

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRENCE JONES,

Defendant-Appellant.

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UNPUBLISHED

April 10, 2008

No. 274094

Wayne Circuit Court

LC No. 06-005505-01

Before: Murray, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, three counts of assaulting, resisting and obstructing a police officer, MCL 750.81d(1), and possession of a firearm during the commission of a felony, (felony-firearm), MCL 750.227b. Defendant was sentenced to life imprisonment for the armed robbery conviction, one to two years' imprisonment for each of the assaulting, resisting and obstructing a police officer convictions, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm defendant's convictions but remand for resentencing.

Defendant first contends that the trial court erred in scoring Offense Variable (OV) 1, OV 2 and OV 12. We disagree with defendant regarding the scoring of OV 1 and OV 12, but agree that the trial court erred in its scoring of OV 2.

"This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). In scoring a particular offense variable, a trial court's determination need only be supported by a preponderance of the evidence. *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006).

At sentencing, the trial court concluded that OV 1 should be scored at 25 points, despite the parties' agreement that it should be scored at 15 points. As provided by MCL 777.31, OV 1 should be scored at 25 points if a firearm was discharged at or toward a human being. In the present case, Agustin Hernandez, the victim, testified that after the armed robbery occurred, the assailant ran to the middle of the street, turned and raised his arm. Hernandez then apparently turned away from the individual. Although he heard a gunshot but saw nothing else, Officer Jennifer Cleary testified that she saw the flash of the gun as it was fired. Officer Cleary stated,

“He brought his arm straight up, and pointed the weapon at the person, and fired the weapon.” Similarly, Officer Michael Bridson indicated that defendant was shooting toward the convenience store and testified that an individual was standing in front of the store.

While the jury apparently determined that defendant did not fire the weapon at Hernandez, the jury utilized a reasonable doubt standard, while the trial court applies a preponderance of the evidence standard when scoring the guidelines. Thus, the trial court properly scored OV 1 at 25 points because the trial court found by a preponderance of the evidence that the defendant discharged a weapon “at or toward” another individual.

Next, defendant contends the trial court erred in scoring OV 2 at 15 points, instead of five points. We agree. MCL 777.32 (OV 2) indicates that where a defendant possesses a pistol that is not fully automatic, five points are warranted. Alternatively, where the weapon is fully automatic, 15 points should be awarded. At trial, Hernandez testified that the perpetrator utilized a handgun in the robbery. Upon searching the area immediately surrounding the camper defendant was hiding under, Officer Bridson discovered a .38 caliber handgun. There is no evidence that this handgun was fully automatic. The record does not support the trial court’s scoring of OV 2, as only 5 points were to be scored.

Defendant also contends the trial court erred in scoring OV 12 at 25 points, because the jury acquitted defendant of two counts of assault with intent to commit armed robbery, and the trial court dismissed the charges of assault with intent to commit armed robbery and felonious assault. However, the fact that the jury acquitted defendant of the charged offenses is inconsequential in scoring OV 12, as the jury was applying the more demanding reasonable doubt standard, *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). OV 12 was properly scored at 25 points.

When taken in conjunction with the uncontested scoring of OV 9 (ten points) and OV 19 (15 points), and with the OV 1 and OV 12 scores remaining at 25 points each, and OV 2 scored at five points, defendant would have had a total OV score of 80 points, to go with his prior record variable score of 35 points. Defendant’s guideline range would therefore remain at 135 to 225 months.

Defendant also contends that the trial court did not have substantial and compelling reasons for departing from the sentencing guidelines. We agree, as it is clear that the trial court felt no obligation to comply with any of the statutory guidelines.

The Michigan Supreme Court has explained that multiple standards of review apply in reviewing a sentence outside of the guidelines range. *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003). In determining whether a particular factor exists, this Court reviews the lower court’s findings for clear error. *Id.* In determining whether a factor is objective and verifiable, this Court conducts a de novo review. *Id.* In deciding whether there was a substantial and compelling reason for departure, this Court reviews for an abuse of discretion. *Id.* The abuse of discretion standard recognizes that in certain circumstances there are multiple reasonable and principled outcomes and, so long as the trial court selects one of these outcomes, its ruling will not be disturbed. *Id.* at 269. The amount a trial court departed from the guidelines is reviewed for an abuse of discretion. *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001).

