

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD LEE KISSNER,

Defendant-Appellant.

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UNPUBLISHED

December 20, 2005

No. 258333

Shiawassee Circuit Court

LC No. 04-000993-FH

Before: Hoekstra, P.J., and Neff and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of burning real property, MCL 750.73. The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to twelve to twenty years' imprisonment. Defendant appeals as of right, challenging his sentence which was an upward departure from the recommended minimum sentence under the sentencing guidelines. We remand for resentencing.

Generally, the trial court is required to impose a minimum sentence that falls within the statutory sentencing guidelines range. MCL 769.34(2); *People v Babcock*, 469 Mich 247, 255-256; 666 NW2d 231 (2003). The trial court may depart from the range established by the sentencing guidelines only if there is a "substantial and compelling reason" for doing so. MCL 469.34(3). A substantial and compelling reason is one that is "objective and verifiable." *Babcock*, *supra* at 270. An objective and verifiable factor is one that is "external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed." *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Moreover, a substantial and compelling reason is one that "'keenly' or 'irresistibly' grabs [the Court's] attention" and is "of 'considerable worth' in deciding the length of a sentence." *Babcock*, *supra* at 257-258, quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). Further, the trial court "shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b).

Defendant was convicted of burning real property, MCL 750.73, a Class D crime. MCL 777.16c. Defendant's offense variable score was seventy-five and defendant's prior record variable score was forty-five. Thus, the minimum appropriate sentence range under the sentencing guidelines was thirty-four to sixty-seven months, MCL 777.65, which was increased

to thirty-four to one hundred months because defendant was a third habitual offender. MCL 777.21(3)(b). The trial court sentenced defendant to a minimum of twelve years' imprisonment, an upward departure of forty-four months from the minimum sentence under the sentencing guidelines.

Appellate review of a sentence that is outside of the appropriate guidelines is not precluded even if the issue was not raised at sentencing, in a motion for resentencing, or in a motion to remand. *People v Kimble*, 470 Mich 305, 310; 684 NW2d 669 (2004). This Court reviews for clear error the trial court's determination that a factor exists to justify an upward departure from the sentencing guidelines. *Babcock, supra* at 264-265. Further, whether the sentencing factor is objective and verifiable is reviewed de novo. *Id.* And, whether the objective and verifiable factor constitutes a substantial and compelling reason to depart from the statutory minimum sentence is reviewed by this Court for an abuse of discretion. *Id.*

Defendant contends that the trial court's characterization of defendant as a "dangerous individual" was not objective and verifiable and, therefore, the trial court erred in basing its departure from the sentencing guidelines on this factor. We agree.

The conclusion that a defendant is a danger to himself and the public is not an objective and verifiable factor. *People v Solmonson*, 261 Mich App 657, 670; 683 NW2d 761 (2004). In *Solmonson*, this Court held that even though the trial court concluded the defendant was a danger to himself and the public, resentencing was not necessary. *Id.* However, in that case, the trial court did not articulate multiple substantial and compelling reasons for departing from the sentencing guidelines. Rather, the only reason for departing from the guidelines was defendant's extensive record of drinking and driving convictions. *Id.* Therefore, this Court concluded that the court's reference to the defendant's dangerousness was merely an explanation of why defendant's extensive criminal history justified departure from the recommended sentence range and did not warrant resentencing. *Id.*

Similar to *Solmonson*, the trial court in this case stated, "this Court having presided over the trial and having presided over your previous conviction and, violation of probation views you as a dangerous individual." However, the trial court also stated, "I think it goes without saying that this is a demonstration of just how dangerous an individual you are, willing to set an entire building on fire for your own vindictive reasons." The court continued, "this crime was nothing more than [defendant] trying to get even in some demented way with the State Police for whatever reason [defendant] had in [his] own mind, [the court did not] know." Thus, the record indicates that the trial court's characterization of defendant as dangerous was based not only on defendant's criminal history, but also on the trial court's conclusion that defendant was vindictive. Further, defendant's criminal history, consisting of one conviction for breaking and entering and assorted non-violent misdemeanors does not show defendant to be a particularly dangerous person. Thus, the trial court's conclusion, unlike in *Solmonson*, was not merely an explanation of defendant's criminal history. Moreover, although the testimony at trial may have led the trial court to conclude that defendant acted out of vindictiveness, there was nothing on the record to objectively verify that vindictiveness was part of defendant's personality. Thus, the trial court's conclusion that defendant was dangerous because he acted out of vindictiveness cannot serve as a substantial and compelling reason to depart from the recommended sentence under the sentencing guidelines.

