

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK QUINN MORGAN,

Defendant-Appellant.

UNPUBLISHED

May 19, 2009

No. 280889

Jackson Circuit Court

LC No. 06-004680-FH

Before: Bandstra, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

Defendant appeals as of right his sentence, following his jury trial conviction for first-degree home invasion, MCL 750.110a. Defendant was sentenced as a habitual fourth offender, MCL 769.12, to serve a prison term of 40 to 60 years. We reverse and remand for resentencing.

A trial court's decision to depart from the sentencing guidelines is reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 268-269; 666 NW2d 231 (2003). An abuse of discretion occurs when a trial court chooses a minimum sentence that is outside the range of reasonable and principled outcomes. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008), citing *Babcock*, *supra* at 269. An appellate court reviews the trial court's reason given for a departure from the sentencing guidelines for clear error, and reviews the conclusion of whether a reason is objective and verifiable as a matter of law. *Id.*

A trial court must state its reason for imposing a sentence at the time of sentencing. A trial court may depart from sentencing guidelines if it has a substantial and compelling reason to do so, and it articulates on the record the reason for departure. MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). The reason used for a departure must be "objective and verifiable." *Babcock*, *supra* at 257. Moreover, "the statutory guidelines . . . require justification for the *particular* departure made." *Smith*, *supra* at 303 (emphasis in original).

The judge discussed defendant's 1991 plea-based conviction for third-degree criminal sexual conduct, noting the violence of the crime and the fact that defendant was convicted of "a

greatly reduced charged” because of the death of the victim prior to trial.¹ The judge then looked to some of the facts of the 1991 case. Turning to the present case, the judge then made the following comments when imposing sentence:

Frankly, Mr. Morgan, I think you’re a serial rapist and . . . when I’m thinking about the protection of society and I’m looking over these sentencing guidelines, I don’t believe that they adequately protect the public in this case.

I really believe had she not interrupted this thing and caught you halfway through your window—and by the way, you just didn’t leave at that point, at that point they apparently chased you out and startled you, you tried to come back anyway, but as luck would have it for law enforcement, you ended up dropping your keys and, of course, interestingly later on when the good detective here pressed the little FOB for the key thing, all of a sudden your little alarm system in your car starts going away and, of course, they begin investigating and just amazing, you gave them that same explanation that you gave them back in 1991, oh, my car must be out of gas, it must not be working correctly, that’s why I’m there.

A striking similarity to . . . the very same modus operandi that you employed back when you brutally raped that woman in 1991.

So therefore . . . I’m finding substantial and compelling reasons for departing from the guidelines. I don’t believe 51 months to 170 months adequately protects the public when you’ve been convicted of home invasion in the first degree as a habitual offender fourth offense and you’re looking at life in prison.

So I want to articulate for the Record my substantial and compelling reasons that I—I’m going to impose a more strict sentence than called for in the guidelines. My first is, that this conviction is the defendant’s fifth felony conviction which demonstrates defendant’s repeated failure to rehabilitate himself and it occurred only two months after having maxed out essentially on a prior felony conviction. The defendant’s failure to rehabilitate may properly support an upward deviation from the sentencing guidelines

The fact that this defendant was the defendant’s second home invasion related conviction with an adult female indicates an uncontrollable propensity towards these type of offenses, which is not adequately scored in the guidelines and can be considered as a basis for an upward departure

The fact that the defendant gave perjured testimony at trial by totally denying any involvement in this crime showing his lack of truthfulness, lack of

¹ Apparently from breast cancer.

respect for the criminal justice system, lack of remorse and consequently, his diminished potential for successful rehabilitation

A trial court's determination that a defendant's potential for rehabilitation or reformation, or the lack thereof, constitutes a substantial and compelling reason for deviation from the sentencing guideline when that determination is supported by objective and verifiable facts The objective and verifiable facts in this case are that the police found in your sister's car conveniently placed in very close proximity to where you were trying to break into that single woman's home condoms, hand lotion or a lubricating cream, cologne, breath mints, two sheets that were in the trunk of that car. This was the same vehicle used by the defendant in this case and found only a short distance from the victim's home.

I am going to strike out what I also consider, because I'm not considering it, and that's that your statements that you broke into these other homes since that's not supported, that's not something I considered.

I am persuaded in this matter, therefore, that there are substantial and compelling reasons for an upward departure and I'm sentencing you, Mr. Morgan [defendant], to forty (40) to sixty (60) years in the Department of Corrections. And frankly, I think you're the kind of person, you're out in the community, the entire community is at risk. Last time, and I would note for the Record, you had not had one, you had two programs in the Department of Corrections specifically aimed at dealing with sexual addictions and interventions and frankly, even two months after they released you you're right back to breaking into women's homes . . . with sheets, condoms, lubricating jellies. There is little doubt in this court's mind that you're a serial rapist

These same reasons were set forth in a written departure evaluation form. Further, in a supplemental factual statement, the trial judge stated that, regardless of the "correct whereabouts² of the Defendant's 'rape kit,' it still would have imposed the departure sentence given to the Defendant." And finally, at sentencing, the trial judge concluded that "I think it's certainly a very fair inference certainly based on his conduct in the last case, . . . that he very well may have intended to sexually assault [the victim]"

We begin by noting that the trial court articulated a number of objective and verifiable factors that constitute substantial and compelling reasons for a sentence departure, most of which defendant does not directly challenge on appeal. As for the court's conclusion that defendant had perjured himself at trial, our Supreme Court stated in *People v Adams*, 430 Mich 679, 693-694; 425 NW2d 437 (1988), "In the sentencing process, the trial judge is required to presume guilt in fact and should be allowed to infer that a defendant's wilful material perjury under oath

² In light of our conclusion below that the trial court improperly relied on what it called the "rape kit" evidence as justification for the departure sentence imposed here, we need not consider defendant's arguments regarding the trial court's alleged error regarding where the "rape kit" was located.

circumstantially indicates the absence of a character trait for being law-abiding that bears on the appropriate sentence.” Here, defendant denied breaking-in to the victim’s home. He testified that he had given an unidentified woman a ride and had walked home after the car he was driving “cut off.” As in *Adams*, defendant’s testimony was “entirely exculpatory and bore directly on the question of his guilt.” *Id.* at 699. Accordingly, the trial court did not err in concluding that defendant had committed perjury and that it bore on his rehabilitative potential.

Nonetheless, we conclude that the trial court did err in basing its departure decision on evidence regarding what it considered to be a “rape kit” located near the scene of defendant’s home invasion. While condoms, lubricating fluids and other items may have been somewhat accessible to defendant at the time of his crime, they do not objectively and verifiably support the “inference” that the trial court drew from them in support of the departure sentence it imposed, i.e., that defendant’s intent was not only to commit a home invasion but also to sexually assault a female victim. Further, our review of the record suggests that, among the various reasons in support of a departure, the “rape kit” may have been the main reason for the sentence imposed.

Thus, while there were appropriate reasons for a departure, we cannot conclude that “the *particular* departure made” by the trial court here was properly based on appropriate reasons. *Smith, supra* at 303 (emphasis in original). The sentence imposed here was certainly “off the charts,” *Id.* at 309; the sentencing guidelines called for imposition of a minimum sentence from 51 to 170 months, MCL 777.21(3); MCL 777.63, and the minimum sentence imposed was 480 months.

We vacate defendant’s sentences and remand this case to the trial judge for resentencing and for an explanation of the extent of any departure made on remand. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Douglas B. Shapiro