According to MCL 769.34(3), “[a] court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.” This Court has previously stated that a court’s reason for departing from the guidelines must be objective and verifiable. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). “The phrase ‘objective and verifiable’ has been defined to mean that the facts to be considered by the court must be 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.” *Id.* Furthermore, a departure may not be based on “an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range, unless the court finds from the facts in the court record that the characteristic has been given inadequate or disproportionate weight.” *Id.*

Before we begin an analysis of the particular sentence, we note that throughout the sentencing hearing, the trial court articulated its fundamental disagreement with the legislatively imposed sentencing guidelines. For instance, when defendant’s counsel was arguing about the scoring of OV 2, the trial court stated:

THE COURT: No. That’s nonsense. That’s why guidelines are illegal and unconstitutional because it is an intrusion on the judgment of the Court by the Legislature. The Circuit Court is a Constitutional Court. Records Court was abolished because Records Court was a creature of the Legislature. This is a Constitutional Court. And according to the Constitution, sentencing is to be done by the Judge.

At a later point during the same discussion, the trial court noted the Legislature had improperly infringed on the trial court’s sentencing discretion, and the law should be returned to as it was under the judicial sentencing guidelines.

Some seven years ago, the Supreme Court dealt with a similar situation in *Hegwood*, *supra*. There the Court held that the Legislature was constitutionally authorized to circumscribe the discretion judges had in sentencing:

As the Court of Appeals explained in *People v Babcock*, 244 Mich App 64, 68; 624 NW2d 479 (2000), the ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature. Const 1963, art 4, § 45. The authority to impose sentences and to administer the sentencing statutes enacted by the Legislature lies with the judiciary. See, e.g., MCL § 769.1(1).

It is, accordingly, the responsibility of a circuit judge to impose a sentence, but only *within the limits* set by the Legislature. *People v Milbourn*, 435 Mich 630, 651; 461 NW2d 1 (1990). [*Hegwood*, *supra* at 436-437 (emphasis in original) (footnotes omitted).]

In applying this law to the trial court’s defiance to the sentencing guidelines in that case, the *Hegwood* Court held:

In the present case, the circuit court stated several reasons for the sentence it imposed. The court characterized the defendant as ‘a professional criminal’ and described his conduct as ‘inexcusable.’ At no point, however, did the court appear to recognize that it was permitted to depart from the range prescribed by the Legislature only ‘if the court has a substantial and compelling reason for that departure and states on the record the reason for departure.’ MCL 769.34(3). Instead, the court opined, ‘When the legislature and the senators take over and start becoming judges in the State of Michigan, they can impose the sentences.’ These remarks demonstrate the court’s misunderstanding in this case of the respective roles of Michigan’s separate branches of government. Contrary to the circuit court’s view, the Legislature may impose restrictions on a judge’s exercise of discretion in imposing sentence. [*Id.* at 440.]

The same holds true here. Whether the trial court agreed or not with the policy choices made by the Legislature within the sentencing guidelines, it was constitutionally obligated to adhere to them unless overturned on constitutional grounds.

Turning now to the particular sentences of defendant, in deciding that substantial and compelling reasons existed to depart from the guidelines, the trial court focused on several factors. The court stated:

And one of the most compelling and substantial reasons that – I think it’s illegal in the first place, but in addition to that, there were matters that were not taken into consideration when they drew out the guidelines and that is, there was an AWIM.<sup>1</sup> I heard it. There were an AWIM. That is not included in these guidelines.

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All right. For the reasons I just stated on there, aiming a weapon, the police were right there. They saw that arm coming down. They saw the gun aimed. They saw it was fired. Then you continue to resist the police officers. Pointed the weapon at a citizen, which is a felonious assault that was not charged, the Court thinks that in this case the guidelines are completely off base. I have absolutely no intent to follow it whatsoever.

