

Court of Appeals, State of Michigan

ORDER

People of MI v Oscar Montes

Docket No. 223539

LC No. 99-004118

Henry William Saad
Presiding Judge

David H. Sawyer

Peter D. O'Connell
Judges

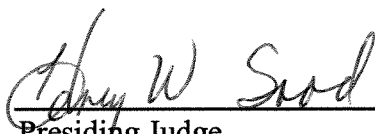
On the Court's own motion, the February 17, 2004 opinion is hereby VACATED. The opinion contained the following clerical error: On page 3, second paragraph, first line, the text reads, "However, the trial court did articulate how this characteristic was given inadequate weight by the guidelines scoring." The word "not" was inadvertently omitted. A new opinion is attached which corrects the error as follows: "However, the trial court did not articulate how this characteristic was given inadequate weight by the guidelines scoring.

The Court orders this case REMANDED to the Wayne Circuit Court. We retain jurisdiction. Proceedings on remand in this matter shall commence within 30 days of the Clerk's certification of this order and they shall be given priority on remand until they are concluded.

Following the first remand in this matter the circuit court failed to make the findings necessary under *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003), instead concluding without specific explanation that the factors cited by the original sentencing judge properly articulated substantial and compelling reasons for departure and constituted matters that were not properly addressed by the guidelines. Although a typographical error in this Court's February 17, 2004 per curiam opinion may have misled the circuit court to believe that the original sentencing judge properly articulated how certain factors were given inadequate weight by the guidelines, this Court intended to have the circuit court review all relevant circumstances and make specific, detailed findings on the record which met the requirements of *Babcock*. On remand, the circuit court must first determine whether substantial and compelling reasons exist to justify the original departure from the sentencing guidelines. If the court determines that the original degree of departure was appropriate, it must state the substantial and compelling reasons justifying the departure and specifically articulate how each of these factors were given inadequate weight by the guidelines. Substantial and compelling reasons for departure may include appropriate reasons cited by the original sentencing judge as well as any additional facts which constitute substantial and compelling reasons for departure. If the court determines that the original degree of departure was not justified, it must resentence defendant.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

Transcripts of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.



Presiding Judge



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

OCT 26 2004

Date



Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OSCAR MONTES,

Defendant-Appellant.

UNPUBLISHED

October 26, 2004

No. 223539

Wayne Circuit Court

LC No. 99-004118

ON REMAND

Before: Saad, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

On October 3, 2003, the Michigan Supreme Court issued an order vacating this Court's opinion dated March 22, 2002 and remanding for reconsideration in light of *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003). Although the broad language of the remand order suggests that this Court's opinion is vacated in its entirety, the Supreme Court could not have intended such a result given the limited purpose of the remand. Therefore, except for the sentencing issue affected by *Babcock*, our prior opinion shall stand as written. As to the sentencing issue, we remand for resentencing or rearticulation.

Defendant's minimum sentence range was 81 to 135 months in prison and, in a prior opinion, we affirmed the trial court's sentence of 360 to 720 months in prison. Defendant contends that the trial court failed to articulate substantial and compelling reasons to justify the upward departure in this case. The sentencing guidelines provide, in part:

A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in [MCL 777.1 *et seq*] if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. [MCL 769.34(3).]

As this Court explained in *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000), quoting *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995):

“[T]he existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. The determination that a particular factor is objective and verifiable should be reviewed by the appellate court as a matter of law. 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 shall be reviewed for abuse of discretion.”

Here, the trial court cited the following reasons for its upward departure: (1) the overall circumstances of the crime, including the victim’s age, that defendant attempted to kidnap two children, but was only successful in abducting one child, and that defendant kidnapped the victim in broad daylight and in the children’s own neighborhood, (2) the psychological impact on the victim, (3) defendant’s significant criminal history, and (4) the former judicial sentencing guidelines.

The trial court did not clearly err by ruling that these factors exist. The record clearly reflects that the victim was four years old, the incident occurred in the victim’s neighborhood in the afternoon, defendant also attempted to grab the victim’s sister during the kidnapping, the victim’s mother testified that the victim has suffered severe emotional trauma because of the kidnapping, and defendant’s presentence investigation report shows that defendant, by age twenty-five, had five other felony convictions. Further, as a matter of law, the factors cited by the trial court are also objective and verifiable. The factors are all are capable of verification in the record, which amply supports each finding.

The trial court did not abuse its discretion by citing the egregious circumstances of the case as a substantial and compelling reason for departure. Describing this crime as “every parent’s worst nightmare,” the trial court stated that, under the circumstances of this case, the offense guidelines are wholly inadequate. The trial court highlighted the fact that defendant not only kidnapped the victim, but attempted to kidnap her nine-year-old sister at the same time. The trial court also emphasized that defendant snatched the victim off a street, about 150 feet from her home, during broad daylight, with the child scratching and beating on the back window of the truck.

The trial court acted well within its discretion to find that the offense variables in the sentencing guidelines were simply insufficient under these circumstances. As our Supreme Court reiterated, “ ‘the reasons justifying departure should ‘keenly’ or ‘irresistibly’ grab our attention, and we should recognize them as being ‘of considerable worth’ in deciding the length of a sentence.’ ” *Babcock, supra* at 257, quoting *Fields, supra* at 67. The record clearly reflects that the trial court believed that the circumstances here present an exceptional case to justify a substantial departure from the sentencing guidelines. “[R]ecognizing that the trial court was in the better position to make such a determination and giving this determination appropriate deference,” we agree with the trial court’s conclusion that substantial and compelling reasons justified an upward departure. *Babcock, supra* at 270.

The trial court also referred to the victim’s age as a reason for departure. Defendant received a score of ten points for OV 10, “exploitation of a vulnerable victim,” because he “exploited [the] victim’s . . . youth” MCL 777.40(1)(b). However, the trial court stated that the sentencing guidelines were inadequate given the deplorable nature of the kidnapping and pointed to the fact that defendant not only exploited the victim, but actually “threw her in the truck [and] she was kicking, crying [and] screaming.” As in our prior opinion, we agree with the trial court that this situation is not adequately considered by the guidelines. Defendant not only exploited the victim’s youth, he also took advantage by physically overpowering her and forcing her into his truck.

The trial court also cited the psychological impact on the victim as a substantial and compelling reason for departure. Defendant received a score of ten points for OV 4, “psychological injury to a victim.” MCL 777.34(1)(a). However, the trial court listed this factor on the departure evaluation form and cited the child’s severe emotional trauma, nightmares and sleeplessness. The record amply supports this finding. As the victim’s mother testified, the victim expresses terror upon seeing vehicles similar to the one defendant used in the kidnapping. Indeed, the child was so traumatized that she physically shakes at the sight of white trucks. Further testimony established that the child changed into a “very scared” and “leery” girl who has regressed to the point of being unable to sleep in her own bed.

However, the trial court did not articulate how this characteristic was given inadequate weight by the guidelines scoring. As our Supreme Court reiterated in *Babcock*, the trial court “shall 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 . . . that the characteristic has been given inadequate or disproportionate weight.” *Babcock, supra* at 258 n 12, quoting MCL 769.34(3)(b). Because the trial court failed to explicitly make this finding, it is necessary to remand this case for resentencing or rearticulation.

On reconsideration of the record, we also hold that the trial court abused its discretion by ruling, or failed to properly articulate the basis for ruling, that defendant’s age and criminal record are substantial and compelling reasons for departure. Defendant’s prior convictions were taken into account in the guidelines scoring and the trial court failed to articulate how defendant’s prior convictions and age received inadequate weight within the guidelines. While the trial court noted that defendant’s criminal history, at his young age, “doesn’t speak well,” the trial court did not otherwise explain how this factor was inadequately scored.

It also appears that the trial court judge’s primary concern at sentencing was that she believed defendant’s guidelines range would have been much higher under the former judicial guidelines. Even assuming this conclusion is correct, the fact that the Legislature drafted different guidelines for kidnapping is not, by itself, a substantial and compelling reason for departure. Rather, the reasons for departure must relate to the particular circumstances of the offense and the offender in the case at hand.

As our Supreme Court directed in *Babcock, supra* at 260, “[b]ecause the trial court must articulate on the record a substantial and compelling reason to justify the particular departure, if the trial court articulates multiple reasons, and the Court of Appeals determines that some of these reasons are substantial and compelling and some are not, the panel must determine the trial court’s intentions.” We note that the record reveals numerous factors that we would deem substantial and compelling reasons for departure, including the victim’s young age, her physical and emotional vulnerability, defendant’s attempt to lure the two victims into his truck with candy or gum, and his attempt to physically overpower both victims. Evidence also established that defendant’s pants were unzipped, defendant had items in his truck that strongly indicate an intent to sexually assault the victim, and the circumstances of the case strongly suggest that the victim was physically unharmed only because a couple happened to witness the kidnapping from their nearby vehicle and chased defendant’s fleeing truck. We also observe that the victim suffered significant emotional trauma and that defendant’s age, along with his considerable criminal history may well have been given inadequate weight by the record variables.

However, as *Babcock* makes clear, it is for the trial court to articulate substantial and compelling reasons for departure and, where necessary, to explain how the guidelines scoring failed to give adequate weight to certain variables. Indeed, despite ample support for departure, our Supreme Court explicitly ruled that we “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.” *Babcock, supra* at 258-259. Here, we cannot determine “whether the trial court . . . would have departed to the same degree on the basis of the substantial and compelling reasons alone.” *Id.* at 260. Therefore, we remand for resentencing or rearticulation of the substantial and compelling reasons to support this 18.75-year departure. We retain jurisdiction.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Peter D. O'Connell