

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANKLIN LEROY RAYMOND,

Defendant-Appellant.

UNPUBLISHED

January 8, 2008

No. 274245

Gogebic Circuit Court

LC No. 06-000142-FH

Before: Fitzgerald, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

A jury convicted defendant of delivery of a controlled substance, MCL 333.7401(2)(b)(ii), and the trial court sentenced defendant as a second habitual offender, MCL 769.10, to fourteen months to ten and one-half years in prison. On appeal, defendant contests the validity of his sentence. Because we conclude that the trial court did not state a substantial and compelling reason for departing from the sentencing guidelines, we vacate defendant's sentence and remand for resentencing. This appeal has been decided without oral argument under MCR 7.214(E).

Defendant's recommended minimum sentence range was zero to seven months. Because the upper limit of defendant's recommended minimum sentence range was 18 months or less, the trial court had to sentence defendant to an intermediate sanction unless it stated a substantial and compelling reason to sentence defendant to the department of corrections. MCL 769.34(4)(a); see *People v Uphaus*, 275 Mich App 158, 163-164; 737 NW2d 519 (2007), reversed in part on other grounds ___ Mich ___; 741 NW2d 21 (2007). An intermediate sanction may include probation or any sanction, other than imprisonment in a state prison or reformatory, that may be lawfully imposed. MCL 769.31(b). An intermediate sanction may also include a jail term not to exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less. MCL 769.34(4)(a). Although defendant qualified for an intermediate sanction, the trial court elected to sentence defendant to serve fourteen months to ten and one half years in prison. On appeal, defendant contends that the trial court did not state a substantial and compelling reason for departing from the sentencing guidelines and requests resentencing by another judge. We agree that defendant is entitled to resentencing.

In reviewing a trial court's decision to depart from the sentencing guidelines, this court reviews for clear error the trial court's finding that a particular factor in support of departure exists. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). However, whether the

factor is objective and verifiable is a question of law that this Court reviews de novo. *Id.* Lastly, this Court reviews for an abuse of discretion the trial court's determination that the objective and verifiable factors in a particular case constitute a substantial and compelling reason to depart from the sentencing guidelines. *Id.*

A substantial and compelling reason is an objective and verifiable reason that keenly or irresistibly grabs one's attention. *Id.* at 449. To be objective and verifiable, a reason must be based on actions or occurrences that are external to the minds of those involved in the decision and must be capable of being confirmed. *Id.* at 450. A substantial and compelling reason must be of considerable worth in deciding the length of a sentence and will exist only in exceptional cases. *Id.* at 449-450.

At sentencing, the trial court opined that abuse of prescription drugs was a serious problem in the county. Further, the court spoke of the defendant's "audacity" in delivering drugs in daylight and in a public place. Additionally, the trial court noted that defendant had several prior jail sentences and had twice been on probation. Finally, the trial court stated its belief that "no amount of jail time" would deter defendant from committing future crimes. For these reasons, the trial court elected to sentence defendant to 14 months to ten and one half years in prison.

The severity of the problem of prescription-drug abuse in general is neither a substantial and compelling factor, nor, in the absence of relevant data, an objective and verifiable one. To the extent the trial court was motivated in this regard by its own personal policy view, the court intruded on the Legislature's prerogative to define crimes and fix punishments. See *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). In addition, we agree with defendant that it is not a proper basis for departure from the guidelines to "punish one man for the many cases [of] abusing prescription drugs that come into the courtroom." Likewise, that the transaction at issue took place in daylight in a public place does not keenly and irresistibly grab our attention. *Young, supra* at 449-450. The evidence indicates only that an unauthorized delivery of Ritalin took place. Such an occurrence would hardly be any less menacing a crime if it took place in darkness or seclusion. Finally, whether no amount of jail time would suffice to reform or correct defendant is not objective and verifiable, and, therefore, is not a factor that may be considered in deciding whether to depart from the sentencing guidelines. *Id.*

The trial court further stated that defendant's score of zero for prior record variable (PRV) 6, MCL 777.56 (relationship to criminal justice system), did not "adequately reflect the history of this case." The trial court also concluded that defendant's score of zero for offense variable (OV) 13, MCL 777.43 (continuing pattern of criminal behavior), was "inadequately reflected or given [in]adequate weight in the consideration of this matter." Defendant suggests that the sentencing guidelines take sufficient account of his prior convictions and that those convictions, therefore, cannot constitute a substantial and compelling basis for a departure. We agree.

A trial court may not base a departure on an offense characteristic or offender characteristic that is already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the record that the characteristic has been given inadequate or disproportionate weight. MCL 769.34(3)(b); *Young, supra* at 450. The trial court's references to PRV 6 and OV 13 clearly reflect the trial court's belief that the

recommended sentence failed to adequately reflect defendant's criminal history. Nevertheless, the sentencing guidelines "make elaborate provision for a defendant's criminal record and base the recommended minimum sentence in part on those provisions" *Young, supra* at 454. Hence, the trial court may not utilize a defendant's criminal record as a reason for departure unless it first determines that the sentencing guidelines gave inadequate weight to defendant's criminal record. *Id.* at 454-455.

OV 13 addresses whether the offense is part of a continuing pattern of criminal behavior. MCL 777.43. The Legislature has determined that offenses that the defendant committed within the last 5 years may reflect such a pattern. MCL 777.43(2)(a). To the extent that the trial court disagreed with the Legislature's determination and would have examined a longer period of time, this disagreement is not a proper basis for concluding that OV 13 gave inadequate weight to defendant's criminal record.

In addition, the trial court's suggestion that a score of zero for PRV 6 constitutes "a legal fiction" shows a misunderstanding of that variable. PRV 6 only takes into account an offender's *current* relationship with the criminal justice system apart from the sentencing offense. MCL 777.56. Because defendant did not have a current relationship with the criminal justice system, the trial court erred in treating earlier, completed, involvements with the criminal justice system as a reason to regard a score of zero as giving that factor inadequate weight. Defendant's completed involvement with the criminal justice system was properly reflected under other prior record variables.

Because the trial court relied on invalid factors in departing from the guidelines, the sentence is invalid. *Young, supra* at 458. Accordingly, we vacate defendant's sentence and remand this matter to the trial court with instructions to resentence defendant. We further remind the trial court that, if it again elects to depart from the guidelines, it must prepare a departure evaluation form. See *People v Armstrong*, 247 Mich App 423, 426; 636 NW2d 785 (2001).

We deny defendant's request that resentencing take place before a different judge. Although the sentencing judge failed to state a valid reason for departure, the court did not reveal the sort of bias that would outweigh the obvious advantages of having the same judge who heard the evidence determine the sentence. See *People v Fox (After Remand)*, 232 Mich App 541, 559; 591 NW2d 384 (1998).

Finally, defendant also argues that his sentence violates the rule stated in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), because the trial court relied on facts not found by a jury in calculating his minimum sentence. However, our Supreme Court has concluded that a trial court's fact-finding in scoring offense variables does not increase the defendant's statutory maximum sentence for purposes of *Blakely*. *People v McCuller*, 479 Mich

672, 677; 739 NW2d 563 (2007). Hence, the rule in *Blakely* is not implicated by Michigan's sentencing system. *Id.* at 689-690.

We vacate defendant's sentence and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Michael R. Smolenski