

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR LEE HORTON, JR.,

Defendant-Appellant.

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UNPUBLISHED  
December 1, 2005

No. 257312  
Monroe Circuit Court  
LC No. 03-033280-FC

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced to 80 to 120 months in prison, with 266 days' credit for time served. We affirm. This case is being decided without oral argument pursuant to MCR 7.214 (E).

On appeal, defendant contends that there were no substantial and compelling reasons for exceeding the statutory minimum sentencing guidelines range and that his sentence is disproportionate to the offense and offender. We disagree.

"[T]he existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. The determination that a particular factor is objective and verifiable should be reviewed by the appellate court as a matter of law. A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion." *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003) (citations omitted).

A trial court must state objective and verifiable factors that exist to justify an upward departure and these factors must be substantial and compelling. Furthermore, the sentence imposed must be proportionate to the offense and the offender. *Id.*

The trial court listed numerous factors for exceeding the sentencing guidelines. However, the trial court also stated:

I would also indicate that one of the *main reasons that I imposed minimum guidelines on Mr. Adams* was because of the disparity in the sentences that are

gonna [sic] apply to these two gentlemen, and that does not apply to him. The jury could have – could have easily convicted Mr. Horton of the principal charge. What their reasoning was, nobody really knows. But nevertheless, that resulted in a big discrepancy between these [c]o-defendants, and I have considered that in *Mr. Adams'* case. [Emphasis added.]

Based on this statement, defendant suggests that the trial court gave defendant a sentence outside the guidelines simply because it thought defendant should be sentenced in a manner similar to codefendant. Defendant argues that this was improper because codefendant was convicted of the greater crime of assault with intent to murder, while defendant was convicted of the lesser crime of assault with intent to do great bodily harm. However, the statement made by the trial court focuses on the reasoning for the sentence imposed on *codefendant*, rather than on the reasoning for the upward departure for defendant's sentence. Because the trial court's statement referred to codefendant's rather than defendant's sentence, defendant's argument lacks merit.

The trial court justified an upward departure for defendant's sentence based on the existence of the following four factors that the guidelines do not take into consideration:

(1) this assault was a surprise attack on the victim; (2) there were multiple assaults committed on the victim; (3) this crime involved multiple assaults by a group of people including the defendant; and (4) the victim was abandoned after being brutally assaulted and left unconscious on a public sidewalk. The guidelines do not take these factors into consideration.

This Court must first determine whether these factors exist and whether they are objective and verifiable. First, the trial court found that this assault was a surprise attack on James Deaton. There was evidence that defendant accompanied Deaton along with a group of men to an area away from the public street and suddenly began attacking him just as Deaton was getting ready to smoke some cocaine. The surprise nature of the crime is supported by the record and comprises an objective and verifiable factor existing in this case.

Second, the trial court found that there were multiple assaults committed on Deaton. The evidence shows that defendant was among the group that first attacked Deaton behind the homes of Almyra and that subsequently attacked an already injured Deaton as he was stumbling down the street. Therefore, the record shows the existence of multiple assaults, which is an objective and verifiable factor in this case.

Third, the trial court found that the assaults involved a group of people. There was evidence that defendant was among a group of assailants who attacked Deaton behind the homes of Almyra. Furthermore, defendant was accompanied by codefendant and another individual when he later attacked Deaton as he was stumbling down Almyra. Therefore, there is the objective and verifiable existence of groups of individuals involved in the assaults in this case.

Fourth, the trial court found that Deaton was abandoned after being brutally assaulted and left unconscious on a public sidewalk. The evidence showed defendant deliberately left Deaton in an incapacitated state on the sidewalk following the second brutal attack. The abandonment was an objective and verifiable factor in this case. Therefore, the four factors that the trial court

relied on to impose a higher sentence are supported by the record and are objective and verifiable.

This Court must also determine if these factors represent substantial and compelling reasons for departing from the sentencing guidelines range where such reasons must be objective and verifiable and grab the reviewing Court's attention. First, the trial court correctly observed that the sentencing guidelines did not properly address the surprise nature of the crime. This consideration receives some attention within offense variable (OV) 10 of the sentencing guidelines, which addresses offender exploitation of a vulnerable victim. MCL 777.40. This variable includes factors such as exploiting a victim's physical disability, mental disability, youth or agedness, or a domestic relationship or the offender abused his or her authority status, but it does not include any factors relating to a surprise attack. Because this variable does not include among its listed considerations the launching of a surprise attack, the trial court properly considered this factor as a reason for upward departure.

Second, the trial court correctly observed that the sentencing guidelines did not properly address the multiple assaults involved in this crime. OV 3 refers to physical injury to a victim and OV 6 addresses the intent to kill or injure another individual, but neither of these variables refers to multiple assaults, as was the case in this situation. MCL 777.33; MCL 777.36. The sentencing guidelines do not contemplate the multiple assaults that occurred in this case, therefore, the trial court properly considered this factor as a reason for upward departure from the sentencing guidelines.

Third, the trial court correctly observed that the sentencing guidelines did not properly address the number of attackers that assaulted Deaton. Although OV 9 refers to the number of victims involved in the attack, there is no reference in the sentencing guidelines to the number of attackers involved in an assault. MCL 777.39. Because this factor is not contemplated by the sentencing guidelines, the trial court properly considered it as a basis for upward departure.

Fourth, abandonment is not among the factors mentioned in the sentencing guidelines. In *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985), this Court noted that the defendant, like defendant here, abandoned the victim, leaving him unconscious on the street. Abandonment was considered an important detail regarding the nature and severity of the crime. Because abandonment is not contemplated by the sentencing guidelines, the trial court properly considered it in formulating an upward departure.

In sum, because the legislature did not contemplate these factors in the sentencing guidelines, they have been given inadequate weight in determining the guidelines range. The existence of these factors provides substantial and compelling reasons for a departure.

Finally, this Court must determine whether the extent of the departure was warranted. The sentence must be proportionate to the severity of the crime and the defendant's prior history. Defendant has previously been charged with two misdemeanors and has a juvenile record. Furthermore, the severity of the crime is reflected in the record. As discussed above, the four factors listed by the trial court in the record are supported by the evidence and represent substantial and compelling reasons for departing from the sentencing guideline range. Defendant attacked Deaton along with a group of others in a surprise assault. Not once, but twice defendant engaged in these attacks, rendering Deaton paralyzed and severely incapacitated. Taking into

account the severity of this offense, an upward departure of thirteen months in excess of the guidelines range is within a range of reasonable and principled outcomes.

In giving the proper amount of deference to the trial court and acknowledging that the key to proportionality is whether the sentence reflects the seriousness of the offense and the offender, we hold that the trial court did not abuse its discretion by sentencing defendant beyond the minimum sentencing guidelines range. Therefore, we conclude that the trial court did not err in departing from the minimum sentencing guidelines range when it sentenced defendant to thirteen months in excess of that range.

Affirmed.

/s/ Michael R. Smolenski

/s/ Bill Schuette

/s/ Stephen L. Borrello