

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CALVIN LEON SMART, JR.,

Defendant-Appellant.

UNPUBLISHED

May 13, 2004

No. 246636

Macomb Circuit Court

LC No. 2002-001782-FC

Before: Fitzgerald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced as a third habitual offender, MCL 769.11, to 6½ to 10 years' imprisonment for the felon in possession of a firearm conviction, to be served consecutively to two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm, but remand for correction of the judgment of sentence.

Defendant argues that his judgment of sentence must be amended because his conviction for felony-firearm was imposed consecutively to his sentence for felon in possession of a firearm. The prosecution concedes error. We agree.

Under the felony-firearm statute, MCL 750.227b, a felony-firearm sentence must be served consecutively only to the sentence for the specific underlying predicate felony. *People v Clark*, 463 Mich 459, 463; 619 NW2d 538 (2000). The felon in possession of a firearm was not the predicate offense; rather, assault with intent to commit murder was the underlying offense for the felony-firearm count according to the felony information, and defendant was acquitted of this charge.¹ Therefore, defendant's felon in possession of a firearm sentence cannot be imposed consecutive to his felony-firearm sentence, and we direct that the judgment of sentence be corrected to reflect that the sentences are to run concurrently.

¹ The felony-firearm count against defendant charged that he "did carry or have in his/her possession a firearm, to-wit: a pistol, at the time he/she committed or attempted to commit a felony, to-wit: Assault With Intent to Commit Murder; contrary to MCL 750.227b."

Defendant next argues that the trial court did not provide substantial and compelling reasons for departing from the sentencing guidelines. We disagree.

Any factor relied on by the trial court in departing from the statutory sentencing guidelines must be objective and verifiable, and this Court reviews the trial court's determination of the existence of any such factor for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003) (*Babcock II*), citing *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000) (*Babcock I*). Whether a particular factor is objective and verifiable is reviewed de novo as a matter of law. *Id.* The trial court's determination that the objective and verifiable factors constitute substantial and compelling reasons to depart from the statutory minimum sentence is reviewed for an abuse of discretion. *Id.* at 264-265.

The trial court, here, departed from the minimum sentencing guidelines' range of seven to thirty-four months and set the minimum at seventy-eight months. The trial court must impose a minimum sentence within the guidelines' range unless a departure is permitted. MCL 769.34(2). But a court may depart from the guidelines if it has substantial and compelling reasons for that departure and states the reasons on the record. MCL 769.34(3); *People v Hegwood*, 465 Mich 432; 636 NW2d 127 (2001). Substantial and compelling reasons justifying departure should "keenly" and "irresistibly" grab the court's attention, must be "of considerable worth" in determining the length of a sentence, and must "exist only in exceptional cases." *Babcock II*, *supra* at 257, quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). In departing from the guidelines, the trial court considered several factors, including defendant's past disregard for court orders and probation, defendant's act of taking a gun to court and shooting his wife on a busy street, the chance for rehabilitation in light of defendant's previous convictions and behavior, and defendant's conduct toward the victim prior to the offense.

Defendant argues that several of the trial court's reasons were not substantial and compelling because they were characteristics already taken into account by the guidelines. The trial court may not "base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b).

Defendant claims that he already received ten points for being on probation under prior record variable (PRV) 6. However, the trial court's decision to depart was based, in part, on defendant's continuing disregard of probation and court orders, not the fact that he was currently on probation. Defendant also claims that he was already given twenty-five points for taking a gun to court under offense variable (OV) 1. The trial court noted defendant's actions of taking a gun to court, shooting the victim, and endangering the public. While OV 1 considers a firearm being discharged, it does not contemplate a person actually being shot. *People v Lowery*, 258 Mich App 167, 171; 673 NW2d 107 (2003). Defendant constituting a continuing threat to the community is not objective and verifiable, rather, it is the trial court's subjective assessment of defendant. However, it is clear from the record that "the trial court would have departed and would have departed to the same degree on the basis of the substantial and compelling reasons alone." *Babcock II*, *supra* at 260.

In applying the *Babcock* standard of review, we conclude that the trial court did not clearly err in its factual determinations, its decision to upwardly depart from the guidelines was based on proper objective and verifiable factors, and these factors constituted substantial and compelling reasons to depart upward from the sentencing guidelines. Several of the proper objective and verifiable reasons stated by the trial court on the record, given the facts of this case, "keenly" and "irresistibly" grab our attention and are of "considerable worth" in deciding the length of the sentence. See *Babcock, supra* at 272. In addition, the sentence is proportionate to the seriousness of the crime and the circumstances surrounding the offense and the offender. The trial court did not abuse its discretion in departing upward from the sentencing guidelines, nor did the extent of the departure amount to an abuse of discretion as the sentence was within the "permissible principled range of outcomes," and represented a principled choice. *Id.* at 269.

Defendant's convictions and sentences are affirmed, and the case is remanded to the trial court for correction of the judgment of sentence to reflect that the felon in possession of a firearm sentence is to run concurrently with the felony-firearm sentence. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Kathleen Jansen
/s/ Michael J. Talbot