Moreover, in addition to defendant's vindictiveness, the trial court's characterization of defendant as dangerous was based on the dangerousness of the crime committed by defendant. The trial court called attention to "not only the potential, but the evident danger" in defendant's act of arson. The court stated that at the time of the fire, some people were in the building and others were coming to work. The court mentioned the danger posed to firefighters and to those people who were running into the building to save their personal property. The court noted the "danger of people losing their lives" as a result of the fire.

However, the trial court assessed the following points under the sentencing guidelines: (1) fifteen points under OV 2 for the use of gasoline, an incendiary device, MCL 777.32; (2) twenty-five points under OV 9 for placing ten or more victims in danger or injury or loss of life, MCL 777.39; and (3) fifteen points under OV 19 for using force or the threat of force, MCL 777.49. The trial court did not find on the record that the dangerousness of the crime was given inadequate or disproportionate weight under the sentencing guidelines.

Thus, we conclude that the trial court inappropriately departed from the sentencing guidelines based on its characterization of defendant as dangerous because the trial court's conclusion was not based on objective and verifiable factors and because the trial court did not state on the record that the offense variables that addressed the dangerousness of the crime were given inadequate or disproportionate weight under the sentencing guidelines.

Defendant also contends that the trial court erred when it departed from the sentencing guidelines based on the enormity of the monetary damages caused by defendant. We disagree.

At sentencing, the trial court stated:

[T]his Court feels that the guidelines simply do not address the seriousness of what you did here any way you look at it. The damages exceed, I think Three Hundred Thousand Dollars (\$300,000) . . . . You're never going to be able to even come close to making or paying restitution. So the damages here are enormous in terms of dollars. And I don't think the Court is supposed to make believe or take a blind eye to the enormity of the financial ruin that you've brought upon businesses . . . .

In this case, the amount of monetary damages was an objective and verifiable factor. According to the victim impact statements and the presentence investigation report, the damages totaled \$335,940.86. Further, although the sentencing guidelines take into consideration the value of property that is damaged, lost, or destroyed by a criminal act, MCL 777.46, the damages in this case were over sixteen times higher than the amount of damages contemplated by the sentencing guidelines. Thus, the guidelines did not give adequate and proportionate weight to the amount of damages caused by defendant and the trial court did not abuse its discretion in departing from the sentencing guidelines based on this factor.

Defendant also contends that the trial court's determination that defendant was unable to pay restitution was subjective and, therefore, could not justify the court's upward departure from the sentencing guidelines. Similarly, defendant contends that the trial court's conclusion that defendant caused financial ruin to the small businesses affected by the fire was not supported by

facts in the record and, therefore, could not justify the court's upward departure from the sentencing guidelines.

We conclude that with regard to the monetary damages, the trial court based its departure on the sheer amount of the damages and that the trial court did not intend for its essentially gratuitous comments about defendant's inability to pay restitution or about the financial ruin caused by defendant to serve as substantial and compelling reasons for departing from the sentencing guidelines.

We hold that the trial court did not err in departing from the guidelines based on the amount of damages caused by defendant but that the trial court's characterization of defendant as dangerous, as articulated on the record, was not a substantial and compelling reason for departing from the sentencing guidelines.

Consequently, when this Court determines that one reason is substantial and compelling and others are not, we must determine whether the trial court would have departed and would have departed to the same degree on the basis of the substantial and compelling reason alone. *Babcock, supra* at 260. And, if we are unable determine whether the trial court would have departed to the same degree, or we determine that the trial court would not have departed to the same degree, we must remand the case to the trial court for resentencing. *Id.* Because it is unclear from the record whether the trial court would have departed to the same degree based on the monetary damages alone, we remand this case to the trial court for resentencing.

Finally, we note that although the trial court articulated its reasons for departure on the record, it failed to complete the required sentencing information report departure evaluation. Thus, upon resentencing, if the trial court departs from the sentencing guidelines, the court shall complete this ministerial task. *People v Armstrong*, 247 Mich App 423, 426; 636 NW2d 785 (2001).

Remanded for resentencing and completion of the sentencing information report departure evaluation in accordance with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Janet T. Neff

/s/ Alton T. Davis