

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL H. HALL, a/k/a KEITH HALE, a/k/a
MICHAEL HALE, a/k/a CRAIG HALE,

Defendant-Appellant.

UNPUBLISHED

November 15, 2005

No. 254615

Wayne Circuit Court

LC No. 01-008679-01

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

PER CURIAM.

Defendant appeals as of right his sentence of life in prison imposed on remand of his conviction of assault with intent to do great bodily harm less than murder, MCL 750.84. We affirm.

Following a bench trial, the trial court convicted defendant of assault with intent to do great bodily harm less than murder as a lesser included offense of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, second offense, MCL 750.227b. The statutory sentencing guidelines as scored for a fourth habitual offender established a minimum term range of nineteen to seventy-six months for assault with intent to do great bodily harm less than murder. The trial court sentenced defendant to life in prison for assault with intent to do great bodily harm less than murder, and to a consecutive five-year term for felony-firearm, second offense. The trial court indicated that it imposed a life term for assault with intent to do great bodily harm less than murder because defendant had accumulated three convictions for that offense in twelve years.

In *People v Hall*, memorandum decision of the Court of Appeals, issued December 16, 2003 (Docket No. 242369), we affirmed defendant's convictions but vacated his life sentence for assault with intent to do great bodily harm less than murder, and remanded for resentencing on that conviction only. We concluded that because defendant's previous convictions were taken into account in calculating the guidelines, a life sentence was disproportionate.

On remand, the trial court again sentenced defendant to life in prison for assault with intent to do great bodily harm less than murder, observing that the guidelines took into account the number of defendant's previous convictions, but did not consider the nature of those convictions. The trial court noted that defendant had committed three prior offenses in which a

firearm had been involved. The trial court observed that defendant's instant conviction was his third assaultive offense, and that it resulted from an act in which he fired a shotgun thirteen to fifteen times in an indiscriminate manner at a group of persons.

To constitute a substantial and compelling reason for departing from the guidelines, a reason 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. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). The reason for the departure must be articulated by the trial court on the record. MCL 769.34(3). 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. *Babcock, supra* at 258-259. A substantial and compelling reason articulated by a trial court to merit a departure from the sentencing guidelines must justify the particular departure at issue. *Id.* at 259-260. If the stated reasons are partially invalid and the appellate court cannot ascertain whether the trial court would have departed to the same extent regardless of the invalid factors, remand for resentencing or rearticulation is necessary. *Id.* at 260-261.

In determining whether a sufficient basis exists to depart from the sentencing guidelines, the trial court must ascertain whether the departure would result in a sentence more proportionate to the seriousness of the offense and the defendant's criminal history than would adherence to the guidelines range. *Id.* at 262. In addition, 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; *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

We review the determination of the existence of a factor for departing from the guidelines for clear error, the determination that a factor is objective and verifiable de novo as a matter of law, and the determination that objective and verifiable factors merited departure from the guidelines range for an abuse of discretion. *Babcock, supra* at 273-274. A trial court may depart from the guidelines range for nondiscriminatory reasons based on an offense or offender characteristic which was already considered in calculating the guidelines range if the trial court concludes that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Babcock, supra* at 265-269. In determining whether substantial and compelling reasons existed to merit departure from the sentencing guidelines, an appellate court must give appropriate deference to the trial court's sentencing determination. *Id.* at 270.

A sentence of life in prison is a departure from the guidelines if it is not recommended by the guidelines as scored for the appropriate habitual offender level. MCL 777.21(3); *People v Houston*, 261 Mich App 463, 474-475; 683 NW2d 192 (2004).¹

¹ Defendant's conviction offense, assault with intent to do great bodily harm less than murder, is a class D offense for which life in prison is never recommended by the guidelines. MCL 777.16d, MCL 777.65.

We affirm defendant's sentence of life in prison for assault with intent to do great bodily harm less than murder.² The life sentence constituted a departure from the guidelines. MCL 769.34(4)(c); *Houston, supra* at 475. Prior Record Variables 1, 2, and 6, MCL 777.51, MCL 777.52, and MCL 777.56, took defendant's prior felony convictions and relationship to the criminal justice system into account in the calculation of the minimum sentence range. However, as the trial court correctly noted, those variables did not account for the objective and verifiable fact that defendant had repeatedly engaged in assaultive offenses with firearms, and had done so in this case after being given an opportunity to reform his conduct. The trial court was entitled to find that the nature of defendant's prior convictions was not given adequate weight in the calculation of the guidelines. MCL 769.34(3)(b). Defendant's history of committing assaultive offenses with firearms can be said to be objective and verifiable, to be a fact that irresistibly attracted the attention of the trial court, and to be a fact that was of considerable worth in deciding an appropriate sentence for a fourth habitual offender. MCL 769.34(3). The departure from the guidelines, while extensive, was authorized by statute and was not outside the range of principled outcomes under the circumstances. The trial court did not abuse its discretion in sentencing defendant to life in prison for assault with intent to do great bodily harm less than murder. *Babcock, supra* at 265-269. Defendant is not entitled to a second resentencing.

Affirmed.

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

² Defendant does not rely on the law of the case doctrine and does not argue that the doctrine precluded the trial court from imposing a life sentence based on our decision in his original appeal. For the reasons stated in this opinion, we conclude that the doctrine should not operate to vacate the sentence of life in prison imposed on remand by the trial court.