

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

VICTOR LEEDALE HAYES,

Defendant-Appellee.

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UNPUBLISHED

May 28, 2009

No. 284322

Wayne Circuit Court

LC No. 08-000423-FH

Before: Sawyer, P.J., and Murray and Stephens, JJ.

MEMORANDUM.

In this prosecutor's appeal, plaintiff appeals by leave granted from the circuit court's decision to depart downward in imposing sentences for defendant's convictions of unarmed robbery, MCL 750.530, and resisting or opposing a person performing his or her duties, MCL 750.81d. We vacate defendant's sentences and remand for resentencing.

In pleading guilty to the two instant crimes, defendant admitted that, on December 19, 2007, he was attempting to push a cart of merchandise, apparently liquor, out of a store when a loss prevention officer grabbed his shoulder, and a struggle ensued. The sentencing guidelines recommended that defendant, a fourth habitual offender, MCL 769.12, serve a minimum term of imprisonment between 36 and 142 months. The trial court instead elected to impose concurrent sentences of 24 months' probation, with the first 90 to 120 days to be served in a jail-based drug abuse rehabilitation program.

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 indicates the legislative intent that deviations from guidelines recommendations follow from only objective and verifiable factors. *Id.* at 257-258, 272. A substantial and compelling reason for departure is one that arises in exceptional cases, and that keenly or irresistibly grabs the court's attention. *Id.* at 257-258.

In this case, the trial court said little about its reasons for the downward departure at sentencing, but prepared a written departure evaluation. That document lists a dozen earlier offenses, several of which were drug-related, dating back to 1983. The trial court opined that, "defendant is in dire need of a very stringent substance abuse program with relapse prevention which our JB 3 Scotts Program will provide." The court further described defendant's earlier

offenses as not assaultive in nature, and attributed to defendant “a sincere desire for a strict substance abuse treatment program . . . .” The court concluded that the prescribed program “with aftercare” would “afford defendant . . . one last chance to overcome his Drug [sic] problem.”

However, the history of substance abuse in this case is not an exceptional circumstance that keenly or irresistibly militates in favor of leniency. Nor can we regard defendant’s sincerity in seeking rehabilitative services to help him conquer his habit, as opposed to simply trying to avoid prison, an objective and verifiable factor. See *People v Daniel*, 462 Mich 1, 8 n 9 and accompanying text; 609 NW2d 557 (2000) (a defendant’s remorse is not generally objective and verifiable).

For these reasons, we conclude that the trial court erred in eschewing the guidelines recommendation of at least three years in prison in favor of a shorter term combining jail incarceration and probation. We therefore vacate defendant’s sentences and remand this case to the trial court for resentencing consistent with this opinion.

Sentences vacated, case remanded. We do not retain jurisdiction.

/s/ David H. Sawyer  
/s/ Christopher M. Murray  
/s/ Cynthia Diane Stephens