

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM RANDALL LITTLE,

Defendant-Appellant.

UNPUBLISHED

March 1, 2007

No. 265802

Wayne Circuit Court

LC No. 05-003750-01

Before: Hoekstra, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 2-1/2 to 4 years' imprisonment for the felonious assault conviction, to be served consecutive to two years' imprisonment for the felony-firearm conviction. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions arise out of a shooting that occurred at Northwestern High School in Detroit on March 24, 2005. After completing a half-day of school, Brandon Hartsfield exited the building through the main entrance and stopped to talk with some fellow students. He heard five or six gunshots fired from across the street and was struck once in the left abdominal area. Testimony revealed that defendant fired from across the street toward a boy with whom defendant or his friends had had a previous altercation, and that Hartsfield was not defendant's intended victim. The trial court sentenced defendant, who was 16 years old at the time of sentencing, as an adult and upwardly departed from the sentencing guidelines.

Defendant argues that he is entitled to resentencing because the trial court failed to state objective and verifiable reasons, not already accounted for in the sentencing guidelines, to support its upward departure. We disagree. In reviewing a departure from the sentencing guidelines range, we review the existence of a particular factor supporting a departure for clear error, the determination whether the factor is objective and verifiable de novo, and whether a reason is substantial and compelling for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). An abuse of discretion occurs if the outcome that the trial court imposed falls outside the permissible principled range of outcomes. *Id.* at 269, 274. We also review the extent of a departure for an abuse of discretion. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

Defendant's sentencing guidelines range was 2 to 17 months, which placed him in an intermediate sanction cell. MCL 769.34(4)(a) provides in part:

If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in [MCL 777.1 *et seq.*] is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections.

A substantial and compelling reason must be objective and verifiable, must “‘keenly’” or “‘irresistibly’” grab the court’s attention, and must be recognized as being “‘of considerable worth’” in deciding the length of a sentence.” *Babcock, supra* at 257, quoting *People v Fields*, 448 Mich 58, 67; 528 NW2d 176 (1995), reh den 448 Mich 1224 (1995). The “objective and verifiable” requirement “mean[s] that the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed.” *Abramski, supra* at 74. Further, a departure may not be based on characteristics already taken into account in determining the appropriate sentencing guidelines range unless the court determines from facts in the record that the particular characteristic at issue has been given inadequate or disproportionate weight. *Id.*

Here, the trial court departed from the sentencing guidelines recommended range, stating in pertinent part as follows:

You had an opportunity to be in [the juvenile justice] system and it had virtually no effect or impact on you at all. [Defense counsel] would argue that you weren’t there long enough and that you should be there longer. One of the witnesses, Mr. Townsell, testified that some kids have to go through the system more than once, a rather sort of casual and flip way of looking at things.

I wonder how many people have to die before we decide that you’ve been through the system enough times. You know, it isn’t another car theft or another ATM break-in or retail fraud that brings you here. It is a crime which represents a very steep and serious escalation in your criminal activity.

A [sic] shooting that was charged is assault with intent to commit murder and if the Jury had brought in a guilty verdict on that charge it would have been a verdict fully supported by the evidence in this case. They cut you a good break and maybe that was their way of accommodating their own sense of justice and trying to give you another chance in life, but it was, nonetheless, a horrendous crime, one where you shot into a location in broad daylight and the Jury, by the way, decided that you did shoot at the victim.

They couldn’t have convicted you [of] felonious assault if they hadn’t made that finding of fact and even though you’ve insisted that you shot in the air the shooting occurred in broad daylight in front of a school into a crowd of kids.

The victim in this case was very seriously injured. There was evidence here that at least four shots struck either him or some part of his body. These are

factors that are not adequately taken into account in the sentencing guidelines that apply in your case.

I think despite your relatively tender age there is – there are objective and compelling reasons for my sentencing you above the guidelines and they are objective and they’re manifest and they’re clearly demonstrated on the record in this case. Some people would argue that your relative youth should be taken into account as a mitigating factor.

I think that sometimes it’s true with some youths and sometimes with some crimes. I think with a crime like this your relative youth actually causes me alarm, greater alarm and concern than it would if you were older. Somebody as young as you are demonstrating the kind of callousness that it took to commit this crime and the kind of easy familiarity that you and your friends have with guns and handguns is very frightening and the fact that you have picked up this information and run with it and have it and are so comfortable with it at such an early age is not a mitigating factor at all.

In fact, it’s an incriminating factor in my view and it concerns me that, too, that – it also shows that the juvenile justice system not only failed you, but it actually may have hardened you and created an individual who’s capable of committing even more serious crimes than he did when he entered the juvenile justice system which is, of course, a clear and obvious fact that cuts entirely against the argument that the adult justice system is going to somehow harden you or make you a more dangerous individual when you emerge.

* * *

It’s up to you. You can spend the rest of your life in and out of the Department of Corrections or you cannot, but it strikes me as completely inappropriate in this case to sentence you [as] a juvenile and I’m not going to do it and for the reasons I stated I’m going to depart from the guidelines.

It is the sentence of this Court that on your conviction for felonious assault you’re remanded to the custody of the Michigan Department of Corrections for a prison term of no less than two and a half, no more than four years and for felony firearm you’re remanded for a consecutive of two years.

Thus, the trial court based its departure on several factors.

Defendant argues that the trial court erred by sentencing him on the basis of its personal belief that he was guilty of the charged offense of assault with intent to commit murder. Although the trial court remarked that the evidence would have supported such a verdict, it does not appear from the court’s comments that it considered this fact as a substantial and compelling reason to depart from the sentencing guidelines. Rather, it appears that the court was emphasizing that despite the jury’s acquittal on the assault with intent to murder charge, “it was, nonetheless, a horrendous crime, one where you [defendant] shot into a location in broad daylight and the Jury, by the way, decided that you did shoot at the victim.” Accordingly,

defendant's claim that the trial court sentenced him on the basis of its personal belief that he committed a greater offense is unfounded.

