

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL H. HALL,

Defendant-Appellant.

UNPUBLISHED

December 16, 2003

No. 242369

Wayne Circuit Court

LC No. 01-008679

Before: Fitzgerald, P.J., and Neff and White, JJ.

MEMORANDUM.

Following a bench trial, defendant was convicted of assault with intent to commit great bodily harm, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to life imprisonment for the assault and to a five year prison term for a second felony – firearm offense. We vacate defendant’s sentence and remand for resentencing.

On appeal, defendant argues that the trial court erred in departing from the sentencing guidelines without stating a substantial and compelling reason. We agree.

A sentencing court may depart from the appropriate sentence range established under the sentencing guidelines if the court has a substantial and compelling reason for the departure, and states the reason on the record. MCL 769.34(3). The existence of a particular factor is a factual determination reviewed for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). The determination that a factor is objective and verifiable is reviewed as a matter of law. *Id.* The determination that the objective and verifiable factors constitute substantial and compelling reasons to depart from the statutory minimum sentence is reviewed for abuse of discretion. *Id.*, 265.

The trial court erred in finding that the guidelines do not apply to habitual offender sentences. While that was true with the judicial guidelines, *People v Hansford (After Remand)*, 454 Mich 320, 324; 562 NW2d 460 (1997), the legislative guidelines include habitual offender sentences. MCL 777.21(3). The court’s failure to acknowledge its departure requires a remand for resentencing. *People v Hornsby*, 251 Mich App 462, 474; 650 NW2d 700 (2002).

The principle of proportionality is relevant to the determination whether there is a substantial and compelling reason for a departure. *Babcock, supra*, 262-264. Given the

maximum guidelines range of seventy-six months, and the fact that defendant's previous convictions were already considered in arriving at that range, the sentence of life imprisonment is disproportionate.

On remand, the court must respond to challenges to the accuracy of information in a presentence report. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). The court may determine the accuracy of the information, accept defendant's version, or simply disregard the information. *Id.* Should the court choose the last option, it must clearly indicate that it did not consider the alleged inaccuracy in determining the sentence. *Id.*, 649. If the information is inaccurate or irrelevant, the court must strike the information from the PSIR before sending it to the Department of Corrections. *Id.*

Defendant's sentences are vacated, and the matter is remanded for resentencing. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Janet T. Neff

/s/ Helene N. White