

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CRAIG SCOTT BAKER,

Defendant-Appellant.

UNPUBLISHED

November 23, 2004

No. 251238

Gratiot Circuit Court

LC No. 01-004181-FC

Before: Cooper, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Defendant appeals the upward sentencing departure from the statutory guidelines, MCL 777.1 *et seq.*, following his plea of guilty, pursuant to a plea agreement, of conspiracy to commit assault with intent to do great bodily harm less than murder, MCL 750.84.¹ The case is before us on remand from our Supreme Court for consideration, as on leave granted, in light of that Court's decision in *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003). We affirm.

In a written "Sentencing Guidelines Departure Form," the sentencing judge explained his imposition of a sentence of five to ten years, rather than the zero to seventeen months called for by the statutory guidelines, as follows:

The Court deviated from a sentence guideline range of zero to 17 months, by imposing a minimum sentence of five years in prison, because the guidelines do not accurately measure the seriousness of defendant's conduct in this case.

Defendant was originally charged with solicitation of murder, a life offense. Had defendant been convicted of the original charge, he would have faced a minimum guideline range of 108 to 180 months. The zero to 17 months range applies to the reduced charge to which defendant pled: Conspiracy to Commit Assault With Intent to do Great Bodily Harm Less Than Murder. The evidence supports a conviction for the original, more serious charge.

¹ Defendant also pleaded guilty to and was sentenced on two charges involving illegal distribution of prescription drugs, both pursuant to MCL 333.7401(2)(b)(ii). The sentences on these counts are not before us on appeal.

Defendant was a patient of a physician named Randy Drumm. Defendant and Dr. Drumm were both addicted to Vicodin, and were involved in a prescription kickback scheme. Dr. Drumm approached defendant about finding someone to murder his wife. Defendant approached one Terry Carmen, who notified the police. Dr. Drumm and defendant were arrested after Drumm met with an undercover police officer posing as a hit man, lined up by Terry Carmen.

Defendant has attempted to minimize his conduct, by claiming that he did not realize a proposed murder was involved. However, his claim is at odds with the actions and admissions of Dr. Drumm, Terry Carmen, and another individual involved in a separate plot. Defendant met with or spoke to Terry Carmen in order to arrange the murder, at least five times. He attempted to talk Dr. Drumm out of the plot, only after becoming aware that other individuals were talking about it.

Defendant's substantial involvement in the murder plot mandates a sentence that exceeds the guidelines for his conviction.

Defendant argues that the trial court's reasons for departing from the guidelines were neither substantial and compelling nor objective and verifiable. We disagree.

Our standard of review is set by the decision of the *Babcock* Court, which stated that in reviewing a sentencing departure decision, "whether a factor [for departure] exists is reviewed for clear error, whether a factor is objective and verifiable is reviewed de novo, and whether a reason is substantial and compelling is reviewed for abuse of discretion." *Babcock, supra* at 265. However, abuse of discretion is defined more broadly in this context than in the typical case. "[T]he appropriate standard of review must be one that is more deferential than de novo, but less deferential than the *Spalding [v Spalding]*, 355 Mich 382, 384-385; 94 NW2d 810 (1959),] abuse of discretion standard." *Id.* at 269.

Because the offenses giving rise to defendant's convictions occurred on or after January 1, 1999, the legislative sentencing guidelines applied to his sentences. The question on appeal, in reviewing a departure from the legislative guidelines, is "whether the trial court articulated a substantial and compelling reason, as required under MCL 769.34(3), to justify its . . . departure from the statutory sentencing guidelines." *Babcock, supra* at 251. The *Babcock* Court made clear that the test for determining the appropriateness of a departure is "whether taking into account an allegedly substantial and compelling reason would contribute to a more proportionate criminal sentence than is available within the guidelines range." *Id.* at 264. Moreover, a factor is substantial and compelling only if it is "objective and verifiable." *Id.* at 257-258.

The trial court essentially based its upward departure on one factor, that being that although defendant pleaded guilty to conspiracy to commit assault with intent to do great bodily harm less than murder, MCL 750.84, if the case had gone to trial the evidence would have shown that he was actually guilty of solicitation of murder, MCL 750.157b(2), the offense with which he was initially charged. We have reviewed the grounds identified by the trial court for finding that defendant committed the offense of solicitation to murder and find no clear error. Moreover, unlike our dissenting colleague, we believe that the trial court could utilize the codefendant's statements in making this determination. Further, on de novo review, we find that whether

defendant committed solicitation to murder is objective and verifiable because the factor is an occurrence external to the mind and capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). And finally, we conclude that the trial court did not err in relying on this factor even though defendant pleaded guilty to a lesser offense. *People v Armstrong*, 247 Mich App 423, 426; 636 NW2d 785 (2001). Nor was it an abuse of discretion for the trial court to find that the factor was substantial and compelling. Defendant's involvement in this plot to kill the wife of Dr. Drum grabs the attention and is of considerable worth in fixing the appropriate sentence in this case. *Babcock*, *supra* at 257.²

Defendant also argues that his due process rights were violated because he did not receive notice of the trial court's possible intent to depart upward. We need not reach the constitutional issue because the factual premise for defendant's argument is misplaced. The Presentence Information Report (PSIR) recommended a sentence of five to ten years. Defendant, therefore, was on notice, not only that a departure would be considered, but also that precisely the departure that was imposed might be considered.

Lastly, defendant argues that his rights of equal protection and due process of law were violated because MCL 770.3(1)(d) precluded him from appealing as of right the sentence imposed for his plea-based conviction.³

There is no federal constitutional right to a criminal appeal. *Evitts v Lucey*, 469 US 387, 393; 105 S Ct 830, 834; 83 L Ed 2d 821 (1985). Rather, there is only a right to see that due process and equal protection rights are preserved in any appellate scheme. *Id.*

In Michigan, appellate review for criminal defendants is governed by Const 1963, art 1, § 20, which provides in pertinent part that "an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court." The Michigan Constitution specifically denies a due process right to an appeal as of right. Persons pleading guilty to a crime are not a suspect classification for equal protection purposes, and a rational basis exists for the distinction between the appellate rights of those persons pleading guilty and those found guilty in trials.⁴ MCL 770.3(1)(d) is not violative of due process or equal protection rights.

² Defendant's argument that *Blakely v Washington*, ___ US ___, 124 S Ct 2531; 159 L Ed 2d 403 (2004), requires this Court to vacate the sentence is misplaced. Our Supreme Court has stated that "the Michigan [statutory guideline sentencing] system is unaffected by the holding in *Blakely* that was designed to protect the defendant from a higher sentence based on facts not found by a jury in violation of the Sixth Amendment." *People v Claypool*, 470 Mich 715, 731 n 14; ___ NW2d ___ (2004).

³ MCL 770.3(1)(d) provides that "all appeals from final orders and judgments based upon pleas of guilty or nolo contendere shall be by application for leave to appeal."

⁴ The legislative history of the current constitutional provision explains that persons who have pleaded guilty have either acknowledged their guilt or agreed to waiver of their constitutional rights, so the need for appeal is not present in the same way as it is after a trial.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Joel P. Hoekstra