

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK JOHN QUINN,

Defendant-Appellant.

UNPUBLISHED

September 20, 2007

No. 271565

Mason Circuit Court

LC No. 06-001580-FH

Before: Bandstra, P.J., and Talbot and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from the sentences of 17 to 48 months in prison imposed on his jury convictions of possession of Alprazolam, MCL 333.7403(2)(b)(ii), and possession of Clonazepam, MCL 333.7403(2)(b)(ii), and the sentence of 16 to 24 months in prison imposed on his conviction of possession of marijuana, MCL 333.7403(2)(d). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E)

The guidelines recommended a minimum term range of zero to 17 months. Pursuant to MCL 769.34(4)(a), because the upper limit of the recommended minimum sentence range was 18 months or less, the trial court was required to impose an intermediate sanction unless it stated on the record that a substantial and compelling reason existed to commit defendant to the Department of Corrections. Following a hearing on defendant's motion for resentencing, the trial court acknowledged an error in the initial guidelines scoring, but reaffirmed its decision to sentence defendant above the guidelines.

Initially, the trial court found that defendant's criminal history and pattern of failing to learn from his mistakes justified a prison sentence. During defendant's motion for resentencing, the trial court noted that defendant had five prior felony and seven prior misdemeanor convictions. The trial court found that the guidelines covered part, but not all, of defendant's prior criminal history. In particular, the trial court noted that prior record variable (PRV) 2 (prior low severity felony convictions), which provides for a score of 30 points for "four or more" prior low severity felonies, MCL 777.52, did not address defendant's fifth prior felony conviction. The trial court also noted that defendant's lengthy criminal history evidenced a "pattern" demonstrating defendant's lack of potential for rehabilitation that was not taken into account in offense variable (OV) 13, which only included crimes committed in the last five years. The trial court observed that defendant failed to appear for sentencing on a number of occasions in the

past and that defendant, who was on parole at the time of the instant offenses, had previously committed other crimes while on probation.

Defendant argues that his prior criminal history was adequately addressed by the existing guidelines and did not amount to a substantial and compelling reason for departure. We disagree.

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 range unless the court finds, based on facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b); *People v Hendrick*, 261 Mich App 673, 682; 683 NW2d 218, *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 which are capable of being confirmed. *Abramski*, *supra* at 74. We are also required to review a departure from the guidelines range to determine whether the sentence imposed is proportionate to the seriousness of 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 ascertain 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 rearticulation. *Id.* at 271.

The trial court's reasons for departure are objective and verifiable, and are substantial and compelling. Defendant's assertion that the guidelines adequately addressed his criminal history is arguably correct, but only with regard to the scoring of PRV 2. The trial court's decision that the guidelines did not adequately account for defendant's fifth prior felony appears to contradict the legislative intent, given the scoring of 30 points for "4 or more prior low severity felony convictions" in MCL 777.52(1)(a). Although this language could be understood not to encompass situations where a defendant had a larger number of felony convictions, such is not the case here. However, the fact that defendant repeatedly committed crimes while on parole or probation and failed to report for sentencing on a number of occasions supports a sentence departure. These factors are objective and verifiable and are not accounted for in the guidelines.¹

¹ Prior record variable 6 addresses defendant's parole status at the time of the instant offenses,
(continued...)

Moreover, defendant's criminal history and apparent contempt of the criminal justice system underscore his inability to conform his conduct to the rules of society and support the trial court's decision. See *People v Hansford*, 454 Mich 320, 326; 562 NW2d 460 (1997). It is evident from the trial court's comments, regardless of any error concerning the import of PRV 2 that the trial court would have departed to the same degree on the basis of the valid reasons alone.

The circumstances of this offense and defendant's history keenly grab our attention. We also find that the extent of the departure did not constitute an abuse of discretion and that the sentence is proportionate. Because we affirm defendant's sentence we need not address defendant's request for reassignment of this matter to an alternative judge.

Affirmed.

/s/ Richard A. Bandstra

/s/ Michael J. Talbot

/s/ Karen M. Fort Hood

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but does not otherwise address defendant's history in this regard. MCL 777.56.