

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

COREY A. ELLIS,

Defendant-Appellant.

UNPUBLISHED
February 22, 2002

No. 227339
Wayne Circuit Court
LC No. 99-004621

Before: Smolenski, P.J., and Doctoroff and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from his sentence of four to ten years' imprisonment for his conviction of assault with intent to cause great bodily harm less than murder, MCL 750.84. We affirm.

The trial court convicted defendant after a bench trial in which the evidence showed that defendant's car slightly bumped the rear of complainant's car as both cars were attempting to enter I-94 from an entrance ramp. Three witnesses testified that they observed defendant approach complainant, strike complainant in the head, and then repeatedly kick and stomp complainant after complainant fell to the ground. Complainant's father testified that complainant's injuries required several surgeries and extensive rehabilitation efforts. A portion of complainant's cranium had to be temporarily removed to prevent fatal swelling of the brain. A passenger in defendant's car testified that after the collision occurred complainant got out of his car, approached defendant's car, and cursed at defendant. The trial court found the testimony of the three witnesses who stated that defendant repeatedly kicked and stomped complainant to be more credible than the testimony given by defendant's passenger, who denied that defendant engaged in such action.

The applicable statutory sentencing guidelines recommended a range of ten to twenty-three months for defendant's minimum sentence. The trial court sentenced defendant to a term of four to ten years' imprisonment, with credit for 164 days served. The trial court stated that it exceeded the guidelines because the guidelines did not adequately account for an unprovoked attack of this severity.

In most instances, a trial court must impose a minimum sentence within the calculated guidelines range. MCL 769.34(2). A trial court may depart from the guidelines if it finds that a substantial and compelling reason exists to do so. To constitute a substantial and compelling

reason for departing from the guidelines, the reason must be objective and verifiable, and must irresistibly hold the attention of the court. *People v Babcock*, 244 Mich App 64, 75; 624 NW2d 479 (2000). We review for clear error the trial court's determination of the existence or nonexistence of a particular factor. We review as a matter of law the determination that the reason is objective and verifiable. We review for abuse of discretion the determination that the reason constituted a substantial and compelling reason to depart from the guidelines. *Id.* at 75-76. Once we determine that a trial court's stated reason for departing from the guidelines is objective and verifiable, we must limit our review of a sentence to whether the trial court abused its discretion in concluding that the factor constituted a substantial and compelling reason for the departure. If we conclude that a substantial and compelling reason existed for departing from the guidelines, we must affirm the resulting sentence as long as it otherwise comports with the sentencing guidelines and other requirements of the law. The statutory sentencing guidelines do not authorize a further review of the sentence pursuant to the principle of proportionality set out in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). *Babcock, supra* at 77-78. The trial court may depart from the guidelines for nondiscriminatory reasons when legitimate factors either were not considered by the guidelines, or were considered but were given inadequate or disproportionate weight. MCL 769.34(3)(b); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001).

Defendant argues that the trial court abused its discretion by departing from the sentencing guidelines and imposing a minimum sentence that twice exceeded the high end of the recommended sentence range. We disagree and affirm defendant's sentence. The guidelines account for life threatening injury in OV 3, physical injury to the victim. Further, the guidelines account for excessive brutality in OV 7, aggravated physical abuse. However, we conclude that the trial court did not err in finding that the severity of the attack was given inadequate weight by the guidelines. *Armstrong, supra*. The undisputed, verifiable evidence showed that complainant required at least six operations, and that a portion of his skull was temporarily removed in order to avoid fatal brain swelling. Each witness found credible by the court testified that defendant struck complainant first, and that complainant made no threatening move toward defendant. The witnesses indicated that defendant repeatedly kicked and stomped complainant in the head as complainant lay motionless on the ground. Furthermore, the undisputed evidence showed that defendant's car struck the rear of complainant's car. No witness found credible by the court testified that complainant made any provocative or threatening remark or gesture toward defendant. The trial court did not err by finding that the attack by defendant lacked provocation. The trial court did not abuse its discretion by finding that substantial and compelling reasons existed for departing upward from the guidelines. Defendant's sentence otherwise comports with the guidelines and other requirements of the law; no further review is authorized. *Babcock, supra* at 75-78.

Affirmed.

/s/ Michael R. Smolenski
/s/ Martin M. Doctoroff
/s/ Donald S. Owens