STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED January 19, 2012
v	No. 301798 Eaton Circuit Court
JOSHUA JAMES WHITTUM, Defendant-Appellee.	LC No. 10-020332-FH

Before: SAWYER, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

The prosecution appeals by leave granted from the circuit court's decision to depart downward from the sentencing guidelines and impose concurrent minimum sentences of two years' imprisonment for each of the four counts of child sexually abusive activity,[1] to which defendant, Joshua Whittum, pleaded guilty. Whittum also pleaded guilty to three counts of disseminating sexually explicit material to a minor,[2] and one count of attempted distribution.[3] The trial court imposed concurrent sentences of one year's imprisonment for each of these latter convictions. We vacate Whittum's sentences for child sexually abusive activity and remand for further proceedings consistent with this opinion.

I. FACTS

This case arose from Whittum's contact with several underage females on Internet social networking sites. He exchanged several photographs with them, some of which showed his exposed penis. In turn, the victims displayed their bare breasts or vaginas, or showed themselves totally nude. Whittum was 20 years old at the time, while his victims were between 14 and 17 years old.

[1] MCL 750.145c(2).

[2] MCL 722.675.

[3] MCL 750.92.

The sentencing guidelines recommended minimum sentences for the convictions of child sexually abusive activity of 45 to 75 months' imprisonment. Whittum offered his guilty plea with the understanding that his minimum sentence would not exceed 48 months. At sentencing, the prosecuting attorney recommended the 48 month minimum, consistent with the plea agreement and the sentencing guidelines. However, the trial court expressed grave concerns over whether the guidelines recommendation was too harsh.

The trial court first stated that, with the current state of technology including all its social networking possibilities, "this type of activity is extremely widespread," then noted Whittum's age, that he had not had trouble with the law before, and that he was highly regarded by the community. The trial court continued that some of the victims had overstated their ages, that at least some of them "were willing, enthusiastic participants in this activity," and that Whittum was immediately cooperative with law enforcement. After further discussing the prevalence of mobile communication devices and social networking sites, and summarizing some of the consensual conduct underlying this case, the trial court asked, "Now does that translate to 48 months?"

The trial court speculated that a sentence at the low end of the guidelines range would be followed by some denials of parole and produce a period of incarceration of "seven or eight" years. The trial court further speculated over what might become of the membership of the parole board following the recent statewide election. The trial court then opined that the statute in question was primarily concerned with pedophiles making victims of young children.

Continuing, the trial court stated that Whittum admitted the error of his ways and was concerned about continuing to assist in the support of his grandmother and young daughter. The trial court then asked how Whittum might be credited for sparing his victims any need to testify or have their provocative images displayed in court.

The trial court recited that the parties agreed that 48 months was not an agreed-upon minimum sentence, but rather a cap. The trial court then announced the intention to impose a sentence that departed downward from the guidelines. The trial court incorporated all the remarks that it had put on the record so far and added that Whittum was a hard worker and a high school graduate, despite having been held back a year or two. The trial court opined that Whittum had not understood the ramifications of his actions and that a lack of parental monitoring or control largely accounted for such mischief. The trial court then imposed minimum sentences of two years for the convictions of child sexually abusive activity, along with the one-year minimums for the other convictions.

The prosecution now appeals.

II. DOWNWARD SENTENCING DEPARTURE

A. STANDARD OF REVIEW

The prosecution argues that the trial court abused its discretion by failing to state substantial and compelling, and objective and verifiable reasons for its downward departure. According to the prosecution, instead of stating with particularity its reasons for departure, the trial court simply announced that it was incorporating everything that it had said earlier in the

hearing, which did not satisfy the criteria for valid departures. The prosecution opines that this Court should not have to sift through the trial court's numerous comments to separate substantial and compelling, and objective and verifiable, reasons for the downward departure. Therefore, the prosecution contends that a remand for resentencing, or at least for rearticulation of the reasons for the sentencing departure is appropriate.

Whittum argues at length that the prosecution failed to preserve this issue by failing to present an objection below. However, just as there is no preservation requirement for a defendant to challenge an upward departure,[4] the prosecutor should not be held to preservation requirements for challenges to downward departures.[5] Further, as noted, the prosecuting attorney did in fact urge the trial court to impose the harshest minimum sentence that comported with the plea agreement, the full 48 months, which also fell within the guidelines recommendation. Having expressed that preference on the record, the prosecuting attorney had no duty to argue with the court upon the latter's pronouncement of a more lenient sentence in order to preserve appellate objections.

