

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON RONALD ZABORSKI,

Defendant-Appellant.

UNPUBLISHED

January 31, 2008

No. 274848

Macomb Circuit Court

LC No. 2004-002667-FH

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

PER CURIAM.

Defendant appeals by delayed leave granted from a sentence of 18 to 60 months imposed on a plea-based conviction of aggravated stalking, MCL 750.411i(3)(a), after the trial court revoked defendant's probation. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The offense is a Class E felony subject to the statutory sentencing guidelines. MCL 777.16t. The guidelines, as scored, recommended a minimum sentence range of 0 to 11 months. When the upper limit of the applicable guidelines range is 18 months or less, "the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections." MCL 769.34(4)(a). The trial court elected to depart from the guidelines. Defendant challenges both the basis for and the extent of the departure.

"[T]he Legislature intended 'substantial and compelling reasons' to exist only in exceptional cases." *People v Fields*, 448 Mich 58, 68; 528 NW2d 176 (1995). Only objective factors that are capable of verification may be used to assess whether there are substantial and compelling reasons to deviate from the sentencing guidelines. *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003). Objective and verifiable factors are "actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed." *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). A departure is appropriate "if there are substantial and compelling reasons that lead the trial court to believe that a sentence within the guidelines range is not proportionate to the seriousness of the defendant's conduct and to the seriousness of his criminal history," such that a departure would result in "a more proportionate criminal sentence than is available within the guidelines range." *Babcock*, *supra* at 264.

Once the court has a valid basis for departing from the guidelines, the reasons cited by the court must justify the particular departure. *Babcock, supra* at 272-273; *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001). In other words, the extent of the departure must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Babcock, supra* at 264.

The trial court's determination regarding the existence of a reason or factor warranting departure is a factual determination that is reviewed on appeal under the clearly erroneous standard. The determination that a particular factor is objective and verifiable is reviewed by this Court as a matter of law. The trial court's determination that objective and verifiable factors present a substantial and compelling reason to depart from the statutory minimum sentence is reviewed for an abuse of discretion, which "occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Babcock, supra* at 273-274. See also *Abramski, supra* at 74.

The trial court did not err in finding substantial and compelling reasons to depart from the guidelines by imposing a prison sentence. The court cited as a basis for departure not only that defendant had violated his probation, but that he had previously violated his probation in a separate case. Defendant's inability to comply with the terms of his probation in two separate cases was an objective and verifiable factor that provided a substantial and compelling reason for departure. *People v Hendrick*, 472 Mich 555, 565; 697 NW2d 511 (2005); *People v Schaafsma*, 267 Mich App 184, 185-186; 704 NW2d 115 (2005).

Although defendant additionally contends that the extent of the departure is disproportionate, this issue is moot because defendant has fully completed his minimum sentence. *People v Bailey (On Remand)*, 218 Mich App 645, 648; 554 NW2d 391 (1996); *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

Affirmed.

/s/ Richard A. Bandstra
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto