

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS JOSEPH DELAZZER,

Defendant-Appellant.

UNPUBLISHED

June 5, 2008

No. 277834

Jackson Circuit Court

LC No. 06-003063-FH

Before: Davis, P.J., and Murray and Beckering, JJ.

PER CURIAM.

This case has been remanded by our Supreme Court for consideration as on leave granted. Defendant, via appointed counsel and *in propria persona*, appeals the sentence of 10 to 21 years in prison imposed on his plea-based conviction of uttering and publishing, MCL 750.249. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded guilty to one count of uttering and publishing and to being a second habitual offender, MCL 769.10, in exchange for dismissal of a second count of uttering and publishing and a charge of fourth habitual offender, MCL 769.12. The statutory sentencing guidelines recommended a minimum term range of 12 to 30 months.¹ The trial court exceeded the guidelines on the grounds that the guidelines did not adequately account for the fact that the sentencing offense was defendant's sixth fraud crime, and that defendant continued to commit the same type of crime even after being punished. The trial court also indicated that it believed that defendant would engage in the same behavior if he was continued on parole. The trial court

¹ If the upper limit of the recommended range exceeds 18 months and the lower limit is 12 months or less, the trial court, absent a departure, must sentence the offender to a prison term within the range, or to an intermediate sanction that may include a jail term that does not exceed 12 months. MCL 769.34(4)(c). An intermediate sanction does not include a prison term. MCL 769.31(b); *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002).

sentenced defendant to 10 to 21 years in prison, to be served consecutively to the sentence defendant was serving on parole at the time he committed the instant offense.²

As a general rule, a trial court must impose a sentence within the guidelines, unless a substantial and compelling reason exists to depart from the guidelines. MCL 769.34(3). To be substantial and compelling, 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 verified. *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), and 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 range is reviewed for an abuse of discretion. *Id.* at 265-269. 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. An appellate court must give appropriate deference to the trial court's sentencing determination. *Id.* at 270.

The trial court's stated reasons for exceeding the guidelines were that the guidelines did not adequately account for the fact that the sentencing offense was defendant's sixth fraud crime, and that defendant continued to commit the same type of crime even after being punished. Defendant's prior record is objective and verifiable. *People v Solmonson*, 261 Mich App 657, 669; 683 NW2d 761 (2004). Defendant's prior record of similar offenses stretches back to 1984, and defendant has been sentenced to prison and probation for this type of crime. Prior record

² The trial court did not inform defendant that he was entitled to appeal his sentence on the ground that it exceeded the guidelines, as required by MCL 769.34(7) and MCR 6.425(F)(4). However, defendant has appealed on that ground; therefore, the error is harmless. *People v Hicks*, 259 Mich App 518, 537; 675 NW2d 599 (2003).

variables 1 and 2, MCL 777.51 and MCL 777.52, account for prior felony convictions, and prior record variable 6, MCL 777.56, accounts for the fact that defendant was on parole when he committed the instant offense. However, these variables do not allow for consideration of the fact that defendant has repeatedly committed the same type of crime, notwithstanding the fact that he has been imprisoned for doing so. A defendant's repeated commission of the same crime can be a substantial and compelling reason for departing upward from the guidelines. See *Solmonson, supra* at 671-672.

The trial court's reliance on defendant's repeated commission of the same type of crime was objective and verifiable, and defendant's lengthy record of fraud crimes was not adequately accounted for in the guidelines. The trial court did not abuse its discretion in determining that this factor merited a departure from the guidelines. The trial court's other stated reason for departing from the guidelines, that defendant would likely commit the same type of crime again, if given another term of parole, was not objective and verifiable as that term is defined. *Abramski, supra* at 74. However, the trial court indicated that it intended that defendant serve the sentence imposed if any reason for departing from the guidelines was found to be valid. Therefore, we conclude that the trial court would have departed to the same extent had it relied only on valid factors. *Babcock, supra* at 260-261.

Furthermore, we find that the trial court's departure, while significant, is not disproportionate to defendant's circumstances or those of the offense. *Milbourn, supra* at 636. Defendant demonstrated an unwillingness to conform his conduct to the requirements of the law. Under the circumstances, the sentence imposed cannot be said to be outside the range of principled outcomes. *Babcock, supra* at 269.

Affirmed.

/s/ Alton T. Davis
/s/ Christopher M. Murray
/s/ Jane M. Beckering