

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROGER WAYNE FIELSTRA,

Defendant-Appellant.

UNPUBLISHED

September 20, 2005

No. 255262

Muskegon Circuit Court

LC No. 00-045349-FH

Before: Smolenski, P.J., and Murphy and Davis, JJ.

PER CURIAM.

Defendant appeals as of right from the sentence imposed by the trial court on resentencing for convictions on two counts of operating a motor vehicle while under the influence of intoxicating liquor (“OUIL”) causing death, MCL 257.625(4), and one count of OUIL causing serious injury, MCL 257.625(5). We affirm.

This case arises from an accident that occurred on October 7, 2000, and resulted in the deaths of James Glover and Todd Anderson, as well as the serious injury of Lissette Cepero, Anderson’s passenger. Defendant struck the rear of Anderson’s vehicle, causing it to cross into the oncoming lane and collide with Glover’s vehicle head-on. Two hours after the accident, defendant’s blood alcohol content registered 0.24 on a Breathalyzer machine; five hours after the accident, a blood test showed defendant’s blood alcohol content to be 0.20.

The applicable minimum sentencing ranges under the guidelines were from 43 to 86 months’ imprisonment for the OUIL causing death convictions and from 7 to 23 months’ imprisonment for the OUIL causing serious injury conviction. At defendant’s original sentencing, the trial court departed upward, sentencing defendant to 10 to 15 years’ imprisonment for OUIL causing death and 3 to 5 years’ imprisonment for OUIL causing serious injury, on the basis that two people were killed and one was seriously injured with long-lasting residual effects, that defendant had prior convictions for OUIL and for an open receptacle in a vehicle, that his blood alcohol content was .24, and on the basis that he was driving with an open beer in his car. This Court vacated defendant’s sentences, concluding that these reasons were insufficient to justify an upward departure because “the deaths of Anderson and Glover, Cepero’s severe injuries, and defendant’s bodily alcohol content were already accounted for in the scoring of the offense variables for these crimes,” because defendant’s prior OUIL conviction, for which the discharge date was more than ten years before the instant offenses, could not be used as a basis in determining defendant’s sentence, and because, although

stunning, defendant's act of driving his vehicle with an open beer in his truck does not constitute "a substantial and compelling reason for departing from a guideline sentence." *People v Fielstra*, unpublished per curiam opinion of the Court of Appeals, issued September 23, 2003 (Docket No. 239706), at 4-5.

At defendant's resentencing, the trial court again sentenced defendant to prison terms of 10 to 15 years for the OUIL causing death convictions and 3 to 5 years for the OUIL causing serious injury conviction. The trial court identified the following factors as justifying its decision to depart upward: (1) defendant never put on his brakes before hitting Anderson's Jeep Cherokee, indicating a relatively high degree of recklessness and inattention to the safety of others; (2) a "blue cloud of Pabst Blue Ribbon beer cans fl[ew] out of [d]efendant's truck" when it hit Anderson's vehicle and there were numerous beer cans in the back of the truck after the accident, indicating either a long-term pattern of drinking while driving or prolonged excessive drinking on that day; (3) defendant asked witnesses to dispose of an open beer and when they refused, he threw it into the back of his truck, and he asked a witness for gum or breath mints after the accident, showing an evasive and dishonest nature and an attempt to avoid responsibility for his conduct; (4) defendant showed no concern for the victims at the scene and was focused instead on avoiding responsibility; (5) defendant lied to detectives, telling them that he had drank just two beers, showing a complete denial of his alcohol problem and its consequences; (6) defendant drove after or while drinking at least seventeen or eighteen beers, indicating a "towering high degree of recklessness and irresponsibility;" (7) defendant has two prior convictions for driving on a suspended license, which show that defendant will simply ignore a court order that he not drive; (8) defendant's conduct caused long-term devastating emotional affects on the survivors; and (9) defendant's offense variable (OV) score of 190 was more than double the maximum score of 75 weighed by the sentencing grid, demonstrating that the guidelines do not sufficiently account for the nature of defendant's conduct.

The trial court's determination that a particular factor exists is a factual determination subject to review for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003)(citation omitted). Whether a particular factor is objective and verifiable is a question of law reviewed de novo. *Id.* (citation omitted). The trial court's determination that objective and verifiable factors constitute substantial and compelling reasons for departure from the sentencing guidelines is reviewed for an abuse of discretion. *Id.* at 264-265 (citation omitted). Finally, the degree of any departure is also reviewed for an abuse of discretion. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Relative to the abuse of discretion standard in the context of sentencing departures, the *Babcock* Court stated that the trial court does not abuse its discretion when its decision is within the range of options from which a person would expect a reasonable trial judge to select. *Babcock, supra* at 269. This Court must give deference to the trial court, "recognizing that the trial court [is] in the better position to make [a departure] determination[.]" *Id.* at 270. The deference given to the trial court "is an acknowledgement of the trial court's extensive knowledge of the facts and that court's familiarity with the circumstances of the offender." *Id.*

We recognize that several of the factors or characteristics cited by the trial court in support of departure are already embedded in the scoring variables; however, a court may nonetheless depart where the guidelines do not give adequate weight to the factors at issue. Indeed, MCL 769.34(3)(b) specifically provides:

The 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 from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.* [Emphasis added.]

