

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 19, 2012

v

STEPHEN LEE HORN, III,

Defendant-Appellant.

No. 304877
Tuscola Circuit Court
LC No. 11-011823-FH

Before: DONOFRIO, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendant was convicted by a jury of unauthorized driving away an automobile, MCL 750.413, and receiving and concealing stolen property, MCL 750.535(7). Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to 6 to 20 years for both offenses. Defendant appeals as of right. We affirm.

Defendant’s convictions arose from an incident involving a stolen truck. At sentencing, the trial court departed from defendant’s recommended guidelines of 14 to 58 months and sentenced defendant to 6 to 20 years. To justify the departure, the trial court adopted the prosecutor’s reasoning contained in the sentencing memorandum as its substantial and compelling reasons. The prosecutor argued, and the trial court adopted, the position that “the Guidelines fail to take into consideration the defendant’s previous failed attempts at rehabilitation and his utterly poor performance while under supervision of the Court or the Michigan Department of Corrections”

Defendant argues that while his performance on probation and parole “was admittedly unsatisfactory, that does not make his an exceptional case” that justified a departure. Defendant also argues that his prior record variable (PRV) score accurately and adequately accounted for his recidivism. We disagree.

Whether the trial court had substantial and compelling reasons for departing from the guidelines is reviewed for an abuse of discretion. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). An abuse of discretion occurs when “the minimum sentence imposed falls outside the range of principled outcomes.” *Id.* However, the trial court’s reasons for departure are reviewed for clear error, and whether the trial court’s reasons are objective and verifiable is reviewed as a matter of law. *Id.*

The Michigan Sentencing Guidelines generally require a trial court to impose a minimum sentence that falls within the sentencing guidelines. MCL 769.34(2); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). A trial court may depart from the sentencing range only when the trial court has substantial and compelling reasons to do so. MCL 769.34(3); *Buehler*, 477 Mich at 24. MCL 769.34(3)(b) also indicates that the trial court may 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 from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.”

The trial court may only use reasons that are objective and verifiable to justify a departure from the sentencing guidelines. *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003). Factors are objective and verifiable if they are based on “actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed.” *People v Horn*, 279 Mich App 31, 43 n 6; 755 NW2d 212 (2008). Furthermore, to be substantial and compelling “the reasons justifying departure should ‘keenly’ or ‘irresistibly’ grab our attention, and we should recognize them as being ‘of considerable worth’ in deciding the length of a sentence.” *Id.* (quotation marks and citation omitted). A trial court should find substantial and compelling reasons only in exceptional cases. *Id.*

Concluding that a defendant is a danger to the public is not an objective and verifiable fact. *People v Solmonson*, 261 Mich App 657, 670; 683 NW2d 761 (2004). However, it is well recognized that a trial court may consider a defendant’s prior criminal record and failures at rehabilitation as objective and verifiable facts. *Horn*, 279 Mich App at 45; *Solmonson*, 261 Mich App at 671.

Defendant’s criminal history included multiple felony and misdemeanor convictions. In 1994, defendant was convicted of carrying a concealed weapon and assault and battery. In 1995, he was convicted of two counts of delivery/manufacture of a controlled substance and assault with intent to do great bodily harm. In 2004, he was convicted of unarmed robbery and conspiracy to unarmed robbery, and in 2011, he was convicted of the instant offenses and domestic violence. Although defendant’s PRV score accurately reflected his prior convictions, parole status, and concurrent convictions, the PRV score did not adequately reflect defendant’s total criminal history.

Defendant was paroled in October 2001, and absconded twice and was returned to prison. When he finished his sentence and was released in 2004, he committed another crime within two months. After being paroled again in November 2009, defendant absconded again and committed an act of domestic violence, as well as the two instant offenses. In addition to defendant’s tendency to commit new crimes and abscond from parole, defendant has failed to attend mandated substance abuse programs. Defendant has also attempted to smuggle contraband into the Tuscola Residential Reentry Program facility while he was there.

Defendant acknowledges on appeal that his performance on probation and parole “was admittedly unsatisfactory.” Defendant’s PRV score did not reflect his poor probation and parole history, nor did it reflect the timing of his release and commission of new crimes. Absconding from parole and violation of probation is itself an objective and verifiable factor worthy of

independent consideration, because it is “an indication of an offender’s callous attitude toward correction.” See *People v Schaafsma*, 267 Mich App 184, 186; 704 NW2d 115 (2005). The trial court could in its discretion conclude that defendant’s repeated failures to comply with probation and parole provided a substantial and compelling reason to depart from the sentencing guidelines. *Id.*; see also *People v Hendrick*, 472 Mich 555, 562-563; 697 NW2d 511 (2005) (holding that a trial court is allowed to consider the conduct underlying the probation violation in departing from the sentencing guidelines on the original offense).

Additionally, defendant’s PRV score did not adequately reflect his failed attempts at rehabilitation, including refusal to attend mandated programs or his attempts to smuggle contraband into a residential program. A defendant’s repeated failure to rehabilitate himself when given the opportunity to do so is an objective and verifiable factor and is a substantial and compelling reason to support his upward departure. *People v Geno*, 261 Mich App 625, 636; 683 NW2d 687. Thus, the trial court did not err in determining that this was objective and verifiable fact equating to substantial and compelling reasons to depart from the guidelines. *Horn*, 279 Mich App at 43 n 6; *Buehler*, 477 Mich at 24.

Defendant’s assertion that his criminal history and total inability to conform to any prior attempts at rehabilitation is “unexceptional” is without merit. Nor is the sentence departure disproportionate under the circumstances. The memorandum adopted by the trial court makes it clear that defendant has been given numerous opportunities to rehabilitate himself, and has not merely failed to do so, but continually demonstrated his contempt for such efforts. We hold that the trial court’s decision to sentence defendant to a minimum sentence of 14 months more than the maximum minimum sentence under the guidelines was not clearly outside the range of principled outcomes, and therefore the trial court did not err in imposing such a sentence.

Affirmed.

/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra