

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC ROSHAWN SMITH,

Defendant-Appellant.

UNPUBLISHED

December 28, 2004

No. 249369

Genesee Circuit Court

LC No. 01-008932-FH

Before: Meter, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

Defendant was charged with and pleaded guilty to one count of carrying a concealed weapon. MCL 750.227. Defendant now appeals by delayed leave granted from a sentence of three to five years imposed on the plea-based conviction. We affirm.

I. FACTS

Defendant pleaded guilty to the charge of carrying and concealing a weapon, MCL 750.227 in exchange for the prosecution not charging defendant with habitual offender second or felon in possession of a firearm. At sentencing, defendant stated to the court that he went to the hospital to visit a friend and saw a gun in the parking lot by a car. According to the presentence investigation report, defendant was seen entering the hospital with a friend. Upon approaching a set of metal detectors, defendant turned around and walked outside to an area used by hospital employees for smoking. Defendant was seen placing a pile of clothing next to a trash can and placing an object in the trash before returning to the hospital. A security officer then went to the trash can and secured what turned out to be a gun. The officer then observed defendant attempting to leave the hospital emergency room. Defendant was handcuffed without resistance and police arrived and placed him under arrest. Defendant stated to the trial court that he did have the gun concealed under his clothing. Finally, he admitted that he placed the gun in the dumpster because he knew that he would have to go through metal detectors.

The legislative guidelines established a minimum sentence range of zero to eleven months. The court elected to depart from the guidelines and impose a prison sentence rather than an intermediate sentence. MCL 769.34(2), (4)(a). The court cited as reasons for the departure defendant's poor performance on probation; his misconduct citations in prison; his poor performance on parole, particularly his continued substance abuse; his failure to appear for

sentencing on this case; the nature of the offense (entering a hospital with a gun); and the need to protect the community.

II. STANDARD OF REVIEW

The trial court's determination regarding the existence of a reason or factor warranting departure is reviewed on appeal under the clearly erroneous standard. The determination that a particular factor is objective and verifiable is reviewed by this Court as a matter of law. Furthermore, "The trial court's determination that objective and verifiable factors present a substantial and compelling reason to depart from the statutory minimum sentence is reviewed for an abuse of discretion." *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995). This "occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

III. ANALYSIS

Each of the factors cited by the trial court, with one exception, were objective and verifiable and supported by the record. The need to protect the public is a factor already considered by the guidelines as a whole, MCL 769.33(1)(e)(i), and is subjective. It appears from the trial court's statements that the need to protect the community was more the conclusion to be drawn from the other articulated factors rather than being a factor in and of itself; therefore, it appears that the court would have departed from the guidelines to the same extent had it not considered public safety. We therefore affirm the trial court's decision to depart from the guidelines. *Babcock*, *supra* at 271. Further, we hold that the sentence imposed by the trial court is not disproportionate. *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001); *People v Babcock*, 250 Mich App 463; 648 NW2d 221 (2002), rev'd on other grounds 469 Mich 247 (2003).

Affirmed.

/s/ Patrick M. Meter
/s/ Kurtis T. Wilder
/s/ Bill Schuette