

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 21, 2010

v

JOHNNY BERNARD CALVIN,

Defendant-Appellant.

No. 294761
Wayne Circuit Court
LC No. 06-006673-01

Before: DONOFRIO, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

A jury convicted defendant of five counts of first-degree criminal sexual conduct (“CSC”), MCL 750.520b(1)(a) and (b), and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a). He was originally sentenced to concurrent prison terms of 23 years and 9 months to 50 years for each first-degree CSC conviction, and 10 to 15 years for each second-degree CSC conviction. In a prior appeal, this Court affirmed defendant’s convictions, but remanded for resentencing because the trial court departed from the sentencing guidelines range, but “gave no reasons at all” for the departure. *People v Calvin*, unpublished opinion per curiam of the Court of Appeals, issued December 11, 2007 (Docket No. 274240). On remand, defendant was resentenced by a different judge to concurrent prison terms of 30 to 60 years for each first-degree CSC conviction and 10 to 15 years for each second-degree CSC conviction. A third judge subsequently granted defendant’s motion for resentencing, because, “It was not clear to this Court when it came back to me whether ...or to what extent Judge Brown actually took this new law (the legislative change in minimum sentencing) into effect. . . . The Court was not ...applying the law retroactively.” The third judge then resentenced defendant to identical prison terms of 30 to 60 years for the first-degree CSC convictions and 10 to 15 years for the second-degree CSC convictions. Defendant appeals as of right. Because the sentencing court did not justify the extent of the departure from guidelines and the proportionality of the sentence imposed as required by *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008), we vacate defendant’s sentences and remand for resentencing. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that resentencing is required because the trial court improperly departed from the sentencing guidelines range for reasons that were already used to determine the appropriate guidelines range. He further argues that the trial court failed to justify the extent of its departure from the guidelines. We agree in part.

A court must impose a minimum sentence within the sentencing guidelines range unless a departure from the guidelines is permitted. MCL 769.34(2). The court may depart from the guidelines if it “has a substantial and compelling reason for that departure and states on the record the reasons for departure.” MCL 769.34(3). Only factors that are objective and verifiable may be used to assess whether there are substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003).

In reviewing a trial court’s departure from the guidelines range, the existence of a particular factor supporting a departure is reviewed for clear error, the determination whether the factor is objective and verifiable is reviewed de novo, and the determination whether a reason is substantial and compelling is reviewed for an abuse of discretion. *Id.* at 264-265. The extent of a trial court’s departure from the guidelines range and the proportionality of a sentence is also reviewed for an abuse of discretion. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

In this case, the trial court referred to the ages of the victims, defendant’s predatory behavior, and the years of abuse as objective and verifiable factors supporting a departure from the guidelines. Defendant does not challenge the trial court’s consideration of the years of abuse as an objective and verifiable factor to support a departure from the guidelines. However, he contends that the trial court improperly considered his predatory conduct and the ages of the victims as reasons for departure because those factors are already reflected in the scoring of the guidelines. MCL 769.34(3)(b) provides that a court “shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds . . . that the characteristic has been given inadequate or disproportionate weight.” See also *People v Hornsby*, 251 Mich App 462, 474; 650 NW2d 700 (2002). To determine whether a factor was given inadequate or disproportionate weight in the guidelines calculations, a court “must determine how that characteristic affected the defendant’s minimum sentence range.” *People v Young*, 276 Mich App 446, 451; 740 NW2d 347 (2007).

Predatory behavior and the ages of the victims, which relate to “vulnerability,” are at least partially accounted for in offense variable 10, MCL 777.40. See *People v Cannon*, 481 Mich 152, 156-162; 749 NW2d 257 (2008). Indeed, the trial court scored 15 points for OV 10 because predatory conduct was involved. The trial court did, however, find that these characteristics were given inadequate or disproportionate weight. In addition, the sentencing court was aware of the sentencing record created by her predecessor judges when she noted, “I think that the judges who have had this case before me have made it clear that these circumstances and these facts are horrific here...” The record establishes that the predatory behavior of the defendant was profound. By way of example, in scoring OV 13, the guidelines score 3 or more crimes against a person within a five year period. Here, the period of criminal sexual conduct exceeded 5 years. Additionally, the number of offenses to show a pattern of criminal behavior of crimes against a person (here 3 or more penetrations and touching), may have been in the hundreds. Also, as Judge Brown noted, the defendant was engaged in grooming behaviors toward these children that not only “cultivated them for your sexual pleasure and increase the sexual exposure to intercourse, but you began to pay them for intercourse.... I can’t think of anything more horrific than to cultivate little girls for you own sexual perversion and then to require them to perform acts of prostitutions so that they could have money . . .” Clearly, it is the profound abuse and the long duration of abuse that constituted the driving force in

establishing the minimum sentence. The factors recited constitute objective and verifiable behaviors that extend beyond the factors considered in the sentencing guidelines. We do not find that the sentencing court's determination that substantial and compelling reasons existed for departure was an abuse of discretion.

Defendant also argues, and the prosecutor agrees, that resentencing is required because the trial court failed to justify the extent of its departure as required by *Smith*, 482 Mich 292. In that case, the Supreme Court held that a trial court must "explain why" the substantial and compelling reasons that exist in a case justify the particular departure imposed. *Id.* at 310-311, 318. In the present case, as in *Smith*, the trial court stated that a departure from the guidelines was appropriate for substantial and compelling reasons, but failed to "justify why it chose the particular degree of departure" and explain "why the substantial and compelling reason or reasons articulated justify the minimum sentence imposed." This lapse in the sentencing record requires resentencing. *Id.* at 319.

For these reasons, we vacate defendant's sentences and remand this case for resentencing consistent with this opinion.

Defendant also argues that the trial court improperly refused to consider his positive prison adjustment at resentencing, erroneously believing that it was not relevant. From the context of the trial court's statement it appears that the trial court determined that the defendant's adjustment to prison and his behavioral progress was not significant to the court's sentencing decision. Because we are remanding this case for resentencing, we merely remind the sentencing court that a defendant's conduct while in prison is an appropriate consideration at a resentencing proceeding. See *People v Triplett*, 407 Mich 510, 516; 287 NW2d 165 (1980).

We vacate defendant's sentences and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald