

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

UNPUBLISHED
November 20, 2012

v

MATTHEW LUCAS ANDERSON,

Defendant-Appellee.

No. 307676
Bay Circuit Court
LC No. 10-011078-FC

Before: TALBOT, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

Plaintiff appeals by delayed leave granted from the sentence of 85 to 180 months imposed on defendant Matthew Lucas Anderson's plea-based conviction of armed robbery, MCL 750.529, arguing that the trial court failed to articulate substantial and compelling reasons for deviating below the guidelines. We vacate defendant's sentence and remand for resentencing.

Defendant and a codefendant pleaded guilty to the armed robbery of an Advance America store. After correction of the sentencing variables to account for two subsequent breaking and entering offenses committed by defendant, the court calculated that the proper sentencing guidelines were 108 to 180 months. Defense counsel asked the court to consider defendant's age as a proper sentencing factor under *People v Fields*, 448 Mich 58; 528 NW2d 176 (1995). Defendant had accumulated a criminal record consisting of both juvenile adjudications and adult convictions. The prosecution asked the court to consider the serious nature of the crimes and defendant's rapid accumulation of offenses. The trial court found substantial and compelling justifications to depart below the sentencing guidelines, stating as follows:

[T]he substantial and compelling reasons that I find are . . . one, that you were, I believe, still 17 years of age

* * *

And, that's not an excuse. What I'm finding is that I don't believe the guidelines allow for the fact that I think and hope that you are rehabilitatable, because I do find that this also correlated with -- I think the crimes were motivated by your drug addiction, which is no excuse either. But, I am finding that, you know, all of this conduct seems to have been in a relatively short period of time which, is one

of the reasons that the guidelines are as high as they are. And, I'm -- so I'm finding that, because of your youth and the chance and hope, but the chance also, I do find that there is a reasonable chance, a good chance that you will make the most of what services the Department of Corrections orders for you and that, perhaps, you will still have the opportunity to form a life.

On appeal, the prosecution claims that the trial court improperly deviated below the sentencing guidelines on the basis of defendant's age and potential for rehabilitation, neither of which is a substantial and compelling reason to justify the departure. We agree.

A trial court may depart from the properly calculated sentencing guidelines range only if it has substantial and compelling reasons to do so and states these reasons for the departure on the record. MCL 769.34(3). Factors for departure must be objective and verifiable, keenly attract the court's attention, and be of considerable worth in deciding the length of a sentence. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). We review for clear error the existence of a particular factor for departure, as a matter of law the determination that a factor is objective and verifiable, and for an abuse of discretion the trial court's determination that the objective and verifiable factors present constitute substantial and compelling justifications for departure. *Id.* at 264-265. An abuse of discretion has occurred when the resulting sentence is not within the "principled range of outcomes." *Id.* at 269. We defer to the "trial court's extensive knowledge of the facts and that court's direct familiarity with the circumstances of the offender." *Id.* at 270.

A defendant's age is a proper factor in determining a sentence; however, departure may not be justified upon a defendant's age alone. See *People v Young*, 276 Mich App 446, 457; 740 NW2d 347 (2007). The inquiry to be made when considering a defendant's age and criminal history is whether the defendant's age is "particularly old to not yet have a more lengthy criminal record." *Id.*, quoting *People v Claypool*, 470 Mich 715, 727; 684 NW2d 278 (2004). This is a high burden to meet. In *Young*, where the defendant was 22 years old with no prior juvenile or adult offenses, this high burden was not met. *Id.* at 457. Additionally, in *Claypool*, where the defendant was 26 years old with one prior conviction for misdemeanor retail fraud, this burden was unmet. *Claypool*, 470 Mich at 727. In the case at bar, defendant fails to meet the burden set by *Young* and *Claypool*. Defendant was 17 years old at the time of this offense. As such, he was considerably younger than the defendants in *Young* and *Claypool*. In addition, he had already accumulated a criminal record. At the time defendant committed the instant offense, he had two juvenile adjudications and one conviction as an adult. And, at the time of sentencing, he had convictions as an adult on five additional charges. In short, defendant's age and criminal history did not present substantial and compelling justification to depart from the sentencing guidelines.

To the extent the trial court relied on defendant's age alone in determining rehabilitative potential, we cannot agree. To allow a court to find on the basis of age alone that a defendant had rehabilitative potential warranting departure from the sentencing guidelines would strip *Young* of its meaning. That is, a trial court that wishes to depart on the basis of age alone could subsume it into rehabilitative potential. To the extent that the trial court found rehabilitative potential from more than simply defendant's age, its findings were unclear. A trial court's

departures must be on the basis of objective and verifiable fact and clearly stated on the record. *Babcock*, 469 Mich at 257-258.

Defendant's age and criminal history were not substantial and compelling justifications for departing from the sentencing guidelines. To the extent that rehabilitative potential was determined upon defendant's age alone, it was improper; furthermore, any objective facts supporting this finding were lacking from the record. Because the trial court failed to present any substantial and compelling justifications warranting departure from the sentencing guidelines, we must remand for resentencing. See MCL 769.34(11).

Defendant's sentence is vacated and the matter is remanded for resentencing. In resentencing, the court shall reconsider the scoring of offense variable 13 in light of *People v Pearson*, 490 Mich 984; 807 NW2d 45 (2012), which was released approximately three months after defendant's sentence was imposed. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Jane M. Beckering
/s/ Michael J. Kelly