

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JEFFERY TODD BARNES,

Defendant-Appellant.

UNPUBLISHED
December 7, 2010

No. 288711
St. Joseph Circuit Court
LC No. 03-011781-FC

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct (CSC-1), MCL 750.520b(1)(a), two counts of CSC-1, MCL 750.520b(1)(b), and one count of second-degree criminal sexual conduct (CSC-2), MCL 750.520c(1)(b), for engaging in sexual penetrations and sexual contact with one of his biological daughters. He was originally sentenced as an habitual offender, second offense, MCL 769.10, to life imprisonment for each of his CSC-1 convictions, and to 120 to 180 months' imprisonment for his CSC-2 conviction. We previously affirmed defendant's convictions but concluded that the trial court sentenced defendant based on inaccurately scored guidelines, so, the case was remanded for resentencing. *People v Barnes*, unpublished opinion per curiam of the Court of Appeals, issued June 19, 2007 (Docket No. 266170). Defendant was subsequently resentenced to life imprisonment for each of his CSC-1 convictions and to 180 to 270 months' imprisonment for his CSC-2 conviction. We vacate in part and remand.

Defendant first argues that the trial court abused its discretion in imposing an upward departure from the guidelines' recommended minimum range for defendant's CSC-1 sentences. A trial court must impose a sentence within the calculated guidelines range, MCL 769.34(2), unless substantial and compelling reasons exist to depart from the statutory minimum range, and the trial court states on the record the reasons for departure. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). A trial court's reasons for a departure are reviewed for clear error; its conclusion that a reason is objective and verifiable is reviewed as a matter of law, and whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). "A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes." *Id.*

In this case, the sentencing guidelines as scored for defendant's CSC-1 convictions placed him in prior record variable (PRV) level D and offense variable (OV) level III of the sentencing grid for a class A offense, MCL 777.62, resulting in a minimum sentence range of 108 to 180 months. Because defendant was a second habitual offender, the upper end of that range is increased by 25 percent, resulting in an adjusted guidelines range of 108 to 225 months.¹ Rather than imposing a minimum sentence within the recommended sentencing guidelines range, the trial court imposed a sentence of life imprisonment. However, the sentencing grid for class A offenses, MCL 777.62, provides a life sentence only for offenders who fall in PRV level F and OV level V, or PRV levels E and F and OV level VI. As noted previously, defendant was within PRV level D and OV level III, which does not provide for a life sentence; consequently, the trial court's life sentence constituted a departure from the guidelines range. See *People v Houston*, 473 Mich 399, 410 n 22, 416-417; 702 NW2d 530 (2005).

In this case, the trial court articulated in the Sentencing Information Report Departure Evaluation form and on the record at sentencing a general reason for the departure: that the defendant is clearly a danger, has demonstrated no possibility of rehabilitation, and protection of society must be considered. An upward departure from the sentencing guidelines may be permissible to protect other children so long as there was evidence to substantiate this factor. *People v Geno*, 261 Mich App 624, 636-637; 683 NW2d 687 (2004). Additionally, in a criminal sexual conduct case involving a child "the need to protect other children by the sentence imposed is another factor not adequately considered by the guidelines." *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001). The trial court then, however, cited specific examples to support its general reason: that defendant was previously convicted for CSC involving his daughter's girlfriend; that the instant offenses involved his daughter; that he sexually abused his daughter 57 to 114 times; and that he supplied his daughter with marijuana and methamphetamine, which resulted in her addiction to drugs. The reasons for the upward departure are objective and verifiable. *Geno*, 261 Mich App at 636; *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

The instant case is also exceptional as it involves a father's sexual abuse of his own daughter and his providing her drugs, resulting in her addiction. Further, defendant was convicted of fourth-degree criminal sexual conduct involving one of his daughter's friends. While defendant claims on appeal that PRV or OV scores contemplate some of the factors the trial court cited, the trial court's determination that the guidelines failed to adequately consider the similar nature of such factors is permitted. *People v Petri*, 279 Mich App 407, 421-422; 760 NW2d 882 (2008). The aforementioned factors keenly and irresistibly grab our attention and are of considerable worth in deciding the length of a sentence. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). We conclude that the underlying factors the trial court articulated are clearly objective and verifiable and are substantial and compelling reasons

