

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD W. DUBOISE,

Defendant-Appellant.

UNPUBLISHED

June 4, 2002

No. 229972

Muskegon Circuit Court

LC No. 00-044551-FH

Before: Fitzgerald, P.J., and Holbrook, Jr., and Doctoroff, JJ.

PER CURIAM.

Defendant appeals as of right his sentence of eight to fifteen years in prison for his convictions of criminal sexual conduct in the fourth degree, MCL 750.520e, and habitual offender, fourth or subsequent offense, MCL 769.12, entered after a bench trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The applicable statutory sentencing guidelines recommended a minimum term range of zero to twenty-two months' imprisonment under the habitual offender grid. MCL 777.21(3)(c). The trial court stated that the guidelines did not adequately account for the offense and defendant's circumstances. The trial court observed that defendant's prior incarcerations had failed to convince him to reform, that his prior criminal behavior, including an attempted kidnapping, involved a risk of personal injury to the victims, that defendant denied having committed other crimes and in fact denied ever having been incarcerated,¹ that defendant failed to follow rules in prison and collected ninety-one misconduct tickets, and that defendant had minimal potential for rehabilitation. The trial court sentenced defendant to eight to fifteen years in prison, with credit for 138 days.

In most instances a trial court must impose a sentence within the calculated guidelines range. MCL 769.34(2). A trial court may depart from the statutory sentencing range 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 the trial court's determination of the existence of a

¹ Defendant does not make a similar denial on appeal.

substantial and compelling reason for departure for clear error. The determination that the reason is objective and verifiable is reviewed as a matter of law. The determination that the reason constituted a substantial and compelling reason to depart from the guidelines is reviewed for an abuse of discretion. *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. *Id.* at 78. "If we conclude that a substantial and compelling reason exists, the defendant's sentence must be affirmed as the sentence otherwise comports with the statute and other requirements of law." *Id.* 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). *Id.* The trial court may depart from the guidelines for nondiscriminatory reasons where 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. We disagree. We believe that the trial court did not err in finding that defendant's continuing potential dangerousness and inability to reform were not given adequate weight by the guidelines. *Id.* Defendant received a score of thirty points, the maximum possible, on prior record variable (PRV) 2, prior low severity felony convictions, MCL 777.52. The scoring of PRV 2 at thirty points took into account defendant's lengthy prior record. However, the evidence, which was verifiable and not realistically disputed, showed that two of defendant's prior felony convictions, for attempted assault with a dangerous weapon and attempted kidnapping, involved activity that posed a potential physical danger to another person. The evidence also showed that defendant was never paroled from his previous prison sentences, but rather served the full sentence on each occasion. Accordingly, we concluded that the trial court did not abuse its discretion by finding that substantial and compelling reasons existed for departing upward from the guidelines. The sentence otherwise comports with the guidelines and other requirements of the law. Thus, no further review is authorized. *Babcock, supra* at 77-78.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Martin M. Doctoroff