

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIK THOMAS CALONI,

Defendant-Appellant.

---

UNPUBLISHED  
November 1, 2005

No. 254187  
Jackson Circuit Court  
LC No. 03-004351-FC

Before: Gage, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of felonious assault, MCL 750.82, and sentenced as a third habitual offender, MCL 769.11, to five to eight years' imprisonment. He appeals his sentence as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The sentencing guidelines range for defendant's offense was five to thirty-five months. The trial court departed upward from the sentencing guidelines range in sentencing defendant. In the departure evaluation form, the court stated that the guidelines did not adequately reflect the unprovoked nature of the assault, the number of times the victim was struck by a baseball bat when helpless, the seriousness of the victim's injuries, or the future ability of the victim to use his arm for work. The court also stated its intention that the sentence be "sustained if an appellate court determines that any of [its] rationales for departure survive review."

Defendant raises three issues on appeal. First, defendant argues that the trial court's departure was based on facts that were not found by the jury beyond a reasonable doubt or admitted by defendant during trial or sentencing. Defendant contends that this violated *Blakely v Washington*, 542 US 296; 124 S Ct 2531, 159 L Ed 2d 403 (2004), which prohibited the use of facts that were not found by a jury or admitted by the defendant to exceed a maximum sentence in a sentencing guidelines range. However, in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), the Michigan Supreme Court held that *Blakely* did not affect Michigan's indeterminate sentencing scheme because departing above the guidelines range in Michigan does not implicate the maximum sentence, which is determined by the Legislature. Therefore, this argument is without merit.

Next, defendant argues that the trial court violated his due process rights by departing above the sentencing guidelines range. In doing so, defendant asserts that the trial court's findings regarding the absence of provocation and the ability of the victim to use his arm for work in the future were not objective and verifiable reasons to exceed the sentencing guidelines range.<sup>1</sup> See MCL 769.34(3); see also *People v Babcock*, 469 Mich 247, 255-258; 666 NW2d 231 (2003). However, while we agree that these reasons are neither objective nor verifiable, see *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003), the trial court's error in relying on those reasons to depart from the sentencing guidelines range does not require resentencing. Generally, if a substantial and compelling reason is invalidated on appeal, the case is remanded to the trial court for reconsideration and rearticulation of the reasons for departure. *Babcock*, *supra* at 269-271. Here, however, the trial court stated in the departure evaluation form that it would impose the same sentence if any of its reasons for departure survived appellate review. Because the trial court's reasons for departure based on the severity of the victim's injuries and the number of times defendant hit the victim while he was helpless have survived our review,<sup>2</sup> there is no need to remand for further consideration or resentencing. *Babcock*, *supra* at 260-261.

Finally, defendant argues that this case must be remanded for resentencing because the judgment of sentence reflects that he was convicted as a fourth habitual offender, MCL 769.12. This issue is moot because an amended judgment of sentence has already been entered reflecting that defendant was convicted and sentenced as a third habitual offender.

Affirmed.

/s/ Hilda R. Gage  
/s/ Joel P. Hoekstra  
/s/ Christopher M. Murray

---

<sup>1</sup> Defendant also argues that, because the sentencing guidelines could have been more accurately scored to reflect the severity of the victim's injuries and the number of times that defendant hit the victim while helpless, the trial court erred in relying on those factors to depart from the guidelines' recommended sentencing range. However, defendant failed to challenge the scoring of the sentencing guidelines below and raises no such challenge on appeal. Rather, in assigning error to the trial court's sentencing decision defendant presents a hypothetical set of circumstances contrary to the facts of this case. Because we must review the trial court's sentencing decision in light of the guidelines as scored, we find his argument in this regard to be unavailing.

<sup>2</sup> See note 1.