¹ MCL 750.520b(2)(b) provides that CSC-1 is a felony punishable "by imprisonment for life or any term of years, but not less than 25 years . . . for a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age." Here, however, the instant offenses occurred before that provision's effective date of August 28, 2006. Thus, that provision is not at issue in this case.

supporting an upward departure. *Geno*, 261 Mich App at 636. Still, a trial court must indicate why it chose a particular departure when imposing an upward departure. *Smith*, 482 Mich at 311, 318. On the record before us, we cannot conclude that the trial court's reasons justify the severity of the sentences imposed. *Id.* at 319. The trial court failed to articulate or "justify why it chose the particular degree of departure," *id.* at 318, making our review impossible. We therefore vacate defendant's CSC-1 sentences and remand this case so the trial court can explain the extent of the departure. *Id.* at 319.

Additionally, defendant asserts that a different trial judge should preside at resentencing. Defendant makes a self-serving assertion that the previous trial judge would have substantial difficulty putting out of his mind previously-expressed views or findings. We are not, however, remanding this case because of erroneous findings. We are remanding for the trial court to justify the extent of the departure. See *People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986). We reject defendant's request for a different trial judge.

Next, defendant complains that due process requires resentencing because the trial court enhanced his sentence based on facts neither admitted by him nor proved to a jury beyond a reasonable doubt. Defendant's unpreserved allegation of error lacks merit. Defendant's sentences were within the statutory maximum for the offenses of which defendant was convicted; thus, the trial court could utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). Defendant has not established plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant next asserts that he was denied due process when the trial court exceeded the sentencing guidelines based on inaccurate information. Defense counsel and defendant agreed that the updated presentence information report (PSIR) was accurate. Consequently, defendant has waived further challenge to the information contained in the PSIR. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Moreover, this allegation of error lacks merit because defendant's real complaint focuses on the conclusions the trial court drew from verified information, defendant's drug use.

Next, defendant claims on appeal that he was improperly assessed minimum state costs in violation of the ex post facto principles. We agree. "Interpretation of constitutional provisions and statutory construction are both questions of law we review de novo." *People v Callon*, 256 Mich App 312, 315; 662 NW2d 501 (2003). "A trial court may require a convicted defendant to pay costs only where such a requirement is expressly authorized by statute." *People v Nance*, 214 Mich App 257, 258-259; 542 NW2d 358 (1995). When defendant was sentenced, MCL 769.1j(1)(a)² provided that "if the court orders a person convicted of an offense to pay any combination of a fine, costs, or applicable assessments, the court shall order that the person pay costs of not less than . . . \$60.00, if the defendant is convicted of a felony." In this case, the trial court assessed \$300 in minimum state costs for defendant's five felony convictions.

² This provision was amended, effective January 13, 2009, to increase the minimum state cost for a felony conviction to \$68. 2008 PA 547.

Defendant was arrested in May 2002, and the instant offenses all occurred before that date. MCL 769.1j, however, did not take effect until October 1, 2003. Foregoing the question whether MCL 769.1j may be given retroactive application, such application may not be given if it amounts to an ex post facto law. Ex post facto laws are prohibited by both the United States Constitution, US Const, art. I, § 10 (“no state shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts. . .”), and the Michigan Constitution, Const 1963, art 1, § 10 (“no bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted”). Both ex post facto clauses prohibit inflicting a greater punishment for an offense than what the law permitted when the crime was committed. *Callon*, 256 Mich App at 317-318.

We have previously held that certain costs or restitution amount to increased punishment for ex post facto purposes. See *People v Slocum*, 213 Mich App 239, 243-244; 539 NW2d 572 (1995) (amendment to statute regarding extradition costs violated ex post facto principles). We conclude that the imposition of the costs at issue amounts to a punishment, therefore imposing such costs retroactively amounts to an ex post facto law. *Id.* Defendant has established plain error affecting his substantial rights regarding this allegation of error, *Carines*, 460 Mich at 763-764, and we vacate the trial court’s order requiring him to pay minimum state costs.³

Finally, although defendant raises two unpreserved claims of ineffective assistance of counsel, his cursory treatment of these claims amounts to abandonment on appeal. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

We vacate defendant’s sentences for CSC-I and the assessments of state costs and remand for re-sentencing on the CSC-I convictions. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher

³ Because we reach this conclusion, we need not address defendant’s argument that MCL 769.1j(1)(a) provides for one \$60 assessment per criminal case rather than a \$60 assessment per felony conviction.