

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

UNPUBLISHED

January 31, 1997

No. 184589

Isabella Circuit Court

LC Nos. 94-007026-FH

94-007027-FH

94-007028-FH

RONALD A. VANBREEMAN,

Defendant-Appellant.

Before: Fitzgerald, P.J., and MacKenzie and A.P. Hathaway,* JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by jury of three counts of embezzlement over \$100, MCL 750.174; MSA 28.371, a conviction that arose from defendant's embezzlement of approximately \$2.3 million from Randell Manufacturing Corporation (Randell). Defendant was sentenced to concurrent terms of five to ten years in prison. We affirm.

Defendant first argues that his sentence, which is a departure from the guidelines' range, is disproportionate. We disagree. Although defendant was charged with three counts of embezzlement over \$100, he had actually embezzled approximately \$2.3 million from Randell since 1991. The scoring of the sentencing guidelines only accounted for embezzlement of over \$100, and did not address embezzlement for any higher amount. Michigan Sentencing Guidelines (2d ed, 1988) at 17. Moreover, the only offense variable to deal directly with the amount of money involved in an embezzlement accounts for crimes where "more than \$5,000 or property having significant historical, social, or sentimental value" is taken. *Id.* at 66. In light of these facts, we hold that the trial court's decision to depart from the guidelines because the guidelines did not account for the extremely large amount of money involved in this case was not an abuse of discretion. Regarding defendant's claim that his sentence was disproportionate, as evidenced by the alleged failure to consider certain factors, we note

* Circuit judge, sitting on the Court of Appeals by assignment.

(1) that the jury found defendant's defense of insanity to be without merit and the trial judge, having presided over the trial, had the ability to make an independent determination and apparently found this factor to be of no relevance; (2) the trial judge did consider defendant's good standing in the community and noted that he had given defendant credit for it in sentencing; and (3) that defendant was a first time offender had to be weighed against the severity of the crime. Based on the amount embezzled, we do not believe that the sentence was disproportionate. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Next, defendant argues he was denied his right to allocution when the trial court declared its intention to depart upward from the guidelines before offering either defendant or defense counsel an opportunity to speak on defendant's behalf. To support this argument, defendant relies on *People v McNeal*, 150 Mich App 85; 389 NW2d 708 (1985). In *McNeal*, the trial court stated in conference prior to resentencing that, irrespective of the range set by the guidelines, he intended to impose the sentence originally imposed by the trial court. *Id.* at 88. After this conference, the trial court allowed defendant and defense counsel to put on the record whatever they thought was relevant to resentencing but noted that it did not have "any intention of changing the sentence." *Id.* Based on this record, this Court held that the defendant had been denied his right of allocution and remanded the case to the trial court for resentencing.

A trial court must allow a defendant to exercise his right of allocution before a sentence is imposed. *McNeal*, *supra* at 89. Defendant correctly notes that the trial court in this case prematurely announced his intention to deviate from the guidelines. However, this case is distinguishable from *McNeal* in that the trial judge remedied any error when, in response to defense counsel's reservations regarding defendant's opportunity to allocute, he stated that he would listen to defendant's arguments regarding sentencing before he ultimately made his decision. Based on these distinguishing factors, we hold that defendant received a bona fide opportunity to allocute.

Defendant next argues that the trial court engaged in impermissible double counting when it scored both prior record variable (PRV) 7 (for two or more concurrent convictions) and offense variable (OV) 25 (for contemporaneous criminal acts). *People v Maben*, 208 Mich App 652, 654; 528 NW2d 850 (1995). We disagree. When the same factor is scored under multiple variables and when each variable scored reflects the same or a similar purpose, the factor has been impermissibly double-counted. See *People v Monins (After Remand)*, 203 Mich App 173, 176-177; 511 NW2d 706 (1993). The definitions section of the Michigan Sentencing Guidelines describes the purpose of each variable section. The OV scores are factors that are "used to evaluate the seriousness of the offense." Michigan Sentencing Guidelines (2d ed, 1988) at 9. The PRV scores are factors that are "used to evaluate the offender's criminal history." *Id.* By their very definitions, these variables clearly show that the purposes of the OV scores and the PRV scores are different.

Defendant implies that the prosecution purposefully charged defendant with three counts of embezzlement in order to artificially inflate defendant's score. However, a prosecutor has discretion to decide whether to initiate criminal charges. *In re Petition for Appointment of Special Prosecutor*, 122 Mich App 632, 636; 332 NW2d 550 (1983). The principle of separation of powers limits judicial

interference with the exercise of that discretion. *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 677; 194 NW2d 693 (1972). Here, the prosecution chose to bring only three counts of embezzlement against defendant. This Court will not question the prosecution's motives as it could lead to judicial interference with the exercise of the prosecution's discretion to bring charges.

Finally, defendant argues that the trial court incorrectly scored ten points under OV 8. This Court's review of sentencing guidelines calculations is very limited and this Court will not disturb the scoring where there is record evidence to support the scores. *People v Johnson*, 202 Mich App 281, 288; 508 NW2d 509 (1993). Under the charge of fraud, which is to be scored where the conviction is for embezzlement, OV 8 is to be scored if:

[t]his offense is part of a pattern of criminal activities over a period of time from which the offender derives a substantial portion of his or her income and/or the offense is directly related to membership in an organized criminal group [Michigan Sentencing Guidelines (2d ed, 1988) at 66.]

Interpreting this same language from a previous version of the Guidelines, this Court has stated:

From reading this offense variable, we find that there are two separate means of arriving at a score. First, the court must decide whether the defendant "derived a substantial portion of his or her income" from the criminal activities involved. Second, the court must decide whether the "instant offense is directly related to membership in an organized criminal group." If *either* the first or second prong, or both, is found to be true, then the court assesses 4 points against defendant under OV 8. [*People v Emma Johnson*, 144 Mich App 497, 501 (1985) (emphasis added); see also *People v McCracken*, 172 Mich App 94, 104 (1988).]

Defendant argues that the embezzlement was incidental to his regular income and that he did not depend on the illegal activity to earn a living. Defendant also argues that the instructions for this variable indicate that it deals primarily with the issue of membership in an organized crime group; defendant claims that it is clear that he was never involved in an organized crime group. However, the trial court noted that defendant embezzled \$2.37 million from January 1991 until July 1994 while earning a salary between \$70,000 and \$130,000 a year from Randell. We hold that these facts were sufficient to determine that the embezzled funds constituted a substantial portion of defendant's income. Furthermore, based on this Court's interpretation of OV 8 in *People v Emma Johnson*, defendant's lack of involvement in organized crime is irrelevant.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Barbara B. MacKenzie
/s/ Amy Patricia Hathaway