The trial court was free to determine that defendant committed an assault with the intent to murder based on the evidence at trial. It need not utilize the beyond a reasonable doubt standard, so long as the record supports a finding by a preponderance of the evidence. *Harris, supra*. The elements of AWIM are “(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.” MCL 750.83; *People v Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005). Here, there was evidence of defendant pointing a gun towards

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<sup>1</sup> Assault with intent to murder. MCL 750.83.

an individual, who ducked in reaction, and then defendant fired the gun. Given the evidence, and the weapon used, the trial court's finding on the issue had support in the record.

The trial court also considered defendants resisting of the police officers. The evidence presented at trial established that defendant violently resisted numerous officers, resulting in a physical confrontation. The resistance was objective and verifiable as there was substantial witness testimony describing the altercation. Furthermore, the altercation was not previously factored in when determining the appropriate sentence range. The trial court did not abuse its discretion in determining that the resistance was a substantial and compelling reason to depart from the guidelines. It was therefore a proper consideration in deciding to depart.

Finally, the trial court also considered that defendant "pointed the weapon at a citizen," thus committing a felonious assault for which he was not charged. This Court can only assume that the trial court is referencing the alleged felonious assault of Torres, which resulted in a felonious assault charge that the trial court dismissed for lack of evidence. However, because there was no evidence in the record to support the allegation that a weapon was pointed at Torres, the trial court committed clear error in reaching this factual determination. As such, there was not a factual basis for factoring in the alleged felonious assault in the trial court's decision to depart.

Of the three factors allegedly relied upon by the trial court in deciding to depart from the guidelines range, only the AWIM and resistance of the officers were properly considered. However, because of the trial court's reputed remarks about the sentencing guidelines, and because the trial court did not indicate that it would remain with its sentence even if some of its factors were found deficient, we must remand for resentencing. *Babcock, supra* at 264.

Defendant next contends that he is entitled to be resentenced by a different judge. We disagree. Although at sentencing the trial court repeatedly expressed its hostility toward the sentencing guidelines, nothing revealed any improper prejudice toward defendant. As the *Hedgwood* Court held:

The defendant asks that the resentencing occur before a different judge. In this instance however, the court's error appears to be a function of its incorrect understanding of the new sentencing structure that now exists in Michigan, and not to any prejudices or improper attitudes regarding this particular defendant. Therefore, we see no reason to assign a different judge to conduct the sentencing. See *People v Evans*, 156 Mich App 68, 71-72; 401 NW2d 312 (1986), and following cases such as *People v Pillar*, 233 Mich App 267, 270-271; 590 NW2d 622 (1998). [*Hedgwood, supra* at 440, n 17.]

Finally, defendant contends that the trial court erred in denying his motion for directed verdict in regard to the armed robbery charge. We disagree. When reviewing a trial court's decision on a motion for directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

In order to secure a conviction for armed robbery, the prosecutor must prove the following elements beyond a reasonable doubt:

(1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. [*People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007).]

Neither Hernandez nor Susanna Gutierrez could identify defendant at trial as being the armed robber. However, their testimony established that a black male wearing a black t-shirt utilized a firearm in the process of taking a wallet and phone from Hernandez. Following the completion of the robbery, the assailant turned and fired in the direction of Hernandez and Gutierrez. Two officers near the scene of the robbery witnessed a black male in dark clothing fire a gunshot. During the course of the pursuit, a number of citizens pointed the officers in the direction of the individual they were chasing. These tips led the officers to a backyard. Defendant was found hiding underneath a camper in the yard. After a struggle, police discovered a firearm near defendant as well as the wallet and phone taken from Hernandez. Furthermore, defendant, a black male, was wearing a dark shirt, as described by Hernandez and Officer Cleary.

Based upon the above described evidence, a rational trier of fact could conclude that defendant, while possessing a firearm, perpetrated a robbery. While it is true that the evidence presented was, to a certain extent, circumstantial, this Court has previously stated that circumstantial evidence and the reasonable inferences arising from that evidence can be sufficient to support a conviction. *People v Nelson*, 234 Mich App 454, 459; 594 NW2d 114 (1999). The circumstantial evidence and resulting inferences in the present case are convincing. The trial court did not err.

Affirmed and remanded for sentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ David H. Sawyer

/s/ Mark J. Cavanagh