

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEONDRE KENYETTA ELIE,

Defendant-Appellant.

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UNPUBLISHED

January 15, 2008

No. 275081

Wayne Circuit Court

LC No. 06-007727-01

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

PER CURIAM.

Defendant appeals as of right from his conviction of possession of a firearm during the commission of a felony, MCL 750.227b, and from his sentences of two to five years in prison imposed on his convictions of third-degree fleeing and eluding, MCL 257.602a, and carrying a concealed weapon, MCL 750.227. We affirm defendant's conviction of felony-firearm, but vacate his sentences for fleeing and eluding and carrying a concealed weapon, and remand this matter for resentencing on those convictions only. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was convicted of third-degree fleeing and eluding, carrying a concealed weapon, and felony-firearm after a jury trial. The statutory sentencing guidelines recommended a minimum term range of zero to nine months for the offenses of fleeing and eluding and carrying a concealed weapon. The trial court departed upward from the guidelines for the stated reasons that defendant's conviction of carrying a concealed weapon together with fleeing and eluding was not adequately accounted for in the guidelines, and that the defense presented by defendant was "palpably preposterous" and reflected defendant's lack of respect for the law. The trial court sentenced defendant to concurrent terms of two to five years in prison for fleeing and eluding and carrying a concealed weapon, and to a consecutive two-year term for felony-firearm. Defendant received credit for 143 days served in jail.

Ultimately, the trial court issued a second amended judgment of sentence indicating that defendant's sentences for carrying a concealed weapon and felony-firearm were to run concurrently, with a beginning date of November 13, 2006, and that the sentence for fleeing and eluding was to run consecutively with the sentence for felony-firearm, and was to begin on June 13, 2008. The effect of this arrangement was that the sentence for carrying a concealed weapon would begin at the same time as did the sentence for felony-firearm, and would overlap a portion of the sentence for fleeing and eluding.

The proper interpretation of a statute presents a question of law that we review de novo on appeal. *People v Clark*, 463 Mich 459, 463 n 9; 619 NW2d 538 (2000).

MCL 750.227b provides in pertinent part:

(1) A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, except a violation of section 223, section 227, 227a or 230, is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this subsection, the person shall be imprisoned for 10 years.

(2) A term of imprisonment prescribed by this section is in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

Defendant argues that carrying a concealed weapon served as the underlying offense for the charge of felony-firearm, and that because that arrangement is prohibited by statute, his conviction for felony-firearm must be reversed, and his sentence for that offense must be vacated. We disagree.

A sentence for felony-firearm must be served consecutively with and prior to a sentence for the underlying felony, MCL 750.227b(2); *People v Fortson*, 202 Mich App 13, 20-21; 507 NW2d 763 (1993), but not consecutively with a sentence imposed for any other offense. *Clark, supra* at 464. The offense of carrying a concealed weapon cannot serve as the underlying offense for felony-firearm. MCL 750.227b(1); *People v Cortez*, 206 Mich App 204, 207; 520 NW2d 693 (1994). Contrary to defendant's assertion, carrying a concealed weapon did not serve as the predicate offense for the charge of felony-firearm. The information filed in the trial court clearly states that fleeing and eluding was the predicate offense for the charge of felony-firearm.

The trial court's second amended judgment of sentence directs that defendant's sentences for carrying a concealed weapon and felony-firearm are to run concurrently, and that the sentence for fleeing and eluding is to run consecutively with the sentence for felony-firearm. Defendant's sentence for felony-firearm is consecutive to the sentence for fleeing and eluding, as required by MCL 750.227b(2), and is concurrent with the sentence for carrying a concealed weapon, as required. *Clark, supra* at 464. Defendant's conviction of and sentence for felony-firearm must stand.

