

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LISA MARIE HAVENS,

Defendant-Appellant.

FOR PUBLICATION

August 30, 2005

9:05 a.m.

No. 252699

Macomb Circuit Court

LC No. 02-000375-FH

Official Reported Version

Before: O'Connell, P.J., and Schuette and Borrello, JJ.

BORRELLO, J.

Defendant appeals by delayed leave granted her sentences of 15 to 40 years imposed for her plea-based convictions of delivery of less than 50 grams of heroin to a minor, MCL 333.7410(1). We vacate defendant's sentences and remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded guilty to four counts of delivery of less than 50 grams of heroin to a minor in return for dismissal of another case in which she was charged with ten controlled-substance offenses, including delivery of heroin to a minor.¹ The statutory sentencing guidelines established a minimum sentence range of 19 to 38 months. The trial court sentenced defendant to concurrent terms of 15 to 40 years in prison.

A trial court must impose a sentence within the sentencing guidelines range, unless it determines that a substantial and compelling reason exists to depart from the guidelines. To constitute a substantial and compelling reason for departing from the guidelines, a reason must be objective and verifiable, must irresistibly attract the attention of the court, and must be of considerable worth in deciding the length of the sentence. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). 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. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

¹ Defendant entered guilty pleas in the instant case in a prior hearing, but withdrew the pleas when the trial court indicated that it was inclined to impose minimum terms of not less than 15 years.

The reason for the departure must be articulated by the trial court on the record. MCL 769.34(3). A departure from the guidelines cannot be affirmed on the basis of a reason that the appellate court perceives but the trial court did not articulate. A substantial and compelling reason articulated by the trial court as meriting a departure from the sentencing guidelines must justify the particular departure at issue. If some of the stated reasons are invalid, and the appellate court cannot ascertain whether the trial court would have departed to the same extent regardless of the invalid factors, remand for resentencing or rearticulation is necessary. *Babcock, supra* at 258-261.

We review the trial court's determination of the existence of a factor for departing from the guidelines for clear error, review de novo the determination that a factor is objective and verifiable, and review the determination that objective and verifiable factors justified departure from the guidelines range for an abuse of discretion. *Id.* at 265. A trial court may depart from the guidelines range for nondiscriminatory reasons based on an offense or offender characteristic that was already considered in calculating the guidelines range if the trial court concludes that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Babcock, supra* at 264-269.

In this case, the trial court erred in concluding that the Legislature did not contemplate that delivery of a controlled substance could be accomplished by injecting it into another person. See *People v Schultz*, 246 Mich App 695, 701-709; 635 NW2d 491 (2001) (delivery of a controlled substance may be accomplished by injecting it into another person). We assume that if injection constitutes delivery for purposes of conviction, the same act constitutes delivery for purposes of scoring offense variable 15 (aggravated controlled substance offenses), MCL 777.45, at 25 points for delivery of a controlled substance other than marijuana to a minor. Furthermore, the trial court's characterization of defendant's offenses as "egregious" is a subjective determination, is not objective and verifiable, and cannot be used as a substantial and compelling reason for departing from the sentencing guidelines. *Abramski, supra* at 74. Other possible reasons for departing from the guidelines suggested by the prosecution on appeal were not articulated by the trial court; therefore, we cannot consider them. *Babcock, supra* at 258-259.

We vacate the trial court sentences and remand this case to the trial court for resentencing. We decline defendant's request to be sentenced before a different judge.

Remanded for the sole purpose of resentencing. We do not retain jurisdiction.

/s/ Stephen L. Borrello