

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SALLY ANN BENNETT,

Defendant-Appellant.

UNPUBLISHED

November 18, 2008

No. 277682

Saginaw Circuit Court

LC No. 01-020409-FH

Before: Fitzgerald, P.J., and Bandstra and O'Connell, JJ.

PER CURIAM.

Defendant Sally Ann Bennett pleaded guilty to one count of embezzlement by an administrator, executor, or guardian, MCL 750.176, after she appropriated and gambled away over \$100,000 from the estate of Helen Oomen. On August 27, 2002, defendant was sentenced as a habitual offender, second offense, MCL 769.10, to 7 to 15 years' imprisonment, with 185 days' credit for time served, and she was ordered to pay \$109,964.20 in restitution. The prison term imposed was an upward departure from the guidelines range of zero to seven months. This case comes to us on remand from our Supreme Court "for consideration as on leave granted of whether the defendant's sentence is invalid, see MCR 6.508(D)(3)(b)(iv); *People v Kimble*, 470 Mich 305, 314 n 6 (2004); and *People v Babcock*, 469 Mich 247 (2003)." *People v Bennett*, 480 Mich 1118; 745 NW2d 765 (2008). We affirm.

Defendant argues that her sentence is invalid because the trial court departed from the appropriate sentence range without a substantial and compelling reason, and because the extent of the departure renders the length of the sentence grossly disproportionate to the seriousness of the offense and the offender. We disagree. The trial court had substantial and compelling reasons for sentence departure, and the extent of departure was justified under the circumstances presented here.

We review for an abuse of discretion a trial court's denial of relief from judgment under MCR 6.508. *People v Ulman*, 244 Mich App 500, 508; 625 NW2d 429 (2001). A defendant may not base a motion for relief from judgment on an issue that could have been raised on direct appeal unless the defendant demonstrates both good cause for failing to raise the issue on appeal and actual prejudice. MCR 6.508(D)(3). "Actual prejudice" includes situations where, "in the case of a challenge to the sentence, the sentence is invalid." MCL 6.508(D)(3)(b)(iv). Here, we find that defendant has shown good cause for failing to raise the issue of departure on direct

appeal because appellate counsel's delayed application for leave to appeal was dismissed as untimely. Thus, we consider whether defendant has demonstrated actual prejudice.

"[A] judge's discretion to depart from the range stated in the legislative [sentencing] guidelines is limited to those circumstances in which such a departure is allowed by the Legislature." *People v Babcock*, 469 Mich 247, 255; 666 NW2d 231 (2003), quoting *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001).

If the upper limit of a guidelines range is 18 months or less, the court must impose an intermediate sanction unless there are substantial and compelling reasons to sentence the defendant to imprisonment. MCL 769.31(b); MCL 769.34(4); *People v Harper*, 479 Mich 599, 617-618; 739 NW2d 523 (2007). A substantial and compelling reason exists only in exceptional cases. *Babcock*, *supra* at 258. The reason must be "objective and verifiable," it must "keenly or irresistibly [grab] [the court's] attention," and it must be "of considerable worth in deciding the length of a sentence." *Id.* (internal citations and quotation marks omitted). "To be objective and verifiable, a reason must be based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed." *People v Horn*, 279 Mich App 31, 43 n 6; 755 NW2d 212 (2008). Furthermore, the substantial and compelling reason articulated by the trial court "must justify the particular departure at issue." *People v Havens*, 268 Mich App 15, 17; 706 NW2d 210 (2005); see also MCL 769.34(3).

A court must articulate its reasons for imposing its sentence on the record at the time of sentencing. *Babcock*, *supra* at 258-259. In the absence of such articulation, this Court must remand the case to the trial court for resentencing or rearticulation. *Id.* at 259. When the trial court articulates multiple reasons for its departure, we must examine each one. *Id.* at 260. If we find that some, but not all, of the articulated reasons are substantial and compelling, we must then "determine whether the trial court would have departed and would have departed to the same degree on the basis of the substantial and compelling reasons alone." *Id.* If we are unable to make either determination, "[we] must remand the case to the trial court for resentencing or rearticulation of its substantial and compelling reasons to justify its departure." *Id.* at 260-261.

Here, the trial judge's characterizations of defendant's conduct as "deplorable," "appalling," and "outrageous" are subjective and do not constitute substantial and compelling reasons for departure. See *Havens*, *supra* at 18 (observing that a court's "characterization of defendant's offenses as 'egregious' is a subjective determination, is not objective and verifiable, and cannot be used as a substantial and compelling reason for departing from the sentencing guidelines"). Beyond that, the judge justified the departure by calling attention to the manipulative nature of defendant's actions, to the effect of her actions on the victim's family, and to defendant's prior criminal record.

