

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK EDWARD LEE,

Defendant-Appellant.

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UNPUBLISHED  
February 26, 2002

No. 226144  
Calhoun Circuit Court  
LC No. 99-000862-FH

Before: O’Connell, P.J., and Sawyer and Smolenski, JJ.

O’CONNELL, P.J. (*dissenting*).

I respectfully disagree with my colleagues’ conclusion that remand for resentencing is required in the instant case. In departing from the statutory sentencing guidelines’ recommended minimum range, the trial court properly considered a factor not already accounted for in the statutory guidelines. Further, I believe that the fact that defendant has proven himself adverse to rehabilitation following an extensive criminal history is objective and verifiable to the extent that it may properly be relied on in departing from the recommended guidelines’ range. Therefore, I would affirm defendant’s sentence.

The majority initially concludes that the trial court acted in contravention of MCL 769.34(3)(b)<sup>1</sup> in departing from the recommended guidelines’ range on the basis of defendant’s failure to change his behavior following his previous convictions. Specifically, the trial court emphasized defendant’s “singular lack of ability to respond to the sentences that have been imposed” on defendant in the past.<sup>2</sup> The court further noted defendant’s “consistent record of

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<sup>1</sup> MCL 769.34(3)(b) provides:

The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

<sup>2</sup> According to the judgment of sentence, defendant’s sentence was enhanced under MCL 333.7413(2), which provides that a defendant convicted of a second or subsequent drug offense “may be imprisoned for a term not more than twice the term otherwise authorized.” A violation of MCL 333.7403(2)(a)(v) is punishable by imprisonment for not more than four years, or a fine

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getting into trouble with the law,” and the concomitant absence of rehabilitation on the part of defendant.

Although I agree with the majority that prior record variables (PRV) one through seven, §§ 51-57 of the statutory sentencing guidelines, MCL 777.1 *et seq.*, address a defendant’s prior criminal history, I do not accept my learned colleagues’ contention that a defendant’s inability to rehabilitate is encompassed by these provisions of the statutory sentencing guidelines. “The [sentencing] court may depart from the guidelines for nondiscriminatory reasons where there are legitimate factors not considered by the guidelines or where factors considered by the guidelines have been given inadequate or disproportionate weight.” *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001). Indeed, our courts have consistently held that a defendant’s potential to rehabilitate is a proper factor to be considered by the court when imposing sentence. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995); *People v Cervantes*, 448 Mich 620, 627-628; 532 NW2d 821 (1995) (Riley, J.); *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972).

I also disagree with the majority’s assertion that the trial court erred as a matter of law in concluding that defendant’s failure to improve his behavior in spite of his lengthy criminal history was objective and verifiable. “[O]bjective and verifiable factors a[re] those ‘actions or occurrences which are external to the minds of the judge, defendant and others involved in making the decision . . . [that are] capable of being confirmed.’” *People v Fields*, 448 Mich 58, 66; 528 NW2d 176 (1995), quoting *People v Krause*, 185 Mich App 353; 460 NW2d 900 (1990); see also *People v Izarraras-Placante*, 246 Mich App 490, 497; 633 NW2d 18 (2001).

More recently, in a slightly different context, our Supreme Court has observed that a factor is “substantial and compelling” where it is objectively verifiable, “rather than requiring assessment by the subjective impression of a sentencing judge.” *People v Daniel*, 462 Mich 1, 11; 609 NW2d 557 (2000). Requiring a sentencing court to articulate objective and verifiable reasons for departing from the recommended guidelines’ range facilitates appellate review. *Id.*; *Fields*, *supra* at 69-70. In the instant case, a review of defendant’s storied criminal history, contained in the presentence investigation report, objectively verifies that defendant has been completely unable to conform his behavior to the requirements of law and therefore has an extremely low potential for rehabilitation.<sup>3</sup> In my view, the court did not abuse its discretion in finding defendant’s failure to rehabilitate himself to be a substantial and compelling reason to depart from the guidelines’ recommended minimum sentence range. MCL 769.34(3).

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of not more than \$25,000, or both.

<sup>3</sup> Thus, in contrast to the sentencing court’s observation in *People v Babcock*, 244 Mich App 64, 79; 624 NW2d 479 (2000), that the defendant “still didn’t fully appreciate what he’s done,” the trial court’s consideration of defendant’s inability to rehabilitate in the instant case was objectively verifiable.

I would affirm.

/s/ Peter D. O'Connell