As a general rule, the trial court must impose a sentence within the sentencing guidelines, unless substantial and compelling reasons exist to depart from the guidelines. To constitute a substantial and compelling reason for departing from the guidelines, a reason must be objective and verifiable, must irresistibly attract the attention of the court, and must be of considerable worth in deciding the length of the sentence. To be objective and verifiable, the factors must be actions or occurrences that are external to the mind, and that are capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The reason for the departure must be articulated by the trial court on the record. MCL 769.34(3). A substantial and

compelling reason articulated by a trial court to merit a departure from the sentencing guidelines must justify the particular departure at issue. If the stated reasons are partially invalid and the appellate court cannot ascertain whether the trial court would have departed to the same extent regardless of the invalid factors, remand for resentencing or rearticulation is necessary. *People v Babcock*, 469 Mich 247, 257-261; 666 NW2d 231 (2003).

In determining whether a sufficient basis exists to depart from the sentencing guidelines, the trial court must ascertain whether the departure would result in a sentence more proportionate to the seriousness of the offense and the defendant's criminal history than would adherence to the guidelines. In addition, in departing from the guidelines, the trial court must determine whether the particular departure is proportionate to the circumstances of the offense and the offender. *Id.* at 262-264; *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

The determination of the existence of a factor for departing from the guidelines is reviewed for clear error; the determination that a factor is objective and verifiable is reviewed de novo; the determination that objective and verifiable factors merited departure from the guidelines is reviewed for an abuse of discretion. A trial court may depart from the guidelines for nondiscriminatory reasons based on an offense or offender characteristic that was already considered in calculating the guidelines if the trial court concludes that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Babcock, supra* at 265-269. In determining whether substantial and compelling reasons existed to merit departure from the sentencing guidelines, an appellate court must give appropriate deference to the trial court's sentencing determination. *Id.* at 270.

The sentencing guidelines for fleeing and eluding and carrying a concealed weapon recommended a minimum term range of zero to nine months. Under the sentencing guidelines, if the upper limit of the recommended minimum sentence range is 18 months or less, the trial court must impose an intermediate sanction unless it states on the record that a substantial and compelling reason exists to commit the defendant to prison. An intermediate sanction may include a jail term that does not exceed the upper limit of the guidelines range or 12 months, whichever is less. MCL 769.34(4)(a). An intermediate sanction does not include a prison term. MCL 769.31(b); *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002).

Defendant argues that the trial court abused its discretion by exceeding the guidelines and imposing minimum terms of two years on his convictions of fleeing and eluding and carrying a concealed weapon. We agree.

We vacate the minimum sentences imposed on defendant's convictions of fleeing and eluding and carrying a concealed weapon, and remand this matter for resentencing on those convictions. The trial court concluded that the fact that defendant was convicted of offenses of the nature of carrying a concealed weapon and fleeing and eluding was not adequately accounted for in the guidelines because it did not reflect the level of dangerousness embodied in

defendant's acts.<sup>1</sup> The nature of the offenses defendant committed is objective and verifiable; however, the trial court did not state why the nature of the offenses warranted imposition of a sentence that exceeded the guidelines by nearly three times. *Babcock, supra* at 262-264. Moreover, the trial court's conclusion that defendant's defense was "palpably preposterous" was not objective and verifiable as that concept is defined. *Abramski, supra*.

Neither the trial court's reasoning for exceeding the guidelines by nearly three times, nor the extent to which the trial court relied on its conclusion that defendant's defense was frivolous to depart from the guidelines, can be ascertained simply by examining the transcript of the sentencing hearing. Therefore, a remand for resentencing on the convictions of fleeing and eluding and carrying a concealed weapon is necessary. *Babcock, supra* at 257-261.

We affirm defendant's conviction of felony-firearm, but vacate defendant's sentences for fleeing and eluding and carrying a concealed weapon, and remand this case to the trial court for resentencing on those convictions only. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Michael R. Smolenski

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<sup>1</sup> The sentencing information report indicates that defendant was scored zero points for Offense Variable (OV) 12, MCL 777.42, contemporaneous felonious criminal acts, and zero points for OV 13, MCL 777.43, continuing pattern of criminal behavior.