Defendant also takes issue with the trial court's statement that the jury could not have convicted him of felonious assault without finding that he shot at or toward Hartsfield. Defendant correctly argues that the elements of felonious assault do not include shooting at a victim. In any event, the evidence presented at trial supported a finding that defendant shot toward a group of people standing outside Northwestern High School. Defendant admitted to Martin Westbrook that he initially shot toward the ground, but that he then lifted up the gun and hit someone. After the shooting, Melinda Hendrickson heard defendant say, "damn, that wasn't the nigger I wanted." The evidence supported a finding that defendant shot toward a group of people that included Hartsfield.

In support of its departure, the trial court relied on the fact that defendant fired into a crowd of students in front of a high school. Defendant argues that the presence of multiple victims was already addressed in the scoring of offense variable (OV) 9. Although defendant was assessed ten points under OV 9 for multiple victims, the sentencing guidelines did not account for the fact that the victims were students who were innocently gathered outside their high school after the school day had ended and that the shooting occurred in front of a high school. These factors are both objective and verifiable, and keenly and irresistibly grab one's attention. *Babcock, supra* at 257-258; *People v Solmonson*, 261 Mich App 657, 668; 683 NW2d 761 (2004), lv den 471 Mich 873 (2004). The trial court did not abuse its discretion in finding that these factors were substantial and compelling reasons to support an upward departure. *Babcock, supra* at 264-265.

The trial court also recognized that Hartsfield was very seriously injured and that at least four shots struck him or his clothing. To the extent that the court departed from the guidelines on the basis that Hartsfield was seriously injured, the sentencing guidelines already considered this factor. Defendant was assessed 25 points under OV 3, MCL 777.33, for "[l]ife threatening or permanent incapacitating injury." The sentencing guidelines, however, did not account for the fact that Hartsfield's clothing was struck by additional bullets that did not cause his injury. The evidence showed that either three or four bullets struck Hartsfield or his clothing. This factor demonstrates the seriousness of the threat that defendant's actions caused Hartsfield. Not only did Hartsfield suffer serious injury caused by one bullet, but he nearly suffered as many as four gunshot wounds. This factor is objective and verifiable, and the trial court did not abuse its discretion in determining that it is substantial and compelling. *Babcock, supra* at 264-265.

The trial court also departed because of defendant's youth and the fact that he failed to rectify his behavior despite previous contacts with the juvenile justice system. The court determined that defendant's youth was not a mitigating factor, but rather, an "incriminating" factor and that it shows that the juvenile justice system failed defendant considering that, after his involvement in the system, he was committing more serious crimes than he committed when he entered the system. Defendant testified at the sentencing hearing¹ that he was charged with

¹ Pursuant to MCL 769.1(3), the trial court was required to hold a hearing to determine whether to sentence defendant as a juvenile or as an adult.

retail fraud for stealing clothing from a mall in 2001 or 2002. He was also previously in the juvenile system for breaking and entering a store and receiving stolen property. Not long before the incident giving rise to this case, defendant was incarcerated at the Calumet juvenile detention facility for approximately one year. Defendant was released from the facility on February 23, 2005, approximately one month before the shooting. Given these circumstances, we cannot conclude that the trial court abused its discretion by determining that defendant's age, failure to benefit from the juvenile justice system, and escalation of crime were substantial and compelling reasons supporting the court's upward sentencing departure. *Babcock, supra* at 264-265.

Therefore, with the exception of the trial court's reasoning that Hartsfield was very seriously injured, all of the trial court's reasons supporting the upward departure were substantial and compelling. As previously discussed, the fact that Hartsfield was seriously injured was already taken into consideration under OV 3. Although the trial court stated that the sentencing guidelines do not adequately account for this factor, the trial court did not elaborate on this point or otherwise indicate why this is so. As such, we conclude that the trial court erred to the extent that it based the departure, in part, on the seriousness of Hartsfield's injuries. Nevertheless, we conclude that the trial court would have imposed the same departure notwithstanding this factor. *Babcock, supra* at 260. A review of the trial court's reasoning shows that the court did not accord this factor any weight other than to merely acknowledge that Hartsfield was very seriously injured. The trial court's primary concern appeared to be that defendant's repeated involvement in the juvenile justice system apparently had no effect on his behavior, and, in fact, the seriousness of defendant's criminal activity had escalated. Thus, the record shows that the court would have departed to the same degree absent consideration of the seriousness of Hartsfield's injuries.

Defendant further argues that the trial court abused its discretion regarding the extent of the upward departure imposed. We again disagree. "[I]n departing from the guidelines range, the trial court must consider whether its sentence is proportionate to the seriousness of the defendant's conduct and his criminal history because, if it is not, the trial court's departure is necessarily not justified by a substantial and compelling reason." *Babcock, supra* at 264.

The sentencing guidelines range was 2 to 17 months, and the trial court sentenced defendant to 2-1/2 to 4 years' imprisonment. Thus, the trial court imposed a 13-month departure. We conclude that defendant's sentence is proportionate to the seriousness of his conduct and his criminal history. Defendant was released from the Calumet juvenile detention facility, where he resided for nearly one year, only one month before committing the instant offense. In fact, as defendant admits in his brief on appeal, he spent much of the three years before this shooting in various juvenile facilities. Thus, the trial court's determination that the juvenile justice system has had virtually no impact or effect on defendant appears to be correct since he failed to rectify his behavior during his previous juvenile incarcerations. Accordingly, the trial court did not abuse its discretion by imposing the 13-month upward departure. *Abramski, supra* at 74.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Kurtis T. Wilder