

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

RONALD PHILLIP BURBRIDGE,

Defendant-Appellee.

UNPUBLISHED

March 4, 2008

No. 273133

Wayne Circuit Court

LC No. 02-011791-01

Before: Murray, P.J., and Hoekstra and Wilder, JJ.

Wilder, J., (*dissenting*).

Respectfully, I dissent. I would again vacate defendant's sentence for second-degree murder, and remand for resentencing.

First, the trial court relied on factors that were not objective and verifiable, *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003), in its consideration of circumstances surrounding the crime. "Objective and verifiable factors are those that are external to the minds of the judge, defendant, and others involved in making the decision, and are capable of being confirmed." *People v Geno*, 261 Mich App 624, 636; 683 NW2d 687 (2004). The trial court's comments reflect that it relied in part on a determination that the victim directed threatening and harassing behavior toward defendant at an incident on New Years Eve. The only evidence on which the trial court relied is testimony from a minister that defendant told him about the incident. Thus, a conclusion that the incident occurred necessarily depends on accepting defendant's truthfulness in reporting that it occurred. Further, the trial court improperly relied on defendant's testimony indicating that he saw the victim go to the open trunk of the victim's car before the shooting occurred. While the trial court's discussion of this point is quite vague, it is most reasonably viewed as relying on defendant's subjective and non-verifiable claim that he was afraid the victim was walking to the open trunk to retrieve a gun. Thus, the trial court's consideration of circumstances surrounding the crime was flawed, because it involved reasons that were not objective and verifiable, and thus, not properly considered as substantial and compelling reasons for departure.

Second, the trial court's reference to defendant's "generosity, concern, and community involvement" indicated in numerous letters does not constitute a substantial and compelling reason for departure. To be a substantial and compelling reason for departure a reason must keenly or irresistibly grab the attention of a reviewing court. *Babcock, supra* at 257-258. The

trial court's vague reference to unspecified instances indicating positive characteristics does not keenly or irresistibly grab one's attention.

As to the trial court's consideration of defendant's pre-arrest conduct, the fact that defendant attempted to clear the street of others before he shot the victim is not an objective and verifiable or a substantial and compelling reason for departure. This act could as easily be construed as an attempt to ensure there were no witnesses, as it could be construed an effort to avoid inflicting serious harm on others. Either conclusion requires an assessment of defendant's state of mind and truthfulness, which are neither objective nor verifiable.

The trial court referred to defendant's post-arrest conduct, which included being cooperative with the police, as "consistent with a person who has remained crime free for seventeen years of his adult life responding to this tragic situation." But defendant's cooperation with the police does not necessarily reflect an acceptance of responsibility, because this was also consistent with maintaining a claim of self-defense.

Finally, as to defendant's post-conviction conduct, the trial court relied on defendant not having "received any misconduct [citations] while incarcerated for four years," and on his "high scores on work assignments," having given him "the best possible score on 13 specific measures of job performance, while in the Department of Corrections." Defendant's lack of prison misconduct citations and scores on measures of job performance are objective and verifiable considerations. However, while defendant's apparently excellent behavior as a prisoner is commendable, standing alone, it was not a substantial and compelling reason for a downward departure, given the severity of defendant's offense. Defendant was convicted of second-degree murder, and the obvious severity of the crime was aggravated by the fact that defendant shot the victim eight times with an assault rifle. Under the circumstances, and even recognizing that an excellent prison record might conceivably support a downward departure with regard to a less serious offense, defendant's prison record simply was not a reasonable basis for a downward departure in light of the severity of defendant's offense. See *Babcock, supra* at 262 ("In determining whether a sufficient basis exists to justify a departure, the principle of proportionality—that is, whether the sentence is proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record—defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed").

In light of the trial court's failure to articulate a substantial and compelling reason for its downward departure from the sentencing guidelines, I would remand this case to the trial court for resentencing. *Babcock, supra* at 258-259.

/s/ Kurtis T. Wilder