

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JAMES ROBERT SMITH,

Defendant-Appellee.

UNPUBLISHED

January 31, 2008

No. 272053

Washtenaw Circuit Court

LC No. 05-001115-FH

Before: Beckering, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Defendant pleaded guilty to two counts of second-degree criminal sexual conduct [CSC-II], MCL 750.520c(1)(a), and was sentenced, pursuant to a *Cobbs*¹ agreement, to concurrent terms of five years' probation, with the first year in jail. The sentences departed downward from the sentencing guidelines' recommended minimum range of 29 to 57 months. The prosecutor appeals by leave granted. We vacate defendant's sentences and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The prosecutor contends the trial court improperly accepted a *Cobbs* plea agreement and sentenced defendant below the statutory minimum without substantial and compelling reasons for doing so. We agree.

Under Michigan's sentencing guidelines act, a trial court may depart from the statutory minimum range only when substantial and compelling reasons exist to do so, and it states on the record the reasons for departure. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001). A substantial and compelling reason to depart from the guidelines "exists only in exceptional cases," and is an "objective and verifiable" reason that "keenly or irresistibly grabs our attention" and is "of considerable worth in deciding the length of a sentence...." *People v Babcock*, 469 Mich 247, 258; 666 NW2d 231 (2003). This Court reviews for clear error a trial court's factual finding that a factor exists in support of a departure from the applicable sentencing guidelines range. *Id.*, 265. Whether the findings are objective and verifiable is reviewed de novo. *Id.* Finally, the Court reviews for an abuse of discretion the trial

¹ *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

court's determination that the factors constitute substantial and compelling reasons for departure from the sentencing guidelines. *Id.*

In this case, there were insufficient compelling reasons to warrant a deviation from the minimum sentencing range. The trial court listed a number of reasons for departing below the guidelines range of 29 to 57 months, including: 1) the close timing of defendant's sexual misconduct offenses in the instant case and the same offense against a different victim in Wayne County; 2) defendant's limited criminal history prior to the Wayne County offense; 3) the relatively minor nature of defendant's probation violation, i.e., being at his sister's when a young child was present for about ten minutes; 4) defendant's psychiatric history of bipolar disorder and schizophrenia; 5) defendant's support from certain family members, especially his sister; 6) defendant's limited literacy; 7) defendant's potential for rehabilitation; 8) defendant's lack of history of abusing children; 9) defendant's use of cocaine; and 10) the impact on the two young victims if they were required to testify at a trial.

Several of the trial court's listed reasons for departure are not objective and verifiable. Without sufficient evidence, the court merely mentioned in passing defendant's limited ability to read and write, and his potential for rehabilitation. These factors, especially the potential for rehabilitation, appear to be conclusions drawn by the trial court without verifiable evidence. The fact that defendant had a prior CSC-II conviction involving another child leads to an opposite conclusion. The court also mentioned the adverse effect of testifying on the two young victims who had been molested by the defendant as a reason for departure. This finding was contradicted by the fact that the victim in this case had testified earlier at the preliminary exam, seemingly without much difficulty, and the mothers of the victims felt they were qualified to testify.

Of those factors that may be considered objective and verifiable, they do not reach the level of substantial and compelling. Nor do they "keenly or irresistibly" grab our attention. *Babcock, supra* at 258. As noted by the trial court initially and by the prosecutor, some of the objective and verifiable circumstances surrounding this case justify an upward departure, rather than downward. The court's consideration of defendant's lack of prior criminal history and his lack of history of abusing children seem to be one and the same. Both of these factors minimize defendant's prior conviction in Wayne County of molesting another child within two years of the instant case. The Wayne County conviction was not related to the present case and involved children from different sides of the family. Defendant was serving jail time for violating his probation in that prior case at the time he pleaded guilty to the instant offenses. As the court even recognized, the nature of the offense, defendant's sexual molestation of children under age seven who were left in his care, is recognized as one of the most heinous offenses by our society.

Defendant did appear to have a verifiable psychiatric history, as outlined in the presentence investigation report. While psychiatric history might be objective and verifiable, there was no evidence that his medical history played a role in these offenses. The PSIR noted that defendant was on psychotropic medication and there was no evidence that his psychiatric history was related to the molestation of the victim.

The trial court also listed family support as a reason for accepting the plea. While defendant did have some family support from a sister who told the court she would provide acceptable housing for him upon his release, it was in her care that defendant violated the terms

of his probation by being in the presence of a young child. Much of defendant's large family, seven siblings and six surviving children, were not involved in this matter and did not speak on his behalf. This level of family support does not rise to the level of a substantial and compelling reason to depart downward.

Finally, defendant did apparently have prior use of cocaine but, again, there was no evidence that this contributed to the molestation or that he was battling drug addiction.

The trial court's reasoning for initially denying the *Cobbs* agreement was correct when it stated:

One, I tend to agree with you that what you've said about the kind of case this is, what occurred, who's involved, the children, it's certainly not one that stands out for downward departure.

For the foregoing reasons, the factors listed by the trial court are not the substantial and compelling reasons necessary for a substantial downward departure from the sentencing guidelines.

We vacate defendant's sentence and remand to allow defendant to withdraw his pleas and proceed to trial or for resentencing. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ David H. Sawyer
/s/ Karen M. Fort Hood