

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYRONE HILL,

Defendant-Appellant.

UNPUBLISHED

March 22, 2002

No. 227591

Ingham Circuit Court

LC No. 00-075424-FC

Before: Fitzgerald, P.J., and Bandstra and K.F. Kelly, JJ.

BANDSTRA, J. (*Concurring in part and dissenting in part*).

I concur with the majority in parts I, II and III of its opinion and in its conclusion that defendant's conviction should be affirmed. However, I respectfully and reluctantly dissent from its conclusion in part IV, that the trial court's upward departure from the sentencing guidelines was proper.

The natural inclination in a case like this, of course, is to affirm whatever lengthy sentence has been imposed. To state the case is to justify this response: A young girl was sexually victimized by a middle-aged predator while waiting for her school bus.

However, notwithstanding these horrendous facts, we are constrained to abide by the dictates of the sentencing guidelines legislation. "The Michigan Constitution gives the Legislature the authority to provide for sentencing, a power which the people gave to that department of government." *People v Milbourn*, 435 Mich 630, 680; 461 NW2d 1 (1990) (Boyle, J., dissenting). Although indeterminate sentencing is a partial delegation of that constitutional authority to the courts, exercise of that authority must be limited as specified in the sentencing statutes. *Id.* at 680-681.¹

¹ Through the sentencing guidelines, the Legislature has expressed its view of the appropriate sentencing range applicable to various offenses depending on the statutorily specified offense and prior record variables. MCL 769.33(1)(e)(iii). In addition, the Legislature was concerned with the cost of imprisonment and the financial impact that sentencing can have on the state budget and the availability of funds for other state purposes. MCL 769.33(2); see also Symposium: The Michigan Sentencing Guidelines, 16 TM Cooley L Rev 13, 22-23 (1999). To the extent the courts fail to respect the limitations on sentencing discretion authorized by the Legislature, these purposes are stymied.

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Under the sentencing guidelines scheme at issue here, a sentence imposed in excess of that allowed by the guidelines must be justified by “substantial and compelling” reasons. MCL 769.34(3).² A reason cannot qualify as substantial and compelling unless it is “objective and verifiable.” *People v Babcock*, 244 Mich App 64, 75; 624 NW2d 479 (2000). The “substantial and compelling” limitation cannot acquire a meaning that would allow trial judges to regularly use their discretion to deviate from the statute. *People v Fields*, 448 Mich 58, 68; 528 NW2d 176 (1995). Instead, “[t]he reasons justifying departure should ‘keenly’ or ‘irresistibly’ grab our attention, and we should recognize them as being ‘of considerable worth’ in deciding the length of a sentence.” *Id.* at 67. Finally, “[t]he court shall not base a departure on an offense characteristic or offender characteristic already taken into account” in scoring the guidelines unless “the characteristic has been given inadequate or disproportionate weight.” MCL 769.34(3)(b).

The reasons identified by the court in departing from the guidelines do not satisfy these standards. The trial court stated that the victim has been “severely damaged, and that needs to be taken into account.” The trial court considered the “extraordinary vulnerability of the victim, in that she was new to this country and unable to communicate with her countrymen in order to get help.” Further, the trial court opined that “the guidelines do not adequately consider the nature of the offense where a child is snatched at a bus stop on the way to school.” Finally, the trial court noted that the violent crime at issue here has had a tremendous impact on the immigrant family and immigrant community in which the victim lives.

The fact that defendant physically removed the victim from her bus stop was taken into account when fifteen points were appropriately leveled against defendant under Offense Variable (OV) 8. MCL 777.38(1)(a). As to the damages to the victim, ten sentencing points were assessed against defendant under OV 3 because he caused her physical injury, MCL 777.33(1)(d), and another ten sentencing points were imposed under OV 4 because his attack caused “serious psychological injury.” MCL 777.34(1)(a). The victim’s vulnerability was at issue when OV 10 was scored at fifteen points. MCL 777.40. The trial court thus determined not only that defendant had exploited the victim’s youthfulness but, further, that defendant was guilty of “predatory conduct.” MCL 777.40(1)(a) and (b). The trial court failed to explain why imposition of these points was inadequate to address these factors. MCL 769.34(3)(b).

