STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 25, 2008
v	No. 280414 Muskegon Circuit Court
JASON JAMES ROSENCRANS, Defendant-Appellant.	LC Nos. 03-049521-FH; 03-049522-FH; 03-049523-FH

Before: Murphy, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from a circuit court order revoking his probation and sentencing him to three concurrent prison terms of 54 to 120 months for each of his three separate convictions of breaking and entering with the intent to commit larceny, MCL 750.110. We affirm defendant's convictions, but vacate his sentences and remand for resentencing. This appeal has been decided without oral argument under MCR 7.214(E).

I. Basic Facts

In 2003, defendant committed a total of 14 acts of breaking and entering with the intent to commit larceny in six different counties. On December 23, 2003, he pleaded guilty to three charges of breaking and entering in Muskegon County, for which he was sentenced to 48 months' probation and a jail term for each conviction,[1] and ordered to pay restitution and other court costs.

On April 29, 2004, defendant was released to the K-PEP program, which he successfully completed on June 25, 2004. Defendant thereafter committed the offense of felonious use of a financial transaction device (FTD) in Ottawa County. In August 2004, defendant absconded from probation and fled to Colorado, following which a bench warrant was issued for the FTD offense.

[1] In LC No. 03-049521-FH, defendant was sentenced to 11 months in jail. In both LC No. 03-049522-FH and LC No. 03-049523-FH, he was sentenced to a 12-month jail term.

In October 2004, defendant was arrested and convicted in Colorado of attempting to disarm a law enforcement officer. He was sentenced to 18 months' imprisonment in Colorado, and paroled in January 2006. Defendant remained in Colorado. In March 2006, defendant was arrested in Colorado on the Michigan FTD warrant and extradited to Michigan.

On May 30, 2006, defendant was convicted of the FTD offense in Ottawa County. On July 24, 2006, he was arraigned in Muskegon County on three probation violation petitions and pleaded guilty to violating his probation in each case by failing to report to his probation agent, by committing a new felony (FTD) while on probation, by moving and failing to report his whereabouts, and by failing to pay any of the court-ordered costs. The trial court revoked defendant's probation and sentenced him to three concurrent prison terms of 54 to 120 months.

II. Updated PSIR

Defendant argues that he must be resentenced because the trial court failed to consider an adequately updated presentence information report (PSIR) when resentencing him. When a defendant is resentenced for a felony conviction, the sentencing court must utilize a reasonably updated presentence report. *People v Triplett*, 407 Mich 510, 511, 515; 287 NW2d 165 (1980). A completely new report is not required; a supplemental report updating the previous report is sufficient. *People v Martinez (After Remand)*, 210 Mich App 199, 202; 532 NW2d 863 (1995), implicitly overruled on other grounds by *People v Cervantes*, 448 Mich 620, 625-626; 532 NW2d 831 (1995). A defendant and the prosecutor may waive the right to a reasonably updated presentence report at resentencing unless the previous report is manifestly outdated. *People v Hemphill*, 439 Mich 576, 582; 487 NW2d 152 (1992).

A PSIR was prepared for defendant's original sentencing on January 26, 2004. The PSIR was apparently updated with a three-page Probation Violation report, attached to the PSIR, for defendant's resentencing on September 6, 2006. Both defendant and defense counsel acknowledged that they had read the PSIR and had no additions or corrections.[2] Defendant's affirmative approval of the PSIR waived any claim of error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Notwithstanding his waiver, defendant speculates that had the updated PSIR referenced his maturity and rehabilitation, similar to the updated PSIR prepared in Ottawa County, the court likely would have given him a shorter sentence. This claim was presented to the trial court in a motion for resentencing. In its opinion denying defendant's motion, the trial court stated that "there is no information in the updated Ottawa County presentence report which would have

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[2] The following exchange occurred:

> *The court:* Has defense counsel had an opportunity to read the presentence report?
> [*Defense counsel*]: Yes, Your Honor. No additions or corrections.
> *The court:* Mr. Rosencrans, have you had an opportunity to read the presentence report and discuss that with your attorney?
> *The defendant*: Yes, I have, Your Honor.
> *The court:* And, sir, do you have any additions or corrections?
> *The defendant*: No, Your Honor.

altered the Court's sentences at resentencing." In addition, at his resentencing, defendant verbally informed the trial court about the matters he claims might have made a difference in the court's sentences.[3] Accordingly, there is no merit to this issue.

III. *Blakely v Washington*

Defendant further argues that he must be resentenced because the trial court departed from the sentencing guidelines range and the facts supporting the court's upward departure were not determined by a jury, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Our Supreme Court has determined that Michigan's indeterminate sentencing scheme, in which a defendant's maximum sentence is set by statute and judicially determined facts affect only the minimum sentence, does not violate the rule stated in *Blakely*. *People v McCuller*, 479 Mich 672, 676-677; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 162-164; 715 NW2d 778 (2006). Although defendant argues that *McCuller* was wrongly decided, this Court is bound to follow decisions of our Supreme Court. *People v Hall*, 249 Mich App 262, 270; 643 NW2d 253 (2002).

IV. Sentence Credit

Defendant argues that the trial court erred in refusing to grant him sentence credit for the time he served in prison in Colorado for his Colorado conviction of attempting to disarm a law enforcement officer.

Defendant relies on *People v Ortman*, 209 Mich App 251, 254; 530 NW2d 161 (1995), in which this Court held that an undue delay in executing a probation violation warrant constitutes waiver of the violation. The factors bearing on the question of due diligence include "the length of the delay, the reason for the delay, and the prejudice to the defendant." *Id.* at 255. The *Ortman* Court further held that a probationer's own responsibility for the delay militates against charging the authorities with a lack of due diligence. See *id.* at 256.

Although defendant concedes that "[his] conduct in absconding to Colorado was unjustified," he claims that he is entitled to sentence credit because "the prosecutor's delay in pursing these charges was also needless and unjustified." Defendant cites no authority for the

[3] Defendant stated:

> Your Honor, I'd just like to say that this case is—those violations are both in 2004. In these past two years I have pretty much been incarcerated the whole time. When I did get out on parole in Colorado I was doing good. I had a job. I was paying rent. I was paying on restitution in Colorado, completing an intensive parole program out there. I was doing well, and so I have learned a lot in these past two years and I feel that once given a chance, I will be doing good on the streets again. It's just I had this case here in Michigan to clear up. That's why I was extradited, and that's why I'm incarcerated now, which was also a case in 2004. So all this has kind of cleared up my past, and I've matured and got a lot of negative influences out of my life. Ask you to consider that.

proposition that a defendant is entitled to sentence credit for a lack of due diligence by law enforcement where he fled the state, essentially placing himself beyond the normal reach of probation authorities, and was subsequently convicted and imprisoned on a new offense in a different state. As aptly stated by the trial court when denying defendant's request for credit:

> Defendant absconded from probation in Michigan, went to Colorado, was convicted for a new felony in Colorado, served 22 months in prison in Colorado, and when released from prison[,] chose to settle in Colorado and continue to ignore the fact that he was still on probation in Michigan. (On his original sentences on January 26, 2004, defendant had been sentenced to 48 months probation.) The Court finds nothing in defendant's behavior which would lead the Court to reward his continued misconduct by exercising the Court's discretion to grant defendant additional credit for time served which is not mandated by law. The main reason for the delay was defendant's misconduct; thus he is not entitled to relief under the holding in [*Ortman*, *supra*.]

Defendant also suggests that, by analogy, he is entitled to sentence credit under the Interstate Agreement on Detainers (IAD), MCL 780.601. The IAD requires that a defendant who is imprisoned in another state and is placed on detainer deliver notice of the place of his imprisonment along with a request for final disposition to the prosecuting attorney of the jurisdiction where the charges are pending. MCL 780.601; *People v Gallego*, 199 Mich App 566, 567-568; 502 NW2d 358 (1993). Delivery of the required notice starts the running of the IAD's 180-day period to try the defendant. *People v Fex*, 439 Mich 117, 120-121; 479 NW2d 625 (1992). If the defendant is not tried on the charges within the 180 days, the charges must be dismissed with prejudice. MCL 780.601. Even if the IAD did apply to defendant's case, defendant failed to comply with the statute's strict notice requirements. Defendant provided no evidence that he ever sent a notice of his imprisonment and request for final disposition, or that the prosecutor of Muskegon County received such communication. Consequently, the 180-day period never began, and there was no violation of the IAD.

V. Sentencing Guidelines Departure

Defendant also argues that the trial court abused its discretion when it elected to depart from the sentencing guidelines and impose a minimum sentence of 54 months for each offense.

Under the sentencing guidelines statute, the trial court must ordinarily impose a minimum sentence within the calculated guidelines range. MCL 769.34(2) and (3); *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003). A court may depart from the appropriate guidelines range only if it "has a substantial and compelling reason for th[e] departure and states on the record the reasons for departure." MCL 769.34(3). A court may not depart from the guidelines range based on an offense or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the court record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). The phrase "substantial and compelling" constitutes strong language intended to apply only in "exceptional cases." *Babcock*, *supra* at 257-258 (citation omitted). The reasons justifying departure should "keenly and irresistibly grab" the court's attention and be recognized as having "considerable worth" in determining the length of a sentence. *Id.* Only objective and verifiable factors may be used to assess whether there are substantial and compelling reasons to deviate from the minimum

sentence range under the guidelines. *Id.* at 257, 273. Further, a departure from the guidelines range must render the sentence proportionate to the seriousness of the defendant's conduct and his criminal history. *People v Smith*, 482 Mich 292, 300, 305; 754 NW2d 284 (2008).

Whether a factor exists is reviewed for clear error on appeal. *Babcock, supra* at 265, 273. Whether a factor is objective and verifiable is subject to review de novo. *Id.* The trial court's determination that objective and verifiable factors constitute a substantial and compelling reason to depart from the minimum sentence range is reviewed for an abuse of discretion, as is the amount of the departure. *Id.* at 265, 274; *Smith, supra* at 300. "A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes." *Smith, supra*.

In the present case, the trial court elected to depart from the guidelines because it felt that the guidelines did not give adequate weight to the number of defendant's prior convictions and did not address the fact that defendant absconded from probation.[4] On appeal, defendant does not challenge the trial court's decision to depart for these reasons. Instead, defendant argues that the substantial and compelling reasons identified by the trial court do not support the particular departure in this case. Even when a departure is warranted by substantial and compelling reasons, the trial court must nevertheless "justify why it chose the particular degree of departure." *Smith, supra* at 318. Here, the trial court imposed a minimum term of 54 months, which is more than three times the highest minimum term recommended by the guidelines, as scored,[5] but made no attempt to explain why the substantial and compelling reasons justified the particular degree of departure. We therefore vacate defendant's sentences and remand for resentencing and for an explanation of the extent of any departure in accordance with *Smith*.

We affirm defendant's conviction, but vacate his sentence and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Michael R. Smolenski

[4] The trial court did not state how defendant's prior offenses affected defendant's minimum sentence range and did not explain how that scoring was inadequate. See *People v Young*, 276 Mich App 446; 740 NW2d 347 (2007).

[5] Defendant's sentencing information reports for the present offenses did not include any scores for his prior felony offenses.