In calculating defendant's sentence range under the guidelines, the court took into account conduct governed by offense variable (OV) 10 (exploitation of a vulnerable victim). MCL 777.40(1). Defendant received ten points under OV 10 for exploiting "a victim's physical disability, mental disability, youth or agedness, or a domestic relationship" or for abusing defendant's "authority status." MCL 777.40(1)(b). Thus, because the manipulative nature of defendant's actions was already taken into account by the sentencing guidelines, the court could only rely on this offense characteristic as a reason for departure if it found that the variable was

given inadequate or disproportionate weight. We believe that the trial court properly made this determination.

The victim was an elderly woman, and the embezzled funds constituted the vast bulk of her assets. The victim's family was depending on this inheritance for their financial security and, in the absence of receiving any money from the victim's estate after her death, they were forced to declare bankruptcy. At sentencing, the judge stated that defendant "cozied up to an old lady, got [her]self appointed as her representative for her estate," accepted a car from her, and then "betrayed somebody whose very life was in [defendant's] hands." The trial judge also justified her decision to depart from the sentence range by stating that, although defendant was authorized to pay the victim's bills, she used her access to the victim's finances to steal the victim's money and the children's inheritance, leaving the family without even enough money to pay for the victim's funeral. The judge concluded that defendant had "devastated" the victim's family. Further, the trial court judge also gave defendant a week to determine if she would be able to pay back the \$109,964.20 in restitution that she owed the victim's family, and the judge sentenced defendant to prison after defendant expressed no indication that she would be able to repay the victim's family. The financial impact of defendant's actions on the victim's family is objective and verifiable. Defendant's conduct displayed complete disregard for the victim's family and the victim's wishes regarding her family. The trial court did not abuse its discretion when it identified the predatory nature of defendant's conduct as a justification for an upward departure from the sentencing guidelines.

The court also appears to have relied on defendant's prior criminal record, referring to her as a "seasoned criminal." Prior record variables (PRVs) "take into account the offender's criminal history." *Babcock, supra* at 264. At sentencing, the judge enumerated defendant's prior convictions for welfare fraud over \$500 and welfare fraud for failing to inform in 1981, as well as the prosecution arising from her tender of an insufficient funds check, which had only been resolved when defendant repaid the money. However, defendant's welfare fraud convictions could not be used in calculating her PRV score because these prosecutions and convictions occurred over ten years before. See MCL 777.50(1). Therefore, defendant's prior criminal history was not taken into account by the guidelines.

Because the guidelines did not adequately address defendant's criminal history, this history also constituted a substantial and compelling reason for the trial court's departure from the recommended sentence range. Prior convictions are objective and verifiable, and they may be sufficient to permit a court to conclude that defendant demonstrates an inability to "conform [her] conduct to the laws of society." *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997). Further, defendant's prior criminal history indicates that she is continuing along a pattern of fraudulent behavior spanning much of her adult life, and that her earlier punishment for committing similarly deceitful acts did not cause her to permanently reform her behavior.

Further, the trial court did not abuse its discretion when it concluded that the extent of its departure was justified in this instance. "The premise of our system of criminal justice is that, everything else being equal, the more egregious the offense, and the more recidivist the criminal, the greater the punishment." *Babcock, supra* at 263. Both defendant's prior criminal history and the repulsive nature of her offense were not adequately taken into account by the guidelines. Further, as the trial court noted at sentencing, the level of injustice that occurred as a result of

defendant's actions warranted a departure from the guidelines to the extent imposed by the trial court. Therefore, the trial court adequately explained both the nature and the extent of the departure, and it did not abuse its discretion when it sentenced defendant to 7 to 15 years' imprisonment.¹ *People v Smith*, 482 Mich 292, 293; 754 NW2d 284 (2008).

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Peter D. O'Connell

¹ The concurring opinion states, without citation to authority, that the Legislature has determined that prior offenses that are not scored under the guidelines cannot be used as a basis for a departure from the recommended sentence. We respectfully disagree. Unscored prior convictions are objective and verifiable, and in this case, the nature of the prior convictions properly grabbed the trial court's attention. Therefore, the trial court appropriately identified defendant's prior convictions as a substantial and compelling reason to depart from the guidelines.