

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOHN HENRY HAIRSTON,

Defendant-Appellee.

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UNPUBLISHED

October 12, 2010

No. 291906

Wayne Circuit Court

LC No. 06-013012-FH

Before: FORT HOOD, P.J., and JANSEN and WHITBECK, JJ.

PER CURIAM.

Defendant pleaded guilty to charges of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), possession with intent to deliver ecstasy, MCL 333.7401(2)(b)(i), and possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). The sentencing guidelines prescribed a recommended minimum sentence range of 72 to 120 months. Nonetheless, even though it was undisputed that defendant was eligible to be sentenced as a fourth habitual offender, MCL 769.12, the trial court sentenced him to five years' probation with the first 180 to 220 days in a drug rehabilitation program, aftercare in the Detroit Rescue Project, and a tether for one year. The prosecution appealed the trial court's downward departure from the sentencing guidelines in Docket No. 277324. This Court vacated defendant's sentence and remanded the case for resentencing on the ground that the trial court had failed to articulate sufficient substantial and compelling reasons for the departure.<sup>1</sup> Following remand, the trial court resentenced defendant to time served (168 days). As in Docket No. 277324, the prosecution once again sought leave to appeal the trial court's downward departure from the guidelines. This Court denied the prosecution's application for leave to appeal,<sup>2</sup> but our Supreme Court subsequently remanded the case to this Court for consideration as on leave granted.<sup>3</sup> For the reasons that follow, we again vacate defendant's sentence and remand for

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<sup>1</sup> *People v Hairston*, unpublished order of the Court of Appeals, entered October 23, 2007 (Docket No. 277324).

<sup>2</sup> *People v Hairston*, unpublished order of the Court of Appeals, entered September 11, 2009 (Docket No. 291906).

<sup>3</sup> *People v Hairston*, 485 Mich 1118 (2010).

resentencing consistent with this opinion. This appeal has been decided without oral argument. MCR 7.214(E).

A sentence falling outside the appropriate guidelines range may be challenged on appeal even if the issue was not raised at sentencing, in a motion for resentencing, or in a motion to remand. *People v McGraw*, 484 Mich 120, 131; 771 NW2d 655 (2009).

In reviewing a departure from the guidelines, the existence of a particular factor is a factual determination subject to review for clear error, the determination that the factor is objective and verifiable is reviewed de novo, and the determination that an objective and verifiable factor constituted a substantial and compelling reason for departure is reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). The extent of the departure is also reviewed for an abuse of discretion. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

A court may depart from the sentencing guidelines range if it has substantial and compelling reasons to do so and it states on the record the reasons for the departure. MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). Factors meriting departure must justify the particular departure made, must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth. *Smith*, 482 Mich at 299. A trial court should deviate from the guidelines for substantial and compelling reasons "only in exceptional cases." *People v Fields*, 448 Mich 58, 68; 528 NW2d 176 (1995). To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *People v Horn*, 279 Mich App 31, 43 n 6; 755 NW2d 212 (2008). However, the court may draw inferences about the defendant's behavior from the objective evidence. *People v Petri*, 279 Mich App 407, 422; 760 NW2d 882 (2008).

If this Court finds that the trial court did not have a substantial and compelling reason for the departure, it must remand for resentencing. MCL 769.34(11); *Babcock*, 469 Mich at 265. If this Court determines some reasons are substantial and compelling and some are not, it must then "determine whether the trial court would have departed . . . to the same degree on the basis of the substantial and compelling reasons alone." *Id.* at 260.

Here, the trial court's stated reasons for departure included (1) that defendant was 29 years old and therefore capable of rehabilitation, (2) that defendant was allegedly caring for his minor children, (3) that he had "shown he wants to get in step with the law and be a productive citizen," and (4) that he had been steadily employed.

Defendant's age is certainly an objective and verifiable factor. However, the court's conclusion that because defendant was 29 years old he was capable of rehabilitation is not objectively verifiable. Nor is this conclusion supported by defendant's long criminal history or by Michigan case law. See *People v Young*, 276 Mich App 446, 457; 740 NW2d 347 (2007) (holding that defendant's status as a 22-year-old with no criminal history did not warrant departure from the minimum sentence range). Defendant is 29 and has a significant criminal history. Consequently, his age alone is not a substantial and compelling reason to depart from the guidelines.

The trial court next noted that defendant was caring for his minor children, and that this justified a downward departure. However, there is nothing objectively verifiable in the record supporting this conclusion. There are no child support statements, no grocery receipts, and no affidavits from teachers, social workers, or other individuals that could objectively attest to defendant's care of his children. Defendant merely testified that while a court did not award him custody of his children, they like to stay with him. This testimony alone is not sufficient to objectively verify that defendant had been caring for his children. Nor was there any objective evidence from which the trial court could have inferred that defendant was caring for his children. See *Petri*, 279 Mich App at 422. Caring for children may be a reason of considerable worth, and therefore substantial and compelling, but such a factor also needs to be objectively verifiable. Apart from his own testimony, defendant has failed to proffer any evidence verifying that he was caring for his children, and the trial court did not note any such evidence when articulating its reasons for departing from the guidelines. We cannot conclude that defendant's purported status as a caregiver for his children was sufficiently objectively verifiable to warrant a downward departure. *Smith*, 482 Mich at 299.

The trial court next stated that defendant has "shown he wants to get in step with the law and be a productive citizen." However, the trial court again failed to indicate on the record the objective evidence that it was using to draw this conclusion. See *Petri*, 279 Mich App at 422. The record reflects that defendant completed a 90-day chemical dependency program, but the court did not state on the record that this was dispositive in its conclusion. Nor did the court state on the record that defendant's completion of the program had given rise to an inference that he had the desire to be a productive citizen. The court's belief that defendant had shown that "he wants to get in step with the law and be a productive citizen" was simply not objectively verifiable. *Smith*, 482 Mich at 299. Nor was it "external to the mind" or "capable of being confirmed." *Horn*, 279 Mich App at 43 n 6.

Finally, the trial court observed that defendant had been steadily employed and that this was a substantial and compelling reason for departure. Again, however, there is nothing in the record that can objectively verify this conclusion. There is no affidavit from defendant's employer, no record of defendant's pay, and no record of how long defendant had been employed. Such objective evidence might have allowed the trial court to adequately conclude that defendant's steady employment was substantial and compelling. But without such evidence, the trial court's reason for departure in this regard was without foundation. Moreover, as this Court has explained, "only extraordinary employment histories will 'keenly' or 'irresistibly' grab one's attention and be 'of considerable worth' in deciding the length of a sentence." *Young*, 276 Mich App at 456 (citation omitted). This includes employment that is particularly lengthy or noteworthy. *Id.*; see also *People v Claypool*, 470 Mich 715, 727; 684 NW2d 278 (2004) (holding that employment as a cabdriver for less than two years did not constitute a substantial and compelling reason for departure). Consequently, unless defendant can show an employment history that meets these standards and that is objectively verifiable, his employment cannot serve as a substantial and compelling reason for departure in this case.

The trial court's downward departure also fails the proportionality test. A departure from the guidelines range must render the sentence proportionate to the seriousness of the defendant's conduct and his criminal history. *Smith*, 482 Mich at 300, 305. Defendant had six prior felonies, three prior misdemeanors, and was on parole at the time of his arrest in the instant case. It is not

clear how the trial court's extreme downward departure could be considered proportionate to defendant's criminal history. Nor did the trial court articulate on the record why it was departing to such a vast degree or how this case was exceptional in any way. See *Fields*, 448 Mich at 68.

In sum, the trial court failed to state substantial and compelling reasons for the downward departure imposed in this case. It also failed to explain on the record how the sentence imposed would be proportionate to the instant offenses or defendant's criminal history. We conclude that the trial court erred by determining that certain of the cited factors were objectively verifiable, that the court abused its discretion by finding that the factors were substantial and compelling, and that the court also abused its discretion by departing to the degree that it did in this case. *Smith*, 482 Mich at 300; *Babcock*, 469 Mich at 264-265.

The prosecution asks us to remand this matter for resentencing before a different judge. We decline to do so. "Resentencing before another judge is required when: (1) the original judge would have substantial difficulty in putting out of his or her mind the previously expressed view determined to be erroneous; (2) reassignment would preserve the appearance of justice; and (3) reassignment would not entail waste or duplication out of proportion to any gain in preserving the appearance of fairness." *People v Garvin*, 159 Mich App 38, 47; 406 NW2d 469 (1987). There is nothing in the record to indicate that the sentencing court will have difficulty putting previously expressed views out of its mind. However, we caution the trial court that if it again decides to depart below the sentencing guidelines, it must articulate on the record objectively verifiable, substantial and compelling reasons for doing so, and must explain how the sentence imposed will be proportionate to defendant's conduct and his criminal history.

Defendant's sentence is vacated and the matter is remanded to the trial court for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood  
/s/ Kathleen Jansen  
/s/ William C. Whitbeck