

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HAROLD E. EDWARDS, III,

Defendant-Appellant.

UNPUBLISHED

December 20, 2002

No. 233750

Wayne Circuit Court

LC No. 00-009945-02

Before: O'Connell, P.J., and White and B.B. MacKenzie*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of larceny from a person, MCL 750.357, and escape from lawful custody, MCL 750.197a. The trial court sentenced defendant to five to ten years' imprisonment for the larceny from a person conviction, concurrent to one year for the escape from custody conviction. We affirm.

I

Defendant argues that the trial court erred in refusing to instruct the jury on receiving and concealing stolen property (RCSP) and unlawfully driving away an automobile (UDAA).¹ Defendant asserts that RCSP and UDAA are cognate lesser offenses of carjacking, and that the court must instruct on cognate lesser offenses when the evidence would support a verdict of guilt of the lesser cognate offense. However, in *People v Cornell*, 466 Mich 335, 357, 359; 646 NW2d 127 (2002), decided during the pendency of this case, the Court concluded that MCL 768.32(1) only provides for instructions on necessarily included lesser offenses, not cognate lesser offenses. Thus, under *Cornell*, *supra*, defendant's claim must fail because *Cornell* abolished the requirement that instructions be given on cognate offenses.

¹ Defendant was charged with carjacking, MCL 750.529a, and escape from lawful custody, MCL 750.197a.

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

II

Defendant next argues that he is entitled to resentencing because the trial court exceeded the sentencing guidelines for reasons that were not substantial and compelling, and were already taken into account in calculating the guidelines.

Because the offenses with which defendant was charged occurred after January 1, 1999, the legislative sentencing guidelines apply. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). A court may depart from the legislative guidelines if it has substantial and compelling reasons to do so, and states those reasons on the record. MCL 769.34(3). A court may not depart from the legislative sentencing guidelines based on certain specified factors, including gender, race, ethnicity, national origin, and lack of employment, MCL 769.34(3)(a), nor may it base a departure on an offense characteristic or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the court record, that the characteristic was given inadequate or disproportionate weight, MCL 769.34(3)(b).

In reviewing a departure from the legislative guidelines range, the existence of a particular factor is a factual determination this Court reviews for clear error, the determination that the factor is objective and verifiable is reviewed as a matter of law, and the determination that the factors constituted substantial and compelling reasons for departure is reviewed for abuse of discretion. *People v Babcock*, 244 Mich App 64, 75-78; 624 NW2d 479 (2000).

A

At the time of the offense, defendant, his wife, and co-defendant were in route to the Clare County jail. Defendant had been arraigned on a misdemeanor insurance fraud charge and had been unable to post the required bond. The three escaped from the van, confronted the victim in the parking lot of a Jehovah's Witness Kingdom Hall, where she was sitting in her car, and took the victim's car and drove away. Apparently co-defendant confronted the victim and ordered her out of the car, and defendant and his wife joined him. Defendant's sentencing guidelines range was ten to twenty-three months. That he was a fourth habitual offender raised the range to ten to forty-six months. The trial court departed upward, sentencing defendant to five to ten years for the larceny from a person conviction:

* * *

. . . but the fact remains is that you continue to break the law and I can only imagine how if it was your sister or your grandmother or your brother who were sitting in the parking lot at the Jehovah's Witness, the Kingdom Hall and had three people who had just escaped from custody involved in a carjacking, one your co-defendant, Mr. Davis, threatening her in the manner that he did, I'm sure you would be appalled and would want that person punished.

DEFENDANT EDWARDS: Right.

THE COURT: Perhaps that relative was simply trying to go to church, so having said that, your guidelines are ten to forty-six months. I'm going to go slightly above the guidelines

* * *

I think the guidelines don't take into account at all what the full impact of what happened here is. I think the guidelines at the very best attempt to force all these crimes in a certain kind of category, *but this was done during an escape and I don't think that's effectively dealt with, even though there is some assessment in offense variable nineteen and offense variable six and previous record variable six to some extent, but I think they wholly don't speak to the – the guidelines don't, to what happened in this case.*

The top of your guidelines would be forty-six months. That would be just under four years. It's the sentence of this Court that you be committed to the Michigan Department of Corrections on Count I for no less than five years and no more than ten years. On Count II, it's the sentence of this Court that you serve – it says a one year – two year maximum. It's just a one year, isn't it?

MR. TALON: It's a one year misdemeanor, Judge.

THE COURT: I'll make that correction. You do a year in jail. The times on Count I and II will be concurrent, but consecutive to the sentence you are currently serving. I understand that you were not on parole. You had just been released from parole some months earlier, but certainly consecutive to whatever the offense was that you were being transported for. [Emphasis added.]

B

Prior record variable six is "relationship to the criminal justice system," and provides:

Score prior record variable 6 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

- (a) The offender is a prisoner of the department of corrections or serving a sentence in jail20 points
- (b) The offender is incarcerated in jail awaiting adjudication or sentencing on a conviction or probation violation.....15 points
- (c) The offender is on parole, probation, or delayed sentence status or on bond awaiting adjudication or sentencing for a felony10 points
- (d) The offender is on probation or delayed sentence status or on bond awaiting adjudication or sentencing for a misdemeanor5 points
- (e) The offender has no relationship to the criminal justice system0 points

* * *

(3) As used in this section:

* * *

(b) “Prisoner of the department of corrections or serving a sentence in jail” includes an individual who is an escapee. [MCL 777.56.]

At sentencing, defendant challenged the scoring of fifteen points under PRV 6, arguing that five points was appropriate because defendant was on bond awaiting adjudication for a misdemeanor at the time of the escape. The trial court disagreed and left the score at fifteen points.

Offense variable nineteen is “threat to the security of a penal institution or court or interference with the administration of justice . . .” MCL 777.49. It provides:

Score offense variable 19 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

- (a) The offender by his or her conduct threatened the security of a penal institution or court25 points
- (b) The offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services15 points
- (c) The offender otherwise interfered with or attempted to interfere with the administration of justice10 points
- (d) The offender did not threaten the security of a penal institution or court or interfere with or attempt to interfere with the administration of justice or the rendering of emergency services by force or threat of force 0 points

At sentencing, defendant objected to this variable being scored at ten points, but the court denied his request and that scoring remained.

C

A court may not base an upward departure on an offense characteristic or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the court record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). While the fact that defendant was an escapee was considered to some extent in the guidelines by prior record variable six and offense variable nineteen, the trial court determined that the guidelines accorded that fact inadequate weight, stating that the guidelines did not effectively deal with the fact that “this was done during an escape.” While defendant’s status as an escapee was a factor in assessing fifteen points under prior record variable six in that he was not regarded as being on bond, because he had not posted

bond, and was, rather, regarded as being incarcerated, the factor did not account for the fact that the offense was committed during the course of an escape. In other words, the variable did not distinguish between the circumstances of a person committing the offense while in the course of escaping, and a person who has previously successfully escaped committing the offense at a later time. The court correctly determined that the fact that defendant was in the course of escaping and the victim was confronted by co-defendant in handcuffs, made the offense more egregious.

Offense variable nineteen also reflected to some extent that defendant was in the course of escaping. However, that variable focused on the effect on the administration of justice, not the aggravation of the larceny inherent in the victim being confronted by persons who appeared to be subject to a heightened level of desperation. Under the circumstances, we are unable to conclude that the trial court's departure violated the statute.

Affirmed.

/s/ Peter D. O'Connell

/s/ Helene N. White

/s/ Barbara B. MacKenzie