

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CALEB KELLY WESTCOTT,

Defendant-Appellant.

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UNPUBLISHED

January 31, 2008

No. 274677

Jackson Circuit Court

LC No. 06-003542-FH

Before: Bandstra, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendant was found guilty by a jury of operating a vehicle while intoxicated, third offense (OWI-3d), MCL 257.625(1), and was sentenced to two to five years' imprisonment. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In the early morning of April 29, 2006, defendant crashed his sister's car, rolling it over and landing upside down in the front yard of a home. Defendant was apprehended at the scene after getting out of the car and attempting to run away. His blood alcohol level registered .17. Defendant was tried before a jury and was found guilty of OWI-3d, which carries a maximum sentence of five years.

Defendant was 20 years old at the time of the offense and had six prior misdemeanor convictions, including two prior drunk driving convictions in 2005. He was unsuccessfully discharged from probation on both drunk driving offenses. He also had two convictions for driving with a suspended license, MCL 257.904(3)(a). At the time of instant offense, he had been out of jail for only a few months for a prior drunk driving conviction and was driving on a suspended license. While the current case was pending, but prior to sentencing, he was picked up for being a minor in possession of alcohol in violation of MCL 436.1703(1).

The sentencing guidelines recommended a minimum sentence range of 0 to 17 months. The trial court departed upward from that recommendation and sentenced defendant to two to five years in prison. In doing so, the trial court cited defendant's prior convictions (especially

the alcohol-related convictions), poor performance on probation, and the circumstances surrounding the instant case.

Defendant thereafter moved for resentencing on the ground that the departure from the guidelines was based on judge-found facts, which he did not admit to, thus violating his Fifth, Sixth and Fourteenth Amendments of the federal constitution as interpreted by the U.S. Supreme Court in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). The trial court denied the motion.

On appeal, defendant first argues that the trial court's departure from the sentencing guidelines violated his constitutional rights. We disagree.

This Court reviews questions of constitutional law de novo. *People v Harper*, 479 Mich 599, 610; 739 NW2d 523 (2007), cert pending. Under the due process clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact that increases the *maximum* penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt. *Apprendi v New Jersey*, 530 US 466, 476, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000). The Fourteenth Amendment requires that the states' criminal sentencing schemes conform to this rule. *Id.* The rule includes exceptions for the fact of prior convictions and any facts admitted by the defendant. *Id.* at 488; *Blakely*, *supra* at 303.

Our Michigan Supreme Court recently determined in *Harper*, *supra* at 637, that, under Michigan's indeterminate sentencing scheme, a defendant does not have a constitutional right to a sentence in the intermediate sanction range. Under an indeterminate scheme, a defendant receives a minimum and maximum sentence. The maximum sentence is not judicially determined but rather is set by statute. *People v Drohan*, 475 Mich 140, 160; 715 NW2d 778 (2006). The sentencing judge ascertains the minimum portion of a defendant's indeterminate sentence by calculating the minimum sentence range under the statutory sentencing guidelines, which consider the circumstances of the crime as well as the defendant's criminal history. When the sentencing guidelines range is in an intermediate cell, defendant has a statutory right to a minimum sentence as an intermediate sanction, conditioned on the absence of substantial and compelling reasons to depart upward. *Harper*, *supra* at 637. However, because the maximum sentence is always the maximum penalty under the law, and in Michigan a defendant may only be released before the maximum term at the discretion of the parole board, MCL 791.234; MCL 791.235, defendant does not have a *constitutional* right to an intermediate sanction. *Harper*, *supra*. The intermediate sanction cell determines the defendant's minimum guideline range and not the maximum sentence authorized by the jury verdict or guilty plea. Thus, "the sentencing judge may exercise his statutorily granted discretion to depart upward on the basis of facts not found by the jury." *Harper*, *supra* at 637-638.

In light of the holding in *Harper*, defendant's constitutional rights were not violated when the trial court exceeded the minimum sentence recommendation of the sentencing guidelines.

Defendant next argues that the trial court did not have valid substantial and compelling reasons for departing from the intermediate sanctions and therefore violated his due process rights. We disagree.

This Court reviews for clear error a trial court's finding that a factor exists in support of a departure from the applicable sentencing guidelines range. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). Further, the Court reviews de novo whether the findings are objective and verifiable. *Id.* Finally, the Court reviews for an abuse of discretion the trial court's determination that the factors are substantial and compelling reasons for departure from the sentencing guidelines. *Id.*

Under Michigan's sentencing guidelines act, a court must impose a sentence within the appropriate sentence range. MCL 769.34(2); *People v Hegwood*, 465 Mich 432, 438-439; 636 NW2d 127 (2001). A defendant's recommended minimum sentence range under the guidelines is determined on the basis of the defendant's record of prior convictions, the facts surrounding his crime, and the legislatively designated offense class. If the upper limit of the recommended minimum sentence range is eighteen months or less, as it was in this case, the court must state on the record that a substantial and compelling reason exists to commit the defendant to the Department of Corrections. MCL 769.34(4)(a). An intermediate sanction may include a jail term of twelve months or less, but does not include a prison term. *Id.*; MCL 769.31(b); *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002).

A substantial and compelling reason exists only in exceptional cases, and is an objective and verifiable reason that "keenly or irresistibly grabs" the attention of the reviewing court and is of considerable worth in deciding the length of a sentence. *Babcock*, *supra* at 258 (citing *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 [1995]). Departure may not be based 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." MCL 769.34(3)(b).

The trial court found that the guidelines did not adequately reflect defendant's multiple alcohol-related convictions, his poor probation record, or the facts surrounding this case, i.e., driving while intoxicated and with a suspended license within two months of release from jail for a prior drunk driving offense, and rolling over a car on someone's front lawn. Prior related convictions can serve as a substantial and compelling reason to depart upward from the sentencing guidelines. *People v Hicks*, 259 Mich App 518, 536-537; 675 NW2d 599 (2003). Further, a defendant's conduct while on probation can be considered a substantial and compelling reason for departure. *People v Hendrick*, 472 Mich 555, 565; 697 NW2d 511 (2005).

In the instant case, the trial court's stated reasons for departure were objective and verifiable. At the age of 20, defendant already had a history of alcohol-related convictions. The punishments imposed, generally in the form of probation, costs and fines, did not effectively deter defendant from his recidivism. The fact and circumstances of this case show that defendant continues to be a danger to the community. Based on defendant's prior alcohol-related

convictions and the failure of probation as a deterrent, the trial court clearly believed probation would again be ineffective in keeping defendant from driving while impaired and posing a danger to the community.

The trial court did not abuse its discretion in determining that this is an exceptional case and that substantial and compelling reasons existed to depart from the recommended minimum sentence range of the sentencing guidelines. The upward departure was justified by defendant's record of repeated drunk driving, of driving while his license was suspended, of alcohol-related convictions and of probation violations.

We affirm.

/s/ Richard A. Bandstra  
/s/ Pat M. Donofrio  
/s/ Deborah A. Servitto