For purposes of deciding whether to depart from the recommended range under the guidelines, an abuse of discretion occurs where the trial court chooses an outcome falling outside a principled range of outcomes.[6]

B. LEGAL STANDARDS

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."[7] Such a reason must be of a sort that "keenly or irresistibly grabs" the attention such as "exists only in exceptional cases."[8] Further, such reasons must be objective and verifiable.[9] An objective and verifiable reason is one that is "external to the minds of the judge, defendant, and others involved in making the decision," and "capable of being confirmed."[10] Where a trial court explains a sentencing departure on the basis of valid and invalid factors, and this Court cannot determine whether the trial court would have arrived at the same result solely on the basis of the valid ones,

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[4] MCL 769.34(7); MCR 2.517(A)(7); *People v Smith*, 482 Mich 292, 300 and n 18; 754 NW2d 284 (2008).

[5] See MCR 2.517(A)(7) ("No exception need be taken to a finding or decision.").

[6] *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

[7] MCL 769.34(3); see also *Babcock*, 469 Mich at 255-256.

[8] *Babcock*, 469 Mich at 257-258 (internal quotation marks and citation omitted).

[9] *Id.* at 257-258, 272.

[10] *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

this Court "must remand the case to the trial court for resentencing or rearticulation of its substantial and compelling reasons to justify its departure."[11]

C. APPLYING THE LEGAL STANDARDS

In this case, the prosecution identifies 23 reasons behind the trial court's decision to depart from the guidelines, some of which are plainly *not* substantial and compelling, or objective and verifiable. These include that Whittum pleaded guilty to all charges, that voluntary dissemination of sexual images of young adults is commonplace, that Whittum had no prior criminal record, that Whittum's family members and a former employer wrote letters favorable to Whittum, that Whittum had graduated from high school, and that Whittum had family responsibilities. While verifiable, none of these are so exceptional as to keenly grab the attention, and thus they are not substantial or compelling reasons to depart.

The trial court also expressed general concerns over the prevalence of mobile communication devices, social networking sites, and the lack of parental monitoring or control over their use. But in identifying this general social problem, the trial court failed to identify a substantial or compelling reason for a downward departure for this defendant. That certain criminal temptations are commonplace does not justify a defendant indulging those temptations or relieve those who so indulge from the dictates of the sentencing guidelines.

We further note that the trial court speculated on Whittum's chances for winning early parole. Although parole eligibility is easy enough to verify, a sentencing court errs when it takes a defendant's parole prospects into account.[12] Moreover, the trial court's comment that the statute at issue was mainly concerned with pedophiles making victims of young children, as opposed to young adults taking imprudent liberties with sexual images of themselves, did not constitute a proper basis for departure. The statute itself does not distinguish between pre- and post-pubescent participants,[13] and in interpreting a statute, courts may not speculate about the probable intent of the Legislature beyond the words expressed in the statute.[14]

The trial court credited Whittum with having spared his victims from having to testify or otherwise publicly reveal their own participation in this criminal conduct, but a great number of criminal convictions in this state result from guilty pleas, which thus spare the attendant victims the unpleasantness of testifying. That the victims were so spared in this instance is not at all exceptional so as to constitute a proper ground for departure.

The trial court opined that Whittum did not fully understand the ramifications of his actions. But given that the common citizenry is charged with the duty to know the law, such lack

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[11] *Babcock*, 469 Mich at 260-261.

[12] See *People v Wybrecht*, 222 Mich App 160, 173; 564 NW2d 903 (1997).

[13] MCL 750.145c(2).

[14] *In re Schnell*, 214 Mich App 304, 310; 543 NW2d 11 (1995).

of knowledge would not be a substantial or compelling reason to depart.[15] That Whittum expressed remorse for his crimes is also not a valid factor, in that remorse is not external to the mind of the defendant or judge, and thus is not objective or verifiable.[16]

Whittum identifies 11 allegedly valid reasons for the departure and urges this Court to disregard the trial court's other statements as mere passing commentary. But in so paring down the reasons for departure, Whittum still relies on some that we have deemed invalid, including that he pleaded guilty and had no prior criminal record. And Whittum, like this Court, could not engage in such parsing without simply guessing at which of the many reasons given did, and did not, affect the trial court's decision to depart.

For these reasons, we conclude that the trial court dragged far too wide a net, presenting a large array of reasons for departing downward from the guidelines range, only some of which are substantial and compelling, or objective and verifiable. Because it is impossible to ascertain from the record whether the trial court correctly separated in its mind the valid departure reasons from reasons that did not satisfy the criteria for justifying departures and then based its decision to depart exclusively on the valid factors, we hereby vacate Whittum's sentences for child sexually abusive activity and remand this case to the trial court with instructions to resentence Whittum within the guidelines, or, alternatively, to articulate on the record the reasons behind any decision to depart from the guidelines. In the latter event, the trial court shall confine those reasons to substantial and compelling, objective and verifiable, factors.

We vacate Whittum's sentences for child sexually abusive activity and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Michael J. Kelly

[15] See *People v Weiss*, 191 Mich App 553, 561; 479 NW2d 30 (1991).

[16] See *Abramski*, 257 Mich App at 74.