

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANCZISEK JOSEF OSSOWSKI II,

Defendant-Appellant.

UNPUBLISHED

October 12, 2004

No. 246667

Genesee Circuit Court

LC No. 01-009070-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANCZISEK JOSEF OSSOWSKI,

Defendant-Appellant.

No. 246668

Genesee Circuit Court

LC Nos. 00-006954-FH;
00-006967-FH

Before: Griffin, P.J., and Saad and O’Connell, JJ.

PER CURIAM.

In Docket No. 246667, defendant¹ appeals by delayed leave granted his habitual third sentence of 5 to 20 years in prison imposed for his conviction of larceny from a person, MCL 750.357; MCL 769.11. In Docket No. 246668, defendant appeals by delayed leave granted his sentences of 5 to 10 years for receiving or concealing stolen firearms, MCL 750.535b, and 5 to 15 years for second-degree home invasion, MCL 750.110a(3), imposed after he was convicted of violating the probation he was serving for these crimes. We affirm in Docket No. 246667 and vacate defendant’s sentences and remand for resentencing in Docket No. 246668. These appeals are being decided without oral argument pursuant to MCR 7.214(E).

¹ There is only one defendant in these appeals, even though the names in the captions are different.

Defendant was charged with armed robbery, MCL 750.529, after he entered a gas station, confronted the cashier, and took money from the cash register. He agreed to plead guilty to unarmed robbery, MCL 750.530, in exchange for dismissal of another charge, but pleaded guilty to larceny from a person after the trial court concluded that he had not supplied a sufficient factual basis to support a conviction of unarmed robbery.

The statutory sentencing guidelines recommended a minimum term range of 0 to 25 months. The trial court sentenced defendant to 5 to 20 years in prison, citing his rapid violation of probation, unauthorized departure from a rehabilitation program, and receipt of a favorable plea bargain as substantial and compelling reasons for exceeding the guidelines. The court also explained that his prison sentences in other cases effectively eliminated probation as an option. Subsequently, the trial court sentenced defendant to 5 to 15 years for second-degree home invasion and 5 to 10 years for receiving or concealing stolen firearms upon revocation of probation. The statutory sentencing guidelines for the underlying offenses recommended minimum term ranges of 12 to 24 months and 0 to 11 months, respectively. The trial court did not refer to the sentencing guidelines when imposing sentence in these cases and did not articulate reasons for imposing the sentences.

Analysis in Docket No. 246667

A trial court must impose a minimum term within the applicable statutory sentencing guidelines unless a substantial and compelling reason exists to depart from the guidelines. A substantial and compelling reason for departing from the guidelines must be objective and verifiable, must irresistibly attract the attention of the court, and must be of considerable worth in deciding the length of the sentence. The reason for the departure must be articulated by the trial court on the record. A substantial and compelling reason articulated by a trial court must justify the particular departure at issue. *People v Babcock*, 469 Mich 247, 257-261; 666 NW2d 231 (2003).

We review the determination of the existence of a factor for departing from the guidelines for clear error, the determination that a factor is objective and verifiable for error, and the determination that objective and verifiable factors merited departure from the guidelines for an abuse of discretion. *Babcock, supra*, at 264-265. An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Id.* at 269. In determining whether substantial and compelling reasons existed to merit departure from the sentencing guidelines, we give appropriate deference to the trial court's sentencing determination. *Id.* at 270. A trial court may depart from the guidelines for nondiscriminatory reasons based on an offense or offender characteristic which was already considered in calculating the guidelines if the trial court concludes that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b).

Defendant argues that the trial court abused its discretion by exceeding the guidelines and imposing a minimum term of five years for his plea-based conviction of larceny from a person. We disagree. Prior Record Variable (PRV) 6, MCL 777.56, regarding defendant's relationship to the criminal justice system, accounted for the fact that defendant committed the instant offense while on probation, but not for the short time he was on probation before lapsing back into criminal activity. The guidelines did not account for the fact that defendant left a rehabilitation program in which he had been ordered to participate as a condition of his probation, or the fact

that he pleaded guilty to a lesser offense. *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994). Defendant's rapid violation of his probation and his unauthorized departure from a court-ordered rehabilitation program were objective and verifiable indications of defendant's unwillingness to appreciate his wrongdoing and modify his behavior. He showed no remorse for his actions. His receipt of a favorable plea bargain impaired the guidelines' ability to account for the severity of his crime, so these were also proper considerations. These factors irresistibly attracted the attention of the trial court, and, taken together, constituted substantial and compelling reasons for exceeding the guidelines.

Therefore, the trial court did not abuse its discretion. Defendant's sentence was proportionate to his circumstances and those of the offense. *Babcock, supra*, at 262-264. He is not entitled to resentencing. Defendant is not entitled to relief as a result of the holding in *Blakely v Washington*, 542 US ____; 124 S Ct 2531; ____ L Ed 2d ____ (2004). *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

Analysis in Docket No. 246668

If a probation order is revoked, the trial court may sentence the defendant in the same manner and to the same penalty as it might have done had the order of probation never been entered. MCL 771.4. The statutory sentencing guidelines apply to a post-probation violation sentencing. MCL 769.34(2); *People v Hendrick*, 261 Mich App 673, 679-680; ____ NW2d ____ (2004). Defendant's minimum terms of 5 years exceeded the recommended guidelines ranges of 0 to 11 months and 12 to 24 months for receiving or concealing stolen firearms and second-degree home invasion, respectively. Upon revoking defendant's probation in each case, the trial court was entitled to sentence defendant as if a term of probation had never been imposed, but was required to do so pursuant to the guidelines.

We affirm defendant's sentence in Docket No. 246667 but vacate his sentences and remanded for resentencing in Docket No. 246668. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Henry William Saad
/s/ Peter D. O'Connell