We have carefully reviewed, scrutinized, and examined the record and the trial court's grounds for departure, and we conclude, taking into consideration the deference that must be given to the trial court, that the court did not abuse its discretion in departing upward from the guidelines. We find no error rising to the level of requiring reversal with respect to the trial court's general conclusion that the sentencing guidelines were inadequate under the factual circumstances of this case. The trial court focused in part on the deceitful nature of defendant's actions at the accident scene, which included asking witnesses to dispose of an open beer can, asking witnesses for gum and breath mints, and lying to detectives regarding the amount of alcohol consumed. While OV 19, MCL 777.49, provides for 10 points where a defendant interferes with the administration of justice, defendant's attempts to avoid justice were multifold and extensive. Moreover, as stated by the trial court, defendant not only made attempts to avert responsibility, he showed no significant concern for the victims while at the scene, which is an objective and verifiable fact not considered by the guidelines. Furthermore, with respect to the court's conclusion that there was a high or towering degree of recklessness, irresponsibility, and inattentiveness as reflected by the lack of braking, an open intoxicant, and defendant's consumption of 17 to 18 beers before getting behind the wheel of his vehicle, OV 17, MCL 777.47, assigns 10 points for wanton and reckless behavior exhibited by the defendant, and OV 18, MCL 777.48, assigns 20 points for a blood alcohol content of 0.20 or greater. But the trial court found that defendant's actions were so egregious as to constitute "towering" recklessness, and *five hours* after the accident, defendant's blood alcohol content was still 0.20, with an expert toxicologist testifying that the blood alcohol content at the time of the accident would have been approximately 0.27; an amount significantly higher than 0.20. As such, the guidelines were insufficient in the mind of the trial court. Overall, and as noted by the trial court, defendant's total OV score of 190 points was more than double the maximum accounted for by the sentencing grid. On this record, we find no abuse of discretion. We likewise find no abuse of discretion in regard to the extent of the departure considering the circumstances.

Although some of the additional reasons offered by the trial court for departure were not objective and verifiable in relation to the record, e.g., the vast amount of beer cans in the truck showed a long-term pattern of drinking and driving, or were arguably improper for purposes of departing from the guidelines,¹ we are confident in concluding, on the basis of the record, that

¹ With regard to the trial court's reference to a 1974 conviction for driving on a suspended license, we believe that the conviction could be considered, in part, as a basis for departure. Although MCL 777.50(1) provides that the court cannot consider, *for purposes of scoring the prior record variables*, any conviction that precedes a period of 10 or more years between the discharge date from a conviction and the defendant's commission of the next offense, this does not mean that the court cannot consider such an objective and verifiable factor *in departing from the guidelines*. However, on the first appeal in this case, the panel ruled to the contrary, and we are bound by the law of the case doctrine to recognize and abide by that holding. *Fielstra, supra*, (continued...)

the trial court would depart and depart to the same degree on the basis of only those reasons that are appropriately coined substantial and compelling and for which we found no error. Thus, remand is unnecessary. See *Babcock*, *supra* at 271.

Finally, we reject defendant's argument that the sentences constituted cruel and unusual punishment under the United States and Michigan Constitutions. The minimum terms of imprisonment were proportionate in light of the circumstances surrounding the offense and the offender, and a proportionate sentence does not constitute cruel and unusual punishment. *People v Colon*, 250 Mich App 59, 65-66; 644 NW2d 790 (2002).²

Affirmed.

/s/ Michael R. Smolenski
/s/ William B. Murphy
/s/ Alton T. Davis

(...continued)

slip op at 5.

² With respect to defendant's argument that the scoring of the sentencing variables violated the principles enunciated in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), our Supreme Court in *People v Claypool*, 470 Mich 715; 684 NW2d 278 (2004), determined that Michigan's sentencing system is not affected by *Blakely*. Although the United States Supreme Court has now issued *United States v Booker*, 543 US __; 125 S Ct 738; 160 L Ed 2d 621 (2005)(federal sentencing guidelines subject to jury trial requirements of the Sixth Amendment), and our Supreme Court has decided to directly address *Blakely* and *Booker* and their application relative to sentencing in Michigan, *People v Drohan*, 472 Mich 881; 693 NW2d 823 (2005), we decline to explore any implications here because defendant fails to provide any details whatsoever when claiming that the verdict did not encompass all the findings made by the trial court in scoring the sentencing factors. There is no discussion, recitation, or mention of the particular sentencing factors supposedly at issue and the interplay between the factors and the facts encompassed by the verdict, which facts are also not discussed. It is insufficient for an appellant to simply announce a position or assert an error and then leave it up to this Court to rationalize and discover the basis for his claims, or unravel and elaborate for him his arguments. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998)(citation omitted). Moreover, the issue is not contained in the statement of questions involved as required by MCR 7.212(C)(5).