

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD LEE OLMAN,

Defendant-Appellant.

UNPUBLISHED

November 18, 2008

No. 281151

Macomb Circuit Court

LC No. 2005-000998-FH

Before: Beckering, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree criminal sexual conduct, MCL 750.520c(1)(a), and was sentenced to a term of 2 to 15 years' imprisonment. The sentencing guidelines score placed defendant in the A-II category, for which the minimum sentence range is 0 to 17 months. MCL 777.64. Due to the fact that the upper limit of the sentencing guidelines is less than 18 months, the trial court was required to impose an intermediate sanction "unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections." MCL 769.34(4)(a). In a prior appeal, *People v Oلمان*, unpublished opinion per curiam of the Court of Appeals, issued June 12, 2007 (Docket No. 268464), lv den 480 Mich 925 (2007), this Court stated that an intermediate sanction is probation or any sanction other than incarceration in a state prison, and may include up to 12 months in jail. MCL 769.31(b); MCL 769.34(4)(a). In that opinion, this Court affirmed defendant's conviction but remanded for resentencing on the basis that the trial court had failed to articulate legally sufficient substantial and compelling reasons for the trial court's departure from the sentencing guidelines. Defendant was resentenced on August 1, 2007 at which time the trial court again deviated from the sentencing guidelines by stating:

Admittedly, OV 10 takes into account the youth or agedness of the victim; however, given the totality of the circumstances of this case, the Court finds that the statutory sentencing guidelines give the victim's age inadequate weight and that as a result the victim's age amounts to a substantial and compelling reason to depart from the appropriate sentencing range.

Moreover, when this crime occurred the defendant's wife, who was ostensibly baby-sitting the victim in this case, was not present, and was on a different floor, I believe, in the basement. Because originally it was the defendant's wife provided full-time daycare for this four-year old.

As Mr. McCarthy indicated, another added factor in this case is that Mr. Olman was a corrections officer with the Michigan Department of Corrections as was the young girl's father, they were coworkers. As a correctional officer, Mr. Olman, you held a position of public trust. Such a position enabled you to understand better than anybody else that people should abide by criminal statutes, especially one prohibiting sexual conduct with a young, tender girl of four years of age.

In my opinion, you violated this position of trust by committing this crime. In committing this sexual offense you have cast aspersions not only upon yourself but upon your profession, and potentially causing your former colleagues to have reduced esteem within the community of the Department of Corrections and already take enough abuse from the prisoners as it is.

I am firmly convinced that taking everything into account, your misconduct committed by a person holding an important public position, constitutes an objective, verifiable basis for exceeding the minimum guideline range, since these factors are not included within the offense variables applicable to this crime, and enable me . . . to impose the minimum term beyond and prescribed by the sentence guidelines. I felt that way originally, I still do. I am . . . pleased that you have completed the program and on your way to become a substantial and productive member of society with the fact that you will have a job upon your release; however, I find that your breach of the personal and professional trust constitutes a substantial and compelling reason to depart from the appropriate guideline range.

This matter is now before this Court a second time on the issue of whether the trial court articulated sufficient and compelling reasons to deviate from the sentencing guidelines, and if by so doing whether the departure would result in a "more proportionate criminal sentence than is available within the guidelines range." *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003), reh den 469 Mich 1224 (2003). See also, *People v Smith*, 482 Mich 292; 754 NW2d 284, 289- 290 (2008) holding in part, "Under MCL 769.34(3), a minimum sentence that departs from the sentencing guidelines recommendation requires a substantial and compelling reason articulated on the record. In interpreting this statutory requirement, the Court has concluded that the reasons relied on, must be objective and verifiable. They must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention. Substantial and compelling reasons for departure exist only in exceptional cases. 'In determining whether a sufficient basis exists to justify a departure, the principle of proportionality . . . defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed.' For a departure to be justified, the minimum sentence imposed must be proportionate to the defendant's conduct and prior criminal history." (Internal citations omitted.)

"On appeal, courts review the reasons given for a departure for clear error. The conclusion that a reason is objective and verifiable is reviewed as a matter of law. Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure. A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes." *Smith* at 754 NW2d

290. “[T]he Legislature intended ‘substantial and compelling reasons’ to exist only in exceptional cases.” *People v Fields*, 448 Mich 58, 68; 528 NW2d 176 (1995). Only objective factors that are capable of verification may be used to assess whether there are substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003). Objective and verifiable factors are “actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed.” *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Further, it is not sufficient that the court simply identify an objective and verifiable factor; it must explain why that factor justifies a departure from the guidelines. *People v Johnson (On Remand)*, 223 Mich App 170, 173-174; 566 NW2d 28 (1997). The court must also explain why the factor cited supports the extent of the departure. *Smith, supra*.

In *Smith*, our Supreme Court summarized the trial court’s statutory obligations by stating:

(1) The trial court bears the burden of articulating the rationale for the departure it made. A reviewing court may not substitute its own reasons for departure. Nor may it speculate about conceivable reasons for departure that the trial court did not articulate or that cannot reasonably be inferred from what the trial court articulated.

(2) The trial court must articulate one or more substantial and compelling reasons that justify the departure it made and not simply *any* departure it might have made.

(3) The trial court’s articulation of reasons for the departure must be sufficient to allow adequate appellate review.

(4) The minimum sentence imposed must be proportionate. That is, the sentence must adequately account for the gravity of the offense and any relevant characteristics of the offender. To be proportionate, a minimum sentence that exceeds the guidelines recommendation must be more appropriate to the offense and the offender than a sentence within the guidelines range would have been.

(5) When fashioning a proportionate minimum sentence that exceeds the guidelines recommendation, a trial court must justify why it chose the particular degree of departure. The court must explain why the substantial and compelling reason or reasons articulated justify the minimum sentence imposed.

(6) It is appropriate to justify the proportionality of a departure by comparing it against the sentencing grid and anchoring it in the sentencing guidelines. The trial court should explain why the substantial and compelling reasons supporting the departure are similar to conduct that would produce a guidelines-range sentence

of the same length as the departure sentence.

(7) Departures from the guidelines recommendation cannot be assessed with mathematical precision. The trial court must comply *reasonably* with its obligations under the guidelines, as set forth in this opinion, to further the legislative goal of sentencing uniformity. 754 NW2d at 299-300.

In this case, the trial court gave three reasons for its departure from the guidelines. The first was the victim's age. In a prior appeal, this Court held that despite the fact that the victim was only four years old, her age was appropriately accounted for by offense variable 10 and was "not a proper basis upon which to deviate from the guidelines." *People v Olman, supra*. Pursuant to the law of the case doctrine, "a trial court may not take any action on remand that is inconsistent with the judgment of the appellate court." *Everett v Nickola*, 234 Mich App 632, 635; 599 NW2d 732 (1999).¹

The second reason given by the trial court was that defendant, as a corrections officer, held a position of public trust. Consideration of defendant's occupation as a basis for providing the trial court with a substantial and compelling reason for departure from the sentencing guidelines is specifically precluded by MCL 769.34(3)(a). Even if we were only to consider that portion of the trial court's statements relating to defendant's occupation as a violation of the public trust, we note that unlike the United States Sentencing Guidelines (USSG), Michigan's statutory guidelines do not account for a defendant's abuse of public trust. However, even under the USSG, an officer's abuse of public trust does not warrant sentence enhancement unless the officer uses special knowledge or access or both, obtained by virtue of his status as an officer, to facilitate the commission of the offense. *United States v Williamson*, 53 F3d 1500, 1525 (CA 10, 1995). There is nothing in the record to suggest that defendant's position as a corrections officer enabled him to commit the offense, or that his employment in a position of trust provided a basis for departure. MCL 769.34(3)(a).

The third reason given by the trial court was the reduced esteem in which defendant's former colleagues may be held by the prisoners in their charge or by other employees of the

¹ This is not to suggest that trial courts cannot consider disproportionate or inadequate weight given to offense variables within the sentencing guidelines. Writing in *Smith*, Justice Kelly, quoting MCL 769.34(3)(b) opined: "The trial court may 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.'" 754 NW2d at 290. However, in this Court's prior opinion we held that "The ten points defendant received for OV 10 were based, at least in part, on the victim's youth and there is no legal authority to suggest that youth aged four are not sufficiently accounted for by the statute. Therefore, the victim's age is not a proper basis upon which to deviate from the guidelines. MCL 769.34(3)(b)." *Olman, supra*, slip op at 4.

Department of Corrections by virtue of the fact that one of their coworkers committed this offense. We are compelled by prior precedent to reject this basis for departure because the issue of defendant's actions having adverse affects on his co-workers is a subjective factor that cannot be objectively verified and thus does not provide a valid basis for a departure. 754 NW2d at 290, quoting *Babcock, supra*. For these reasons, we vacate defendant's sentence and remand for resentencing.

At the time that defendant was resentenced, the trial court did not have the guidance afforded trial courts when departing from the sentencing guidelines as quoted in this opinion. On remand, we direct the trial court to that portion of Justice Kelly's opinion summarizing the statutory obligations of trial courts when departing from sentencing guidelines.²

Vacated and remanded for resentencing. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Alton T. Davis

² See *People v Smith*, 754 NW2d at 299-300.