

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONIO MOORE,

Defendant-Appellant.

UNPUBLISHED

June 29, 2004

No. 242463

Wayne Circuit Court

LC No. 01-008233-01

Before: Donofrio, P.J., and Griffin and Jansen, JJ.

JANSEN, J. (*dissenting*).

I respectfully dissent. Defendant's minimum sentencing guidelines range, as scored by the trial court, was forty-seven to eighty-seven months' imprisonment for his kidnapping a child conviction, MCL 750.350. The trial court departed downward and sentenced defendant to five years' probation conditioned upon defendant participating in a group therapy program. Defendant had served 321 days in jail. I would affirm the trial court's downward departure.

A court may depart from the sentencing guidelines range if it has a substantial and compelling reason to do so, and it states on the record the reasons for departure. MCL 769.34(3), *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). Factors meriting departure must be objective and verifiable, must "keenly" attract and "irresistibly" hold the court's attention, and must be of "considerable worth." *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). A substantial and compelling reason "exists only in exceptional cases." *Id.* at 258, quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). And, a departure from the guidelines range must render the sentence proportionate to the seriousness of the defendant's conduct and his criminal history. *Id.* at 264.

In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination by the trial court subject to review for clear error, the determination that the factor is objective and verifiable is reviewed de novo as a matter of law, the determination that the factor or factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion, and the extent of the departure is reviewed for an abuse of discretion. *Id.* at 264-265; *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). In terms of sentencing departure review, "an abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Babcock, supra* at 269. In ascertaining whether the departure was proper, this Court must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Id.* at 270.

The trial court provided the following rationale for its downward departure:

We do have that report from the psychiatric clinic in which they conducted various tests and came up with a recommendation regarding [defendant], and their recommendation is that he participate in alcohol anonymous.

* * *

This is a very serious matter. Fortunately no one was harmed in this case, but I don't think the guidelines in this case really reflect the seriousness of it, and it might be overstated to some extent. In order to, in order to divert from the guidelines the Court is required to provide on the record substantial and compelling reasons to do so. And the reasons that I would give to depart, and the Court intends to depart, is based on the investigation and report prepared by the clinic indicating that [defendant] has been working, he seems to be able to keep a job, he's had various jobs where he has had to, that he has had to leave either because of layoffs or the place that he worked closed down, that in spite of that he continued with his employment in other places, and that he eventually set up an operation to repair cars, and that is to his credit.

It appears also that the recommendation that is made by the clinic is one that we should follow if we are serious about trying to do something regarding rehabilitation. The clinic has identified his problem, and that is drinking. The Court is also taking into consideration that he's already served almost a year in jail. I don't know what further incarceration, what purposes further incarceration would do.

"Objective and verifiable factors are those that are external to the minds of the judge, defendant, and others involved in making the decision, and are capable of being confirmed." *People v Geno*, ___Mich App___; ___NW2d___ (Docket No. 241768, issued April 27, 2004). It is objective and verifiable that the Third Circuit Court-Criminal Division Psychiatric Clinic evaluated defendant and recommended that he be placed on a long period of probation with the stipulation he participate in Alcoholic's Anonymous. Defendant's employment history is also objective and verifiable and can be considered a substantial and compelling reason for departure. See *People v Daniel*, 462 Mich 1, 7; 609 NW2d 557 (2000); *Fields, supra* at 77. In addition, the fact that the clinic recommended probation to rehabilitate defendant rather than incarceration is objective and verifiable. The factors cited by the trial court are objective and verifiable because all are capable of verification in the record, which amply supports each finding. Although not all of the information in the clinic report is objective and verifiable the fact that defendant was evaluated by a professional from the trial court's psychiatric clinic and received a recommendation of probation is objective and verifiable and does "keenly" and "irresistibly" grab attention and is of "considerable worth" in deciding the length of the sentence. *Babcock, supra* at 257-258. The stated factors are objective and verifiable and provide substantial and compelling reasons to support the downward departure.

In applying the *Babcock* standard of review, I would conclude that the trial court did not clearly err in its factual determinations, its decision to downwardly depart from the guidelines was based on proper objective and verifiable factors, and these factors constituted substantial and

compelling reasons to depart downward from the sentencing guidelines. The objective and verifiable reasons stated by the trial court on the record, given the facts of this case, in particular, the recommendation from the psychiatric clinic, "keenly" and "irresistibly" grab attention and are of "considerable worth" in deciding the length of the sentence. See *id.* Lastly, based on the facts and circumstances of the crime, the sentence was proportionate to defendant's conduct and criminal history. See *id.* at 263-264. I would find that this an exceptional case and the trial court did not abuse its discretion in departing downward 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; see also *People v Hicks*, 259 Mich App 518, 536-537; 675 NW2d 599 (2003).

I would affirm the trial court. This is a most unusual case of kidnapping and the trial court is in the best position to determine whether substantial and compelling reasons for departure exist.¹

/s/ Kathleen Jansen

¹ At the very least I would remand for resentencing *or* rearticulation of substantial and compelling reasons for the downward departure. The majority determined that there were insufficient objective and verifiable factors to establish substantial and compelling reasons for departure. "The obligation is on the trial court to articulate a substantial and compelling reason for any departure." *Babcock, supra* at 259. If the reasons articulated by the trial court are partially invalid and this Court cannot determine whether the trial court would have departed from the guidelines range to the same extent regardless of the invalid factors, it must remand for rearticulation or resentencing. *Id.* at 260. I believe the majority erred in taking this decision from the trial court, particularly, under the unusual circumstances of the present case deference should have been given to the trial court's direct knowledge of the facts and familiarity with the offender. See *id.* at 270.