The trial court also failed to explain why the impact of the crime on the victim’s community can be used as a substantial and compelling reason to depart from the guidelines. I question whether this is an “objective and verifiable” consideration.³ Further, sentencing is itself

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² This is not to say that, absent substantial and compelling reasons for a departure, there is no discretion afforded to the courts in sentencing. Minimum sentences can be set anywhere within a range depending on the crime, the offense variable level and the prior record variable level. In this case, for example, ample judicial discretion was afforded within the guidelines which provided for a range of almost sixteen years, from 126 months to 315 months.

³ The impact of a crime on the victim of the crime and the victim’s family is itself quite subjective. However, the sentencing legislation specifically provides that these are appropriate issues to be considered in fashioning an appropriate sentence, but only if they require
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“the community’s response to crime.” *Babcock, supra* at 68. In other words, the sentencing scheme that has been enacted by the Legislature, with varying sentences imposed depending on the crimes at issue, offender characteristics and offense characteristics, reflects the fact that different crimes have greater and lesser impacts. The trial court failed to explain why the impact on the community here was significantly different from that contemplated by the general legislative scheme. Certainly, there is nothing to indicate why it matters (or should matter) that this case involved an immigrant community.

Finally, the trial court noted that the violent crime at issue here had a tremendous impact on the victim’s family. However, such an impact can justify a higher sentence under OV 5, but only if it results in professional psychological treatment. MCL 777.35. Apparently, no such impact upon the victim’s family occurred here as no points were scored against defendant under OV 5. In light of that, I would conclude that the trial court erred in considering this as an appropriate reason for departing from the guidelines range.

In sum, while fully recognizing the total depravity of defendant’s conduct, I do not conclude that the reasons provided by the trial court for its departure from the sentencing guidelines are substantial and compelling. Therefore, I do not conclude that they justified any departure from the range of minimum penalties authorized by the guidelines scoring. Further, even assuming that the “substantial and compelling” test can be satisfied, the particular sentence imposed outside of the guidelines must be justified. *People v Hegwood*, 465 Mich 432, 437, n 10; 636 NW2d 127 (2001). The Legislature did not intend, in every case in which a minimal departure is justified, “to allow unreviewable discretion to depart as far below or as far above the guideline range as the sentencing court chooses.” *Id.* The 480-month minimum sentence imposed here was more than fifty percent greater than the 315-month maximum-minimum sentence within the applicable guideline range. The trial court failed to explain why a departure of that magnitude was justified under the facts and circumstances of this case.⁴

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professional treatment. MCL 777.34; MCL 777.35. With the treatment requirement, these impacts are made somewhat objective and verifiable. In contrast, the impact of a crime on a community is nowhere made an appropriate factor for consideration in the legislative scheme and is not susceptible to objective verification through any course of professional treatment.

⁴ Neither *Hegwood* nor any other precedent provides guidance on determining whether a particular departure from the statutory guidelines is appropriately small or great. It is not clear whether courts should use the “principle of proportionality” which was employed when the judicial guidelines were in place. The principle of proportionality has been appropriately characterized as “amorphous,” *Babcock, supra* at 70, and perhaps some other approach, more closely tied to the legislative sentencing scheme itself, would be better. For example, some guidance might be gleaned from the legislative directives for enhancing sentences of habitual offenders, MCL 777.21(3), or by considering the use of cells contiguous to that applicable to a defendant as providing appropriate ranges for an upward or downward departure. In any event, courts across Michigan must make decisions regarding departures on a regular basis and I encourage the Supreme Court to provide further guidance to both bench and bar at its earliest appropriate opportunity.

I would remand for further articulation of the reasons for departure from the guidelines and for resentencing. MCL 769.34(11).

/s/ Richard A. Bandstra