

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES WADE CARPENTER,

Defendant-Appellant.

UNPUBLISHED
November 2, 2004

No. 248456
Hillsdale Circuit Court
LC No. 02-269869

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

PER CURIAM.

Following a jury trial, defendant was convicted of operating a vehicle while intoxicated (third offense), MCL 257.625, and driving with a suspended license (second offense), MCL 257.904. He was sentenced as a second-offense habitual offender, MCL 769.10, to 40 to 90 months in prison for the OUIL conviction, to run concurrent to a term of twelve months for the DWLS conviction. Defendant appeals as of right, challenging only his sentence. We affirm.

Testimony at trial established that when defendant was pulled over for speeding, he alighted from the driver's side of the car and fled. Defendant maintained that he was not driving, implying that Rusty McNall was driving. McNall testified that he was in the passenger's seat when defendant was pulled over for speeding, but got behind the wheel to prevent the car from rolling forward after defendant fled.

On appeal, defendant argues that the trial court did not have substantial and compelling reasons that were objective and verifiable to depart from the minimum sentence range of 0 to 13 months calculated under the legislative sentencing guidelines. We disagree.

In *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003), our Supreme Court held:

[I]f there are substantial and compelling reasons that lead the trial court to believe that a sentence within the guidelines range is not proportionate to the seriousness of the defendant's conduct and to the seriousness of his criminal history, the trial court should depart from the guidelines.

A substantial and compelling reason must be objective and verifiable, must keenly or irresistibly grab the court's attention, must be of considerable worth in deciding the length of a sentence, and

exist only in exceptional cases. *Id.* at 258, quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). The existence of a particular factor warranting departure is a factual determination that is reviewed for clear error, the determination that a factor is objective and verifiable is reviewed de novo, and the determination that objective and verifiable factors constitute substantial and compelling reasons to depart is reviewed for an abuse of discretion. *Babcock, supra* at 264-265.

Defendant first argues that the trial court erred in relying on the fact that six of eleven misdemeanor convictions were not scored in calculating the guidelines because defendant's prior record was already taken into account and adequately weighed. However, there was no clear error in determining that there were six misdemeanors that were not factored into the prior record score calculation, and this fact was objective and could be verified by reference to defendant's record.

Defendant further argues that the trial court's assumption that defendant posed a risk to the community was a subjective and non-verifiable consideration based on mere predictions of future behavior. Defendant's future actions could not be predicted with factual accuracy and obviously could not be verified. However, that he had six prior alcohol-related offenses, including one OUIL, third offense, and yet repeated the behavior, was factually accurate and verifiable. Moreover, it was documented that he had numerous unsuccessful attempts at rehabilitation.

The extent of defendant's repeated behavior, and the fact that his behavior was seemingly impervious to treatment, does grab one's attention, is of considerable worth in deciding what sentence should be imposed, and is exceptional. We do not conclude that the trial court's determination that this was a substantial and compelling reason for the departure sentence imposed constituted an abuse of discretion.

We affirm.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Richard A. Bandstra