

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT ROBERT BURNS,

Defendant-Appellant.

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UNPUBLISHED

October 26, 2004

No. 248551

Genesee Circuit Court

LC No. 02-010679-FH

Before: Whitbeck, C.J., and Jansen and Bandstra, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from concurrent sentences of ten to fifteen years' imprisonment imposed on his two plea-based convictions of second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(a). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole issue on appeal is that he is entitled to resentencing because the trial court improperly based its sentence on crimes for which he was not convicted. We disagree.

The trial court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is permitted. MCL 769.34(2). A departure from the guidelines is appropriate if the trial court finds substantial and compelling reasons to conclude that a sentence within the guidelines ranges is not proportionate to the seriousness of the circumstances surrounding the offense and the offender. MCL 769.34(3); *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). Factors meriting departure must be objective and verifiable, must "keenly" attract and "irresistibly" hold the court's attention, and must be of "considerable worth." *Babcock*, *supra* at 257-258. A substantial and compelling reason "exists only in exceptional cases." *Id.* at 258, quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). And, a departure from the guidelines range must render the sentence proportionate to the seriousness of the defendant's conduct and his criminal history. *Id.* at 264.

In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination by the trial court subject to review for clear error, the determination that the factor is objective and verifiable is reviewed de novo as a matter of law, the determination that the factor or factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion, and the extent of the departure is reviewed for an abuse of discretion. *Id.* at 264-265; *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). In terms of

sentencing departure review, "an abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Babcock, supra* at 269. In ascertaining whether the departure was proper, this Court must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Id.* at 270.

The court may not make an independent finding of the defendant's guilt of a crime for which the defendant has been acquitted and then sentence the defendant on the basis of that finding. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). If, however, there is record support that a greater offense has been committed, the court may consider that as an aggravating factor at sentencing. *People v Purcell*, 174 Mich App 126, 130; 435 NW2d 782 (1989). Thus, the court may consider evidence of other uncharged offenses or criminal acts that are the subject of dismissed charges, *People v Coulter (After Remand)*, 205 Mich App 453, 456-457; 517 NW2d 827 (1994), as well as the fact that the defendant pleaded guilty to a lesser charge in exchange for dismissal of greater charge. *People v Williams*, 223 Mich App 409, 411; 566 NW2d 649 (1997); *People v Brzezinski (After Remand)*, 196 Mich App 253, 256; 492 NW2d 781 (1992).

Defendant was originally charged with two counts of first-degree CSC, a life offense. MCL 750.520b(2). Those charges were dismissed as part of the plea agreement. In establishing a factual basis for the plea, defendant admitted that he engaged in sexual penetration with the victim. The trial court did not err in finding a proper objective and verifiable factor that presented a substantial and compelling reason to depart from the guidelines. *Babcock, supra*; *People v Armstrong*, 247 Mich App 423, 426; 636 NW2d 785 (2001). The objective and verifiable reason stated by the trial court "keenly" and "irresistibly" grabs attention and is of "considerable worth" in deciding the length of the sentence. *Babcock, supra* at 257-258. This an exceptional case and the trial court did not abuse its discretion in departing from the sentencing guidelines, nor did the extent of the departure amount to an abuse of discretion as the sentence was within the "permissible principled range of outcomes," and represented a principled choice. *Id.* at 269; see also *People v Hicks*, 259 Mich App 518, 536-537; 675 NW2d 599 (2003).

Affirmed.

/s/ William C. Whitbeck

/s/ Kathleen Jansen

/s/ Richard A. Bandstra