

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY TYRONE THOMPSON,

Defendant-Appellant.

UNPUBLISHED

November 20, 2008

No. 279972

Wayne Circuit Court

LC No. 07-003991-01

Before: Jansen, P.J., and O’Connell and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b.¹ He was sentenced, as a third habitual offender, MCL 769.11, to four to ten years in prison for the felon-in-possession conviction, and two years in prison for the felony-firearm conviction. We affirm.

I. Facts

On December 12, 2006, a dispute arose between some high school girls. Several people met at a house in Detroit to try to peacefully mediate the disagreement. People began arguing with raised voices. A woman brought out a butcher knife and the fight became physical: some men joined in the fight. Defendant came out of the house and went to the trunk of a car parked on the corner. When someone asked him why he was going to the trunk, he swore and said not to worry about it. A witness heard three gunshots and saw defendant stepping back while holding a gun at waist level. The victim fell to the ground and defendant kicked him in the face. The witness later identified defendant in a photographic lineup.

The victim testified that he saw a man push or hit his mother, so he ran over and pushed the man, and, three seconds later, he turned around and was shot in the chest. He was taken to the hospital, where he spent approximately ten days. He suffered a collapsed lung and two fractured vertebrae, and the bullet lodged in his back muscles. He testified that he was not

¹ Defendant was acquitted of assault with intent to murder, MCL 750.83.

carrying anything that could be considered a weapon when he went to confront the man who had pushed his mother.

II. Offense Variables

Defendant first argues that he is entitled to resentencing because the trial court based its scoring of the offense variables (OVs) on an improper finding that defendant was guilty, under an aiding and abetting theory, of assault with intent to murder. We disagree.

We review the interpretation of the statutory sentencing guidelines, MCL 769.34, de novo as a question of law, and a trial court's findings of fact at sentencing for clear error. *People v Babcock*, 469 Mich 247, 253, 264; 666 NW2d 231 (2003), clarification den 469 Mich 1224 (2003). We review a trial court's scoring decision for an abuse of discretion. *People v Cox*, 268 Mich App 440, 453-454; 709 NW2d 152 (2005), lv den 474 Mich 1099 (2006). A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). Scoring decisions for which there is any support will be upheld. *Id.*

Here, the trial court assessed defendant points for two offense variables: 25 points for OV 1, and ten points for OV 3 (Sentencing Information Report, lower court file). OV 1 involves "aggravated use of a weapon." MCL 777.31. MCL 777.31(1)(a) authorizes a score of 25 for this offense variable where "[a] firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon." In assessing defendant 25 points for OV 1, the court stated, "[w]ell, I'm going to find the 25 points goes there because he was an aider and abettor by giving the gun to the other individual." (S, p 13.) OV 3 involves "physical injury to a victim." MCL 777.33. MCL 777.31(d) authorizes score of ten points where "[b]odily injury requiring medical treatment occurred to a victim." MCL 777.33(d). In assessing defendant ten points for OV 3, the court stated, "[b]ecause of the aider and abettor situation, [defendant] gave the gun to somebody else that he knew was probably going to use it, knew was going to use it, I would say ten points because there's no showing that he intended anything greater than the injury to take him to the hospital."

Defendant argues that he is entitled to resentencing because the trial court erred in finding that he aided and abetted an assault with intent to murder and in sentencing him based on this improper finding. Because we find support for the trial court's decision to score defendant 25 points for OV 1 and ten points for OV 3, we disagree. With respect to OV 1, the trial court's scoring of 25 points was appropriate as long as "a firearm was discharged at or toward a human being." MCL 777.31(a). The evidence in this case supports the trial court's scoring of 25 points for OV 1 because it is undisputed that a firearm was discharged at a human being (Defendant's Brief on Appeal, pp 4-8). Although the trial court used "aiding and abetting" language in scoring the OVs, the court did not find that defendant committed assault with intent to murder. Rather, it appears that the trial court determined that even if defendant did not pull the trigger, as defendant claimed in his statement to the police, 25 points was nevertheless appropriate because a gun was discharged at or toward the victim. Because the evidence supported the trial court's score, we uphold the scoring of 25 points under OV 1. *Endres, supra* at 417. Similarly, with respect to OV 3, it is undisputed that the victim suffered injury requiring medical treatment. Therefore, the evidence supported the trial court's scoring of this variable as well. *Id.*

III. Upward Departure From Sentencing Guidelines

Defendant next argues that the trial court erred in finding substantial and compelling reasons to depart from the statutory sentencing guidelines and abused its discretion in imposing a minimum sentence above the guidelines range. We disagree.

A trial court's determination that a particular sentencing factor exists or does not exist is a question of fact that we review for clear error. *Babcock, supra* at 273. We review a trial court's determination that there are substantial and compelling reasons for a departure from the statutory minimum sentencing guidelines for an abuse of discretion. *Id.* at 274. "[A]n abuse of discretion standard acknowledges that there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *Id.* at 269. "When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id.*

A trial court must impose a sentence within the range recommended by the statutory sentencing guidelines and may depart from the guidelines recommendation only if it states on the record a substantial and compelling reason for the departure. MCL 769.34(3); *Babcock, supra* at 258. A substantial and compelling reason is one that exists only in exceptional cases. *Id.* "[T]he substantial and compelling reason must also be objective and verifiable, must keenly or irresistibly grab our attention, and must be of considerable worth in deciding the length of a sentence." *People v Solmonson*, 261 Mich App 657, 668; 683 NW2d 761 (2004). In addition, "the statutory guidelines require more than an articulation of reasons for a departure; they require justification for the *particular* departure made." *People v Smith*, 482 Mich 292, 303; 754 NW2d 284 (2008). Accordingly, a trial court that departs from the guidelines "must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been." *Id.* at 12.

In this case, defendant, as a third habitual offender, faced a guidelines minimum range of 12 to 36 months for the felon-in-possession conviction. MCL 777.66; MCL 777.21(3)(b). The trial court departed from the guidelines minimum range, sentencing him to four to ten years in prison. The court's stated reason for departure was as follows:

And it is this Court's opinion that, very frankly, the 36 months in a case where after the man is shot and down, this man goes over and kicks him, increasing the danger, obviously to the victim, was done without any kind of heart as far as caring about the individual, other than caring about himself and showing how bad he can be when the man is already down and out, that I'm going to increase the penalty from the 36 months. I think four years is what he ought to do on the felon in possession of a firearm.

We find that the trial court articulated a substantial and compelling reason for departing from the sentencing guidelines. The act of kicking a victim in the head after he was already shot and lying on the ground does "keenly or irresistibly grab our attention" and renders this an "exceptional case[.]" justifying an upward departure. *Babcock, supra* at 258; *Solmonson, supra* at 668.

IV. Constitutionality

Defendant next argues that, under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), reh den 542 US 961; 125 S Ct 21; 159 L Ed 2d 851 (2004), his Sixth Amendment right to a jury trial was violated when the trial court increased his sentencing guidelines range by scoring the OVs using facts neither admitted by defendant nor proved to a jury beyond a reasonable doubt. We disagree. Our Supreme Court has held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006). Therefore, defendant's constitutional right to a jury trial was not violated.

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Donald S. Owens