

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TODD ALAN BINSCHUS,

Defendant-Appellant.

UNPUBLISHED

March 24, 2009

No. 283799

Jackson Circuit Court

LC Nos. 06-004643-FH

06-004752-FH

06-004760-FH

Before: Cavanagh, P.J., and Fort Hood and Davis, JJ.

PER CURIAM.

Defendant pleaded guilty to attempted larceny in a building, MCL 750.92 and MCL 750.360, attempted second-degree home invasion, MCL 750.92 and MCL 750.110a(3), and breaking and entering with intent to commit a felony or larceny, MCL 750.110. The trial court imposed concurrent prison sentences of 16 to 24 months for the attempted larceny conviction, two to five years for the attempted home invasion conviction, and five to ten years for the breaking and entering conviction. Each of these minimum sentences constituted an upward departure from the recommendations under the sentencing guidelines, which were, respectively, zero to nine months, zero to 11 months, and zero to 17 months. The trial court departed from the guidelines because defendant had engaged in an abrupt rash of criminal activity, including several crimes beyond the three of which he was convicted. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This Court initially denied leave to appeal, but our Supreme Court remanded this case to this Court with instructions decide it as on delayed leave granted. 482 Mich 970; 754 NW2d 883 (2008). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Facts

In connection with the attempted larceny conviction, defendant admitted that, on the evening of November 5, 2006, he and a companion entered a garage through an open door looking for something to steal, and there found and took some drills. In connection with the attempted home invasion conviction, defendant admitted that, on November 14, 2006, he and the same companion entered the enclosed porch of a residence and from it defendant took a red box and his companion took a black one, clarifying that they were a ratchet set and a tool case. In

connection with the breaking and entering conviction, defendant admitted that, on November 4, 2006, he and apparently the same companion forcibly entered an abandoned house with the intention of removing copper from it. At sentencing, defense counsel admitted that defendant “was stealing to support his cocaine habit at the time.”

On appeal, defendant argues that the trial court erred in departing from the guidelines, and alternatively that the extent of the departure in connection with his five-year minimum sentence for the breaking and entering conviction was disproportionate to the crime.

II. Departures

A sentencing court departing from the guidelines must state on the record its reasons for the departure, and may deviate for only a “substantial and compelling reason” MCL 769.34(3). See also *People v Babcock*, 469 Mich 247, 255-256, 272; 666 NW2d 231 (2003). This legislative language, in light of its statutory and caselaw history, indicates the legislative intent that deviations from sentencing recommendations follow from only objective and verifiable factors. *Id.* at 257-258, 272.

In reviewing a trial court’s decision to depart from the recommended range under the guidelines, “whether a factor exists is reviewed for clear error, whether a factor is objective and verifiable is reviewed de novo, and whether a reason is substantial and compelling is reviewed for abuse of discretion” *Id.* at 265. For purposes of sentencing departures, an abuse of discretion occurs where the trial court chooses an outcome falling outside a “principled range of outcomes.” *Id.* at 269.

In this case, the trial court issued separate, but identical except for docket numbers, written departure evaluations for each sentence. The court first stated, “Guidelines do not adequately consider that the defendant committed 6 felonies and 2 misdemeanors within 33 days in order to feed his drug habit, several of which he receives no points for,” then lists the offenses. The court then stated, “The guidelines do not adequately reflect the crime wave inflicted upon Jackson County by the defendant, nor his inability to conform his behavior to the law.” Finally, the court declared, “I am persuaded that the Defendant should serve the sentence I have rendered and it is my intention that this sentence be sustained if an appellate court determines that any of my rationales for departure survive review.”

A. Other crimes

Focusing his attack on his five-year minimum sentence for breaking and entering, defendant argues that the trial court erred in presuming his guilt in connection with three other charged offenses which were dismissed by order of *nolle prosequi*, with no hearing, admission, or specific judicial finding that they actually took place.

A criminal defendant has a due process right to be sentenced on the basis of accurate information. *People v Hoyt*, 185 Mich App 531, 533; 462 NW2d 793 (1990), citing US Const, Am XIV, § 1, and Const 1963, art 1, § 17. See also MCL 769.34(10) (authorizing remand for resentencing upon discovery that the sentencing court relied on inaccurate information in fashioning sentence). In this case, when the trial court referred to the now-disputed offenses at sentencing, the defense expressed no disagreement. At the post-sentencing hearing on the

motion to correct the sentence, defense counsel reminded the trial court of the presumption of innocence, but again did not in fact assert that defendant did not commit the offenses. We further note that defendant, in his brief on appeal, nowhere actually asserts his innocence in those matters. Because defendant has not in fact contradicted the trial court's conclusion that the three dismissed charges related to offenses for which defendant was responsible, defendant fails to show that the trial court erred in taking those offenses into account at sentencing.

