

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHANIEL L. EDELEN,

Defendant-Appellant.

UNPUBLISHED

December 23, 2003

No. 242167

Genesee Circuit Court

LC No. 01-008646-FC

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

PER CURIAM.

Defendant appeals as of right his jury conviction for manslaughter, MCL 750.321, possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a weapon, MCL 750.224f. We reverse and remand for resentencing.

Defendant first asserts that the court erred in scoring OV 3 and OV 7. A sentencing court has discretion in determining the number of points to be scored for a variable, provided that evidence on the record adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision for which there is any evidence in support will be upheld on appeal. *Id.*; *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

OV 3 concerns physical injury to the victim. It provides for a score of 100 points if a victim is killed and homicide is not the sentencing offense. MCL 777.33(2)(b). It provides for a score of 35 points if death results from the commission of a crime and the elements of the offense involve the use of a vehicle under the influence or while impaired. MCL 777.33(2)(c). A score of 25 points is assessed if a life threatening or permanent incapacitating injury to the victim occurred. MCL 777.33(1)(c).

In *People v Hauser*, unpublished opinion per curiam of the Court of Appeals, issued 10/29/02 (Docket No. 239688), the Court found that where the victim died, the trial court erred in scoring OV 3 at 25 points for a homicide. The Court stated:

The statute reflects a graduated scale for assessing the harm to the victim. Given that death is assessed the highest number of points and no injury at all is assessed no points, the plain and most reasonable meaning of the intervening sections is that they are meant to apply where there is some harm short of death. [Slip op, p 2].

Although *Hausner* is not precedential, we find its reasoning persuasive. The court erred in scoring OV 3 at 25 points. However, the court properly scored OV 7 at 50 points for excessive brutality. Where the error in scoring OV 3 did not affect the guidelines range, the error was harmless. *People v Mutchie*, 468 Mich 50; 658 NW2d 154 (2003); *People v Jarvi*, 216 Mich App 161; 548 NW2d 676 (1996).

Defendant also argues that the court abused its discretion in departing from the guidelines range. 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); *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001). The existence of a particular factor is a factual determination reviewed for clear error. *People v Babcock*, ___ Mich ___; 666 NW2d 231 (2003) slip op at 28. 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.*, 29.

Substantial and compelling reasons exist only in exceptional cases and 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.*, 27.

The victim's status as an immigrant was an objective and verifiable fact. However, the crime was unrelated to his status as an immigrant. The court seems to have found that the victim was a good man, and it increased the punishment based on that fact. This is not an objective and verifiable factor that would support a departure.

The court also relied on defendant's gang affiliation. Defendant testified that he had been a gang member, and he had a continued inactive connection with the gang. At the time of the shooting, he was wearing a bandana that was a symbol of the gang. While defendant's gang membership was objective and verified, there was no evidence that the crime was connected to gang activity.

The sentencing guidelines considered the fact that defendant was on probation at the time he committed the instant offense. However, the guidelines do not address the fact that defendant had violated probation in the past. This is an objective and verifiable factor. However, where one probation was already considered, and scored 10 points under PRV 6, a second probation violation does not seem to be a substantial factor.

The nature of the offense was already considered in OV 7, when the court scored the factor for excessive brutality. MCL 769.34(3)(b) provides that the court shall not base a departure on a characteristic already taken into account in determining the appropriate sentencing range unless the court finds from the facts that the characteristic has been given inadequate or disproportionate weight. The court made no reference to the scoring for OV 7 in its departure explanation, and did not make the required finding.

Finally, the court noted that defendant's trial testimony was not credible, and his lack of remorse reflects on his potential for rehabilitation. A trial court may properly consider a

defendant's lack of remorse, however this is a subjective factor, and cannot be a basis for departure.

The trial court relied largely on subjective factors and a factor already considered in the guidelines in making its departure decision. Under the circumstances presented, the trial court abused its discretion in exceeding the guidelines range.

Reversed and remanded for resentencing. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Janet T. Neff

/s/ Helene N. White