

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONAKI RAY,

Defendant-Appellant.

UNPUBLISHED

November 20, 2003

No. 241559

Clinton Circuit Court

LC No. 01-007058-FC

Before: Sawyer, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

Defendant Jonaki Ray appeals as of right her jury trial conviction of voluntary manslaughter, MCL 750.321. She was sentenced to five to fifteen years' imprisonment for the manslaughter conviction, which was an upward departure from the sentencing guidelines.¹ We affirm defendant's conviction, but remand for resentencing.

The instant conviction stems from the stabbing death of defendant's husband, Dinesh Balagangadbar, after they argued and fought at their DeWitt residence. It was the prosecution's theory that defendant intentionally stabbed her husband to death. The defense theory was that defendant wanted only to stop the violence, not kill her husband, and acted in self-defense because her husband was physically abusing her. Originally charged with open murder, defendant was found guilty of voluntary manslaughter following a three-day jury trial.

On appeal, defendant asserts that the trial court erred in failing to articulate on the record substantial and compelling reasons for its upward departure from the statutory sentencing guidelines. We agree.

Defendant's minimum sentencing guidelines range was scored at nineteen to thirty-eight months for the voluntary manslaughter conviction.² The trial court sentenced defendant to a

¹ Clinton County Prosecuting Attorney Charles D. Sherman has chosen not filed an appellate brief or otherwise defend the appeal. A letter advising Mr. Sherman that no brief has been filed on behalf of the people was sent by the clerk of this Court on April 1, 2003.

² Because the offense for which defendant was convicted occurred after January 1, 1999, the legislative sentencing guidelines apply. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, (continued...)

minimum of five years in prison. The trial court's sole comment in justifying this upward departure was that "I am satisfied that the guidelines don't adequately reflect the need to properly punish the consequences of the offense or deter others." The trial court also completed a sentencing guidelines departure evaluation form, which stated: "The guidelines range did not adequately reflect the nature and extent of the loss caused by the defendant's criminal act and the need to impose a sentence that would have the effect of deterring others from like conduct in similar circumstances."

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

This Court reviews the sentencing court's determination of the existence or nonexistence of a particular factor for clear error. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003), quoting *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000). We review de novo the determination that a sentencing factor is objective and verifiable. *Id.* A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence is reviewed for an abuse of discretion. *Id.* "An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Id.* at 274.

In the recently issued *Babcock* decision, *supra*, our Supreme Court addressed the issue of departure from the statutory sentencing guidelines and set forth a trial court's responsibilities in this regard. The Court initially noted that "[f]ollowing the enactment of these guidelines, the trial court is required to choose a sentence within the guidelines range, unless there is a 'substantial and compelling' reason for departing from this range." *Id.* at 255-256. Substantial and compelling reasons only exist in exceptional circumstances, and the reasons justifying departure should keenly or irresistibly grab the court's attention and be recognized as having considerable worth in determining the length of a sentence. *Id.* at 257, 271. The *Babcock* Court further explained:

The statutory sentencing guidelines, MCL 769.34(3), require the trial court to "state[] on the record the reasons for departure." Therefore, it is not enough that there *exists* some potentially substantial and compelling reason to depart from the guidelines range. Rather, this reason must be articulated by the trial court on the record. Accordingly, on review of the trial court's sentencing decision, the Court of Appeals cannot affirm a sentence on the basis that, even though the trial court did not articulate a substantial and compelling reason for departure, one exists in the judgment of the panel on appeal. Instead, in such a situation, the Court of Appeals must remand the case to the trial court for resentencing or rearticulation. The obligation is on the trial court to articulate a substantial and compelling reason for any departure. . . .

(...continued)

253; 611 NW2d 316 (2000).

Further, the trial court must go beyond articulating a substantial and compelling reason for *some* departure. Rather, the trial court can depart from the guidelines range only “if the court has a substantial and compelling reason for *that* departure” MCL 769.34(3) (emphasis added). [*Id.* at 258-259.]

“The 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), citing MCL 769.34(3)(a), (b). See also *Babcock*, *supra* at 272. This Court must determine whether the trial court articulated a substantial and compelling reason to justify its departure from the guidelines range. *Id.* at 261-262.

In the instant case, although the trial court found that the legislative guidelines were accurately scored with regard to defendant, who had no prior record, the trial court nonetheless found the recommended range of nineteen to thirty-eight months to be far too low under the circumstances and sentenced defendant to five to fifteen years’ imprisonment, stating that “the guidelines don’t adequately reflect the need to properly punish the consequences of the offense or deter others.”

