

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 13, 2012

v

WILFRED MARTIN HADLEY,

Defendant-Appellant.

No. 305021
Jackson Circuit Court
LC No. 09-005026-FC

Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

Wilfred Martin Hadley pleaded no contest to manslaughter.¹ The trial court sentenced Hadley to ten to 15 years' imprisonment with 651 days credit. Hadley appeals by leave granted the trial court's upward departure from the sentencing guidelines. We remand for rearticulation or resentencing.

Hadley argues that the trial court erred by departing from the recommended minimum sentence range under the legislative guidelines. We agree in part.

On appeal, courts review the reasons given for a departure for clear error. The conclusion that a reason is objective and verifiable is reviewed as a matter of law. Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure. A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes.²

The trial court used the legislative sentencing guidelines to determine the recommended range of Hadley's minimum sentence.³ Under the sentencing guidelines, Hadley's recommended

¹ MCL 750.321.

² *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

³ MCL 769.34(2).

minimum sentence range was 43 to 86 months' imprisonment.⁴ It is well established, however, that "[a] court may depart from the appropriate sentence range . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure."⁵ In order to be substantial and compelling, the reasons on which the trial court relied "must be objective and verifiable."⁶ "To be objective and verifiable, a reason must be based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed."⁷ The reasons for departure must also "be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention."⁸

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 . . . that the characteristic has been given inadequate or disproportionate weight."⁹

Moreover, "the statutory guidelines require more than an articulation of reasons for a departure; they require justification for the particular departure made."¹⁰ Thus, "the trial court . . . must justify on the record both the departure and the extent of the departure."¹¹

In this case, the trial court articulated three reasons for its upward departure. The trial court found that the sentencing guidelines did not take into account that Hadley recklessly wielded a gun in the presence of multiple people who could have been injured, that Hadley had a prior assaultive felony conviction and was a felon in possession of a firearm, or that the victim charitably allowed Hadley and his family to live with her. On appeal, Hadley only contests the trial court's first two reasons for departure.

The trial court based its reasons for departure on facts contained in the presentence investigation report ("PSIR") and the preliminary examination testimony. Michigan courts have held that a trial court's reason for departing is objective and verifiable where the trial court relies on the PSIR or testimony in the record.¹² Hadley argues, however, that the trial court already took into account his use of a gun by scoring offense variables ("OVs") 1 and 2. The trial court

⁴ MCL 777.64.

⁵ MCL 769.34(3).

⁶ *Smith*, 482 Mich at 299.

⁷ *People v Horn*, 279 Mich App 31, 43 n 6; 755 NW2d 212 (2008).

⁸ *Smith*, 482 Mich at 299.

⁹ *Id.* at 300, quoting MCL 769.34(3)(b).

¹⁰ *Smith*, 482 Mich at 303.

¹¹ *Id.* at 313.

¹² *Horn*, 279 Mich App at 43 n 6.

scored 25 points for OV 1, finding that Hadley fired a gun at a person.¹³ The trial court also scored five points for OV 2, finding that Hadley possessed or used a gun.¹⁴ The language of MCL 777.31(1)(a) refers to a defendant’s aggravated use of a weapon against a victim and, thus, does not take into account the presence of additional potential victims. Similarly, MCL 777.32(1)(d) takes into account that Hadley “possessed or used a pistol[,]” not the nature or circumstances of his use of the pistol. Accordingly, we find that the trial court did not abuse its discretion by determining that the sentencing guidelines did not take into account that Hadley recklessly endangered multiple people and that this conduct “keenly or irresistibly grabbed the court’s attention.”¹⁵

Hadley also argues that the trial court should not have considered his prior felony because consideration of his prior felony was barred,¹⁶ and the prosecution dismissed his felony-firearm charge and did not charge him with felon in possession of a firearm. The court convicted Hadley of felonious assault in 1987. Thus, the trial court was unable to consider Hadley’s prior felony when scoring his prior record variables (“PRVs”).¹⁷ Hadley does not cite any authority to support that MCL 777.50 also bars the trial court from considering his prior felony for the purposes of departing from the sentencing guidelines. We find that MCL 777.50 applies only to the scoring of Hadley’s PRVs and did not preclude the trial court from considering Hadley’s prior conviction for the purpose of departure. Hadley also fails to cite any authority supporting that a trial court may not consider dismissed charges and uncharged offenses when determining the appropriate minimum sentence range. This Court has held that the “sentencing court is allowed to consider the facts underlying uncharged offenses Further, this Court has recognized that a sentencing court may consider the nature of a plea bargain and the charges that were dismissed in exchange for the plea for which the court is sentencing.”¹⁸ In sum, we find that the trial court did not abuse its discretion in finding substantial and compelling reasons to depart from the guidelines’ recommended minimum sentence range.¹⁹

Notwithstanding the above, the trial court must also justify its particular departure by giving an “explanation for the extent of the departure independent of the reasons given to impose a departure sentence.”²⁰ Here, Hadley pleaded no contest to manslaughter, which is a Class C felony with a maximum minimum sentence range of 114 months’ imprisonment.²¹ As such,

¹³ MCL 777.31(1)(a).

¹⁴ MCL 777.32(1)(d).

¹⁵ *Smith*, 482 Mich at 299.

¹⁶ MCL 777.50.

¹⁷ *Id.*

¹⁸ *People v Coulter*, 205 Mich App 453, 456; 517 NW2d 827 (1994) (citations omitted).

¹⁹ *Smith*, 482 Mich at 299-300.

²⁰ *Id.* at 305-306.

²¹ MCL 777.16p; MCL 777.64.

Hadley’s ten-year minimum sentence “would constitute a departure from the recommended minimum sentence range that the Legislature reserved for the most egregious class C offenses and the more recidivist criminals.”²² Despite the significant extent of its departure from the sentencing guidelines, the trial court failed to justify the extent of its departure independent of its reasons for departure.²³ “[I]f it is unclear why the trial court made a particular departure, an appellate court cannot substitute its own judgment about why the departure was justified. A sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear.”²⁴ As a result, we must remand this case to the trial court so that it “may articulate why this level of departure is warranted or resentenced” Hadley.²⁵

Remanded for rearticulation or resentencing. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

²² *People v Hicks*, 485 Mich 1060; 777 NW2d 412 (2010) (Kelly, CJ, concurring) (citation and quotation omitted).

²³ *Smith*, 482 Mich at 305-306.

²⁴ *Id.* at 304.

²⁵ *Id.* at 311.