

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEO MARTINEZ ABBY,

Defendant-Appellant.

---

UNPUBLISHED

January 6, 2009

No. 279498

Saginaw Circuit Court

LC No. 04-024065-FC

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

PER CURIAM.

Defendant appeals as of right from his sentence of 40 to 60 years in prison imposed on his conviction of second-degree murder, MCL 750.317. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was convicted by a jury of second-degree murder in the killing of Calvin Tubbs. The evidence showed that Tubbs's body was dismembered with a saw, and parts thereof were placed in a number of garbage bags. Defendant was sentenced to 40 to 60 years in prison.

Defendant claimed an appeal to this Court, and argued, inter alia, that: the trial court erroneously relied on facts not found by the jury when imposing sentence; the trial court failed to respond to his challenges to information in the presentence information report (PSIR); and the trial court failed to cite substantial and compelling reasons for departing from the sentencing guidelines. In *People v Abby*, unpublished per curiam opinion of the Court of Appeals, issued February 27, 2007 (Docket No. 262365), this Court affirmed defendant's conviction, but vacated his sentence and remanded for resentencing, finding that the trial court did not respond to defendant's challenges to information contained in the PSIR. Because it vacated defendant's sentence and remanded the case for resentencing, the *Abby* Court did not address defendant's contention that the trial court did not state substantial and compelling reasons for departing from the sentencing guidelines. *Id.*, slip op at 17-18.

On remand, the trial court scored the minimum term guidelines at 162 to 270 months. Defense counsel declined to challenge the scoring of the guidelines, but defendant did so on his own behalf. Defendant challenged the scoring of Offense Variable (OV) 7, MCL 777.37, aggravated physical abuse, at 50 points, arguing that the evidence did not support that score. Defendant seemed to argue that Tubbs could not be considered a victim after he was dead.

The trial court rejected defendant's challenges both to the information contained in the PSIR and to the scoring of the sentencing guidelines, and found that substantial and compelling reasons existed to exceed the guidelines. The trial court found that the evidence produced at trial showed that defendant acted as "judge, jury, and executioner" by killing Tubbs and dismembering the body. The trial court noted that defendant returned the borrowed saw with Tubbs's flesh still embedded in it. The trial court concluded that the guidelines did not take sufficient account of the viciousness and the depravity of the crime, and of the fact that the entirety of the victim's body had not yet been found. The trial court sentenced defendant to 40 to 60 years in prison, with credit for time served.<sup>1</sup>

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 constitute a substantial and compelling reason for departing from the guidelines, 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). A substantial and compelling reason articulated by a trial court to merit a departure from the sentencing guidelines 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 range. In addition, in departing from the guidelines range, 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. A trial court may depart from the guidelines range for nondiscriminatory reasons based on an offense or offender characteristic that was already considered in calculating the guidelines range 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

---

<sup>1</sup> The trial court informed defendant that he was entitled to appeal his sentence, but did not inform defendant that he was entitled to do so on the ground that the sentence 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).

outcomes. *Babcock, supra* at 265-269. In determining whether substantial and compelling reasons existed to merit departure from the sentencing guidelines, an appellate court must give appropriate deference to the trial court's sentencing determination. *Id.* at 270.

Offense Variable 7 is properly scored at 50 points if the evidence showed that the "victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a).

Defendant argues that the trial court abused its discretion by exceeding the guidelines and imposing a minimum term that was 210 months greater than the high end of the guidelines. Defendant contends that had OV 7 been scored at zero points, the guidelines would have recommended a minimum term range of 144 to 240 months. Defendant asserts that he is entitled to resentencing.<sup>2</sup>

We affirm defendant's sentence. The evidence showed that defendant lured the victim to a secluded location, killed him, and dismembered his body. A physician testified that the burn on the victim's hand had been present before the victim died; however, contrary to defendant's assertion, the trial court did not base its scoring of OV 7 at 50 points based solely on the presence of the burn on the victim's hand. Rather, the trial court found that defendant's acts of dismembering the victim's body, placing parts thereof in garbage bags,<sup>3</sup> and leaving other parts where they could be found by animals (as happened), demonstrated a viciousness and depravity that was not fully accounted for in the guidelines. The medical evidence showed that the victim was dead before his body was dismembered. However, the scoring of OV 7 does not depend on the victim actually being aware of physical abuse being perpetrated on him. See *People v Kegler*, 268 Mich App 187, 191-192; 706 NW2d 744 (2005). The trial court's finding that the victim's body was treated with sadism and excessive brutality was capable of being verified, and was not adequately accounted for in the guidelines.

The evidence supported the trial court's scoring of OV 7 at 50 points. The trial court's departure from the guidelines, while extensive, was not an abuse of discretion under the circumstances.

Affirmed.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Kurtis T. Wilder

---

<sup>2</sup> Defendant also contends, as he did in his first appeal, that the trial court erred by relying on facts not found by the jury to impose sentence, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), but acknowledges that 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), and that this Court is required to follow *Drohan*.

<sup>3</sup> Defendant's fingerprints were found on the garbage bags.