However, even assuming *arguendo* the accuracy of the trial court’s observations, we agree with defendant that resentencing is required because the trial court failed to articulate such substantial and compelling reasons for departure on the record, thereby failing to meet its obligations under MCL 769.34(3). *Babcock*, *supra* at 258-259. Although the trial court expressed the view, in the departure evaluation form, that the guidelines “did not adequately reflect the nature and extent of the loss . . . and the need to impose a sentence that would have the effect of deterring others,” the court failed to acknowledge that the offense variables already take into account the loss of life in a homicide and the basic and primary sentencing function of deterrence. See *People v Fields*, 448 Mich 58; 528 NW2d 176 (1995); *People v Coles*, 417 Mich 523; 339 NW2d 440 (1983); *People v Snow*, 386 Mich 586; 194 NW2d 314 (1972). As previously noted, the Legislature has clearly authorized sentencing judges to find that a reason already accounted for in the guidelines has been given inadequate or disproportionate weight, and therefore, is a substantial and compelling reason to depart from the recommended guidelines range. However, a court may do so only if it expressly finds that the characteristic has been given inadequate or disproportionate weight. *Babcock*, *supra* at 267-268. Here, the sentencing court, in its brief and generalized comment, did not articulate any specific offense characteristic that was given inadequate weight by the guidelines. The trial court failed to adequately articulate any reason for this particular, extensive departure. *Id.* at 258-259.

Because the trial court did not have the benefit of the recent *Babcock* decision and did not comply with the procedures required by it, we remand for resentencing or rearticulation of a substantial and compelling reason, based on objective and verifiable factors, to justify a particular departure. MCL 769.34(11); *Babcock*, *supra* at 260-261.

Defendant next contends that the trial court erred in scoring ten points to OV 19. As provided in MCL 777.49, OV 19 permits the scoring of ten points when “[t]he offender otherwise interfered with or attempted to interfere with the administration of justice.” In the instant case, over defense counsel’s objection, the trial court agreed with the prosecution that the variable was properly scored because of the different stories defendant told the officers and

detectives, and because she did not tell the truth right away. The trial court opined that if a person speaks to the police, “I think they have a duty to speak truthfully.”

After the sentencing occurred in this case, this Court for the first time directly addressed the issue of scoring of OV 19 in *People v Deline*, 254 Mich App 595; 658 NW2d 164 (2002), lv granted 468 Mich 942 (2003). In *Deline*, the trial court scored OV 19 at ten points because the defendant attempted to evade OUIL charges by switching seats with the passenger of his vehicle and refusing an immediate blood-alcohol content test. This Court set forth the following definition and analysis of interference with justice:

“Interference with” justice is equivalent in meaning to “obstruction of” justice. Garner, *A Dictionary of Modern Legal Usage* (2d ed), p 611. Obstruction of justice “is a broad phrase that captures every willful act of corruption, intimidation, or force *that tends somehow to impair the machinery of the civil or criminal law.*” *Id.* (emphasis added). Interference with the administration of justice thus involves an effort to undermine or prohibit the judicial process by which a civil claim or criminal charge is resolved. See, e.g., *People v Coleman*, 350 Mich 268; 86 NW2d 281 (1957) (affirming a conviction of obstruction of justice involving witness tampering).

Defendant here did not engage in any conduct aimed at undermining the judicial process by which the charges against him would be determined. Instead, he tried to evade those charges altogether by switching seats with his passenger and refusing an immediate blood-alcohol content test. If we were to conclude that this evasive and noncooperative behavior justified the imposition of points under OV 19, that variable would apply in almost every criminal case. Defendants almost always seek to hide their criminal behavior and rarely step forward to offer evidence proving their guilt.

Accordingly, the imposition of ten sentencing points against defendant under OV 19 was error. [*Id.* at 597-598.]

In light of our determination that resentencing is already required because the trial court imposed a sentence outside of the legislative guidelines range without stating on the record a substantial and compelling reason for the departure, we conclude that on remand the court should review again its scoring of the offense variables, taking into consideration the recently issued *Deline* decision as it pertains to OV 19, in determining what sentence is appropriate in this case.

We affirm defendant’s conviction, but vacate her sentence and remand for resentencing. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski