Jessica R. Cooper

/s/ Kirsten Frank Kelly