Defendant additionally argues that the court erred in basing its departure on factors already accounted for in the guidelines. "A court shall not base a departure on an offense characteristic or offender characteristic already taken into account . . . unless the court finds . . . that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b). In this case, the trial court expressed concern that two misdemeanor convictions were not scored for purposes of the guidelines because they took place after commission of the instant felonies, and that the three recent felonies in addition to the instant ones were also not scored. The court thus correctly identified an aspect of defendant's criminal history for which the guidelines did not adequately account. Defendant protests that those additional felonies were in fact scored, offense variable (OV) 13 having been scored at ten points for committing "three or more" crimes against a person or property within the requisite time, emphasizing the statutory "or more" language. See MCL 77.43(1)(c). However, the three instant offenses themselves warranted the ten points, with the additional crimes bringing no additional points under the statute. Defendant calculates what the result would be had the offenses beyond the instant three generated additional points, and arrives at a result still less harsh than the departures here imposed. However, defendant cites no authority for the proposition that a court looking upon activity beyond that for which the guidelines prescribe points must calculate its departures by strict extension of guidelines procedure. Lacking any such requirement, the trial court properly exercised its discretion in the matter instead.

Defendant points out that he was separately convicted, and served sentences, for the misdemeanors that the trial court cited, and argues that using them as aggravating factors for purposes of the instant sentence was thus improper. However, the trial court was not imposing additional sentences for those other crimes, but was instead quite properly taking them into account in recognizing that the instant crimes were but three from an intense period of criminal activity.

A substantial and compelling reason for departure is one that "keenly" or "irresistibly" grabs our attention"; is 'of "considerable worth" in deciding the length of a sentence'; and 'exists only in exceptional cases.'" *Babcock, supra* at 257-258, quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). In light of the flourish of theft-related activity that included the instant offenses, we conclude that the trial court did not err in regarding those circumstances as substantial and compelling reasons to depart from the guidelines.

B. Ability to Conform to the Law

Defendant points to the trial court's stated concern that he had shown that he could not conform his behavior to the requirements of the law, and argues that this was not an objective and verifiable factor for purposes of departing from the guidelines. We agree, but deem the error harmless.

Because it is obvious that any criminal offender has, simply by committing a crime, failed to conform to the law at least in that one instance, we deem the trial court's concern as relating to defendant's potential to reform himself, and resume his status as a law-abiding citizen, in the near future. We do not express disagreement with the court's prognosis even as we note that defendant's prospects in this regard are not sufficiently "external to the minds of the judge, defendant, and others involved in making the decision" as to be "capable of being confirmed," and thus not objective and verifiable. See *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

Where a trial court explains a sentencing departure on the basis of valid and invalid factors, and this Court cannot determine whether the court would have arrived at the same result solely on the basis of the valid ones, this Court "must remand the case to the trial court for resentencing or rearticulation of its substantial and compelling reasons to justify its departure." *Babcock, supra* at 260-261. In this case, however, the trial court took pains to indicate that it deemed the instant sentences proper in the event that an appellate court deemed "any" of its "rationales for departure" valid. Accordingly, because we agree with the trial court that defendant's crime spree of which the instant offenses were but part was itself sufficient to justify the departures imposed, our concerns about the court's reference to defendant's ability to conform to the law do not merit resentencing.

III. Proportionality

Defendant alternatively argues that, if the trial court did not err in concluding that a departure was warranted in connection with the sentence for breaking and entering, the extent of the resulting departure, going beyond the upper end of the guidelines recommendation of 17 months to five years, rendered the sentence disproportionate to the crime. We disagree.

Where there are adequate reasons for departure, the extent of the departure is subject to review for proportionality. *People v Smith*, 482 Mich 292, 299-300; 754 NW2d 284 (2008). An abuse of sentencing discretion occurs where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Defendant emphasizes that the departure in question produced a minimum sentence approximately four times the length of the guidelines recommendation. We, however, are less concerned with the ratio between the recommended and actual minimum sentences than with the sentence itself and how it relates to the facts and circumstances of the crime. We do not deem a five-year minimum term of imprisonment imposed for a breaking and entering, that took place as part of a fit of criminal activity that came about because of the perpetrator's submission to a cocaine habit, a result lying beyond a principled range of outcomes. *Babcock, supra* at 269.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Alton T. Davis