

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LISA MARIE HAVENS,

Defendant-Appellant.

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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.

SCHUETTE, J. (*dissenting*).

I respectfully dissent from the majority. I would find that the trial court did not abuse its discretion and that the trial court did articulate objective and verifiable factors that justified upward departure from the guidelines range. I would affirm defendant's sentences.

A trial court must impose a sentence within the sentencing guidelines, 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). 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. *Babcock, supra* at 258-260.

I agree that 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). I also agree that a mere 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. However, in this case, the trial court also offered another substantial and compelling reason for the upward departure. It stated:

Further, this Court is finding that the guidelines are totally inadequate [sic], because defendant was dangerous and a serious threat to the community. Especially a threat to the community in so far as we were dealing with minors and minors are considered minors because they lack the mental capacity to formulate recklessness, its intent and knowledge as to what is right and what is wrong. And as an adult, this individual defendant should have taken control of the situation, should have been a leader with respect to what was right and what was wrong, what was moral and what was immoral. But instead, this particular defendant took it upon herself to place individual minors and in this case I understand that we're only relying on one minor, by showing this minor how to use the drug, injecting the minor with the drug. I can't think of anything more egregious than an adult doing this to a minor child.

Thus, the trial court articulated its reasons beyond just calling the act "egregious." Defendant argues that her role as a leader in a multiple-offender situation was already factored into her sentence by scoring ten points for offense variable (OV) 14.<sup>1</sup> I would find that the trial court's stated reasons for its upward departure encompass factors beyond those contemplated in OV 14. OV 14 does not take into consideration the unique roles of the individuals involved in this case. Defendant was more than a leader in this crime. As an adult and a parent, defendant had a special relationship with the minors into whom she injected heroin. Not only did defendant violate the law against delivery of heroin, she also helped abuse the body of a child who should have been able to look to her as a role model. In fact, she taught minors how to use this addictive, dangerous, and illegal drug.

It is objective and verifiable that in this case defendant abandoned her role as a mother and an adult and encouraged and assisted minors to violate the law. Even though I agree that 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, I believe that the excerpt quoted from the trial court's statements allows this Court to ascertain that the trial court would have departed to the same extent regardless of the invalid factors. *Babcock, supra* at 260-261.

I would affirm defendant's sentences.

/s/ Bill Schuette

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<sup>1</sup> The scoring of OV 14 at ten points is appropriate on the basis of a finding that the defendant was a "leader in a multiple offender situation[.]" MCL 777.44.