

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ANTHONY FRENCH,

Defendant-Appellant.

UNPUBLISHED

December 16, 2004

No. 248173

Ingham Circuit Court

LC No. 00-075555-FH

Before: Markey, P.J., and Fitzgerald and Owens, JJ.

MEMORANDUM.

Defendant appeals by delayed leave granted his sentence of two to fifteen years in prison imposed after his conviction of probation violation. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded guilty of second-degree home invasion, MCL 750.110a(3). The trial court sentenced defendant under the Holmes Youthful Trainee Act, MCL 762.11 *et seq.*, to a term of three years' probation, with the first six months to be served in jail. Subsequently, following defendant's fifth conviction of probation violation, the trial court revoked probation and sentenced defendant to two to fifteen years in prison.

The statutory sentencing guidelines apply to a sentence imposed after a probation violation. *People v Hendrick*, 261 Mich App 673, 679-680; 683 NW2d 218 (2004). A trial court may depart from the recommended guidelines range if it has a substantial and compelling reason to do so, and clearly articulates that reason on the record. MCL 769.34(3). A substantial and compelling reason for departing from the guidelines must be objective and verifiable, must irresistibly attract the attention of the court, and must be of considerable worth in deciding the length of the sentence. A departure from the guidelines cannot be affirmed on the basis of a reason which the appellate court perceives but the trial court did not articulate. *People v Babcock*, 469 Mich 247, 257-261; 666 NW2d 231 (2003). In departing from the guidelines range, the trial court must determine whether the particular departure is proportionate to the circumstances of the offense and the offender. *Id.* at 262-264.

The statutory sentencing guidelines established a minimum term range of zero to eleven months;¹ thus, the trial court's sentence of two to fifteen years in prison constituted an upward departure from the minimum guidelines range. The trial court erred by failing to sentence defendant within the guidelines or to articulate substantial and compelling reasons for exceeding the guidelines. MCL 769.34(2), (3). Although a substantial and compelling reason is readily apparent on this record, our Supreme Court has held this Court cannot affirm the sentence on that basis. *Babcock, supra* at 258-259. "Instead, in such a situation, the Court of Appeals must remand the case to the trial court for resentencing or rearticulation." *Id.* at 259.

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

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens

¹ If the upper limit of the established minimum sentence range is eighteen months or less, the trial court must impose an intermediate sanction unless it states on the record that a substantial and compelling reason exists to commit the defendant to the jurisdiction of the Department of Corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the guidelines range or twelve months, whichever is less. MCL 769.34(4)(a). An intermediate sanction does not include a prison term. MCL 769.31(b); *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002).