

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WINDELL CHRISTOPHER LEWIS,

Defendant-Appellant.

UNPUBLISHED

September 13, 2007

No. 272822

Berrien Circuit Court

LC No. 06-003010-01

Before: Cavanagh, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from his sentences for his jury convictions of two counts of first-degree fleeing and eluding, MCL 257.602a(5), two counts of operating a motor vehicle without a license causing death, MCL 257.904(4), two counts of failure to stop at the scene of an accident resulting in death, MCL 257.617(3), two counts of failure to stop at the scene of an accident resulting in serious impairment, MCL 257.617(2), and two counts of involuntary manslaughter, MCL 750.321. Defendant was sentenced to concurrent prison terms of ten to 15 years for each conviction, with the exception of the convictions of failure to stop at the scene of an accident resulting in serious impairment, for which the trial court imposed concurrent terms of three years, four months to five years. We affirm.

Defendant's convictions arose out of a fatal automobile accident that occurred in the early morning hours of October 15, 2005, while defendant was fleeing from police officers in a stolen vehicle. Defendant was driving at a high rate of speed in a 25-mile per hour residential area. Defendant ran a stop sign and collided with two automobiles. Two of the occupants of one vehicle, Alvin Golden and Lester Johnson, were killed. Another passenger, Christopher Battle, suffered a closed head injury, a fractured shoulder, facial scarring, and a severed ear, and was in a coma for one week. The final occupant, Antwan Golden, was in a coma for one month, suffered a stroke, was blinded in his right eye, and suffered other injuries. Defendant fled on foot after the accident.

The sentencing guidelines for defendant's convictions of failure to stop at the scene of an accident resulting in death recommended a minimum term range of 50 to 100 months. MCL 777.64. However, the trial court sentenced defendant to the statutory maximum of ten to fifteen

years in prison. The trial court adopted the prosecutor's proposed reasons for exceeding the guidelines, including the facts that: defendant had previously fled from police officers,¹ the guidelines did not take into account the serious injuries that occurred to Christopher Battle and Antwan Golden or the second death that occurred, defendant had escaped house arrest at the time of these offenses, defendant was apprehended after this accident while yet again fleeing from police in a stolen car, defendant was repeatedly truant from juvenile detention, defendant fled the scene of the accident when it was clear that at least one person was dead, defendant's conduct resulted in psychological injury to the survivors, and defendant's OV score was twice the maximum covered under the guidelines.

In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination subject to review for clear error, the determination that the factor is objective and verifiable is reviewed de novo, and the determination that the factors constituted substantial and compelling reasons for departure and the extent of the departure are reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 265-269; 666 NW2d 231 (2003); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). In ascertaining whether the departure was proper, we must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Babcock*, *supra* at 270.

A court may depart from the sentencing guidelines if it has a substantial and compelling reason to do so, and states on the record the reasons for departure. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). A court may not depart from the sentencing guidelines based on an offense or offender characteristic already considered in determining the guidelines unless the court finds, based on facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3); *People v Hendrick*, 261 Mich App 673, 682; 683 NW2d 218 (2005), *aff'd in part and rev'd in part* 472 Mich 555 (2005). Factors meriting departure must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth. *Babcock*, *supra* at 257-258. To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *Abramski*, *supra*. We must also review a departure from the guidelines range to determine whether the sentence imposed is proportionate to the seriousness of the defendant's conduct and his criminal history. *Babcock*, *supra* at 263 n 20, 264. If a trial court articulates multiple reasons for its departure, and we determine that some of the reasons are invalid, we must determine whether the trial court would have departed, and if so to the same degree, on the basis of the valid reasons alone. *Id.* at 260-261, 273. If we are unable to make such a determination, we must remand for resentencing or re-articulation. *Id.* at 271.

Defendant maintains that the trial court erred because his previous incidents of fleeing and eluding were covered under the sentencing guidelines in PRV 4 (prior low severity juvenile adjudications). Defendant also maintains that, because he received additional convictions for the additional death, the injuries to Battle and Antwan Golden, his fleeing and eluding, and his decision to drive without a license, these actions were already considered under the guidelines,

¹ The lower court record indicates that defendant, while driving stolen cars, previously fled police on October 22, 2001, and on March 7, 2002.

particularly in PRV 7 (concurrent convictions), and could not be used as reasons for sentence departure. Moreover, defendant contends that all OV scores over 75 points should be treated equally. We disagree.

The trial court's reasons for departure are objective and verifiable, and are substantial and compelling. Defendant's arguments have little merit where the trial court correctly found that the guidelines did not adequately take into account the circumstances of the offenses and defendant's circumstances. For example, defendant received 20 points for OV 7, representing the fact that he had "2 or more subsequent or concurrent felony convictions." MCL 777.57. This score does not adequately reflect defendant's ten concurrent serious convictions. Nor does the fact that defendant received five points for OV 4, which does not take into account his later flight from the police which led to his apprehension, adequately reflect the seriousness of defendant's pattern of extremely dangerous behavior.

In addition, defendant has provided no support for his contention that, because he was convicted of separate offenses concerning the injuries to Battle and Antwan Golden, the trial court could not use the extent of these injuries as a rationale for departure. We agree that the guidelines did not adequately take these injuries into account. Because the scored offense involved a "homicide", the injuries to Battle and Antwan Golden were not scored under OV 3. MCL 777.33(2)(b); MCL 777.1(c). Because defendant had already received 100 points for OV 9 due to the multiple deaths that occurred, the injuries to the other survivors were not adequately addressed in this scoring variable. MCL 777.39. The survivors' injuries occurred during the same offense, and the severity of the offense was heightened by the presence of these additional victims with catastrophic injuries. This constitutes a valid reason for sentence departure.

Finally, we agree with the trial court's notation that the extent to which defendant's OV score exceeded the maximum range indicates that the guidelines were inadequate to address this situation.

As a whole, the circumstances of this offense and defendant's circumstances keenly grab our attention. We thus find that the extent of the departure did not constitute an abuse of discretion, and that the sentence is proportionate.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto