

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CAL DUANE CLARK, II,

Defendant-Appellee.

UNPUBLISHED

January 22, 2009

No. 282539

Oakland Circuit Court

LC No. 2007-215703-FH

Before: Zahra, P.J., and O’Connell and Fort Hood, JJ.

PER CURIAM.

Defendant Cal Duane Clark pleaded guilty to possession with intent to deliver 50 grams or more but less than 450 grams of cocaine, MCL 333.7401(2)(a)(iii), among other offenses.¹ He was sentenced, in a downward departure from the sentencing guidelines, to six months’ to 20 years’ incarceration. Plaintiff appeals this sentence by delayed leave granted. We vacate that sentence, and remand for resentencing on the possession with intent to deliver conviction. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant entered his plea pursuant to *Cobbs, supra*, and the trial court stated that if it could not agree that substantial and compelling reasons existed to depart downward from the guidelines for the possession with intent to deliver offense, defendant would be entitled to withdraw his plea. However, at sentencing, the trial court concluded that it could not depart below the minimum sentence range recommended in the guidelines: 57 to 95 months for the possession with intent to deliver offense. Defendant and his counsel decided to proceed with the sentencing. Specifically, after conferring with his counsel, defendant indicated to the court that he understood he had a right to withdraw his plea but elected not to do so. Defendant stated he understood he could be facing a substantial period of incarceration. Defendant indicated he was acting freely and voluntarily.

¹ Defendant also pleaded guilty to one count of possession with intent to deliver 50 grams or more but less than 450 grams of cocaine, one count of second-degree fleeing and eluding, MCL 257.602a(4), one count of carrying a concealed weapon, MCL 750.227, one count of possession of marijuana, MCL 333.7403(2)(d), and two counts of possession of a firearm during the commission of a felony (“felony-firearm”), MCL 750.227b.

At the sentencing hearing, defense counsel argued that substantial and compelling reasons existed to depart downward from the recommended range set forth in the guidelines because defendant was only 19 years old, had a history of employment, was involved in volunteer work in the community, took responsibility for his actions, and had reported for nearly all his required drug tests (and contested one positive result for cocaine). Defendant also maintained that an older, known drug dealer had convinced him to engage in the actions that resulted in his convictions in this case. In response, the prosecutor asserted that no substantial and compelling reasons existed to justify a downward departure. The prosecutor noted that officers had discovered a fully loaded semi-automatic handgun under the driver's seat of the vehicle defendant was driving, and defendant had tested positive for marijuana and cocaine at some of his drug tests.

Notwithstanding the trial court's original indication that it would not deviate downward from the sentencing guidelines, it did just that and sentenced defendant to two-years' imprisonment for the felony-firearm convictions, to be served consecutively to defendant's sentences of six months to 20 years for the possession with intent to deliver conviction, six months to 10 years for the fleeing and eluding conviction, six months to five years for the carrying a concealed weapon conviction, and two days for the possession of marijuana conviction, with credit for two days' time served. The trial court cited defendant's work history, volunteer work in the community, and strong family ties as reasons for departing downward from the guidelines range of 57 to 95 months' imprisonment for the possession with intent to deliver conviction. The trial court also adopted the reasons given by defense counsel in support of departure, which focused primarily on defendant's youth and lack of a criminal record.

As a general rule, a trial court must impose a sentence within the sentencing guidelines unless a substantial and compelling reason exists to depart from the guidelines.² *People v Horn*, 279 Mich App 31, 43; 755 NW2d 212 (2008). Substantial and compelling reasons for departure must be based on objective and verifiable factors. "The reasons for departure must also irresistibly attract the attention of the court, and must be of considerable worth in deciding the length of the sentence. 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

² We review the trial court's decision to depart from the sentencing guidelines for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). We review de novo the determination that a factor supporting a departure is objective and verifiable, and we review the trial court's determination that objective and verifiable factors merited departure from the guidelines for an abuse of discretion. *Id.* at 264-265. A trial court may depart from the guidelines for nondiscriminatory reasons based on an offense or offender characteristic that was already considered in calculating the guidelines if the trial court concludes that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). The trial court abuses its discretion when it imposes a sentence that is not within the range of principled outcomes. *Babcock*, *supra* at 269. We defer to the trial court's sentencing determinations regarding whether substantial and compelling reasons exist to merit departure from the sentencing guidelines. *Id.* at 270.

confirmed.” *Id.* at 43 n 6 (internal citations omitted). The trial court must articulate the reason for the departure on the record. MCL 769.34(3). 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. *People v Babcock*, 469 Mich 247, 259; 666 NW2d 231 (2003). 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.

[I]n considering whether to depart from the guidelines, the trial court must ascertain whether taking into account an allegedly substantial and compelling reason would contribute to a more proportionate criminal sentence than is available within the guidelines range. In other words, if there are substantial and compelling reasons that lead the trial court to believe that a sentence within the guidelines range is not proportionate to the seriousness of the defendant’s conduct and to the seriousness of his criminal history, the trial court should depart from the guidelines. Additionally, in departing from the guidelines range, the trial court must consider whether its sentence is proportionate to the seriousness of the defendant’s conduct and his criminal history because, if it is not, the trial court’s departure is necessarily not justified by a substantial and compelling reason. [*Id.* at 264.]

We vacate defendant’s sentence of six months to 20 years for possession with intent to deliver cocaine and remand this case to the trial court for resentencing on that conviction. The trial court based its decision to depart downward from the guidelines, in part, on defendant’s young age and lack of a prior criminal record. Although a defendant’s age is an objective and verifiable factor, age alone is not a factor that keenly or irresistibly grabs one’s attention. *People v Young*, 276 Mich App 446, 457; 740 NW2d 347 (2007). Moreover, at the age of 19, defendant was not particularly old to have a significant criminal record. See *id.*; *People v Claypool*, 470 Mich 715, 727; 684 NW2d 278 (2004). Furthermore, defendant’s lack of a prior record was accounted for in the Prior Record Variables, and the trial court did not assert that the guidelines did not give adequate weight to defendant’s lack of a prior record. See MCL 769.34(3)(b). We conclude that the trial court abused its discretion when it determined that defendant’s young age and lack of a prior record warranted a downward departure from the guidelines.

The trial court also based its decision to depart downward in part on defendant’s employment history, activity in the community, and community ties. However, defendant’s employment history (part-time at a restaurant and as an unpaid trainee at a mortgage company) was not lengthy or noteworthy, and defendant was unemployed at the time he was sentenced. The trial court abused its discretion when it concluded that defendant’s employment history constituted a substantial and compelling reason for departing downward from the guidelines. See *Young*, *supra* at 456-457. Defendant’s activity in the community and community ties are objective and verifiable, but the trial court did not explain why it considered defendant’s community activities and ties to be substantial and compelling reasons for departing downward from the guidelines. Hence, these reasons are insufficient to justify a downward departure.

The trial court also relied on other reasons stated by defense counsel as support for its decision to depart downward from the guidelines, including defendant’s claim that an older, known drug dealer persuaded him to engage in the criminal activities at issue in this case, and the

fact that defendant had appeared for most of his required drug tests (and that he contested one positive result). However, at the plea hearing, defendant acknowledged that he knowingly participated in criminal activities. Moreover, the parties did not dispute that at least one drug test performed after defendant's arrest resulted in a positive reading for cocaine. We conclude that the trial court abused its discretion by finding that defendant's willing participation in criminal activities, even at the behest of an older person, and defendant's imperfect drug-test record, constituted substantial and compelling reasons for departing downward from the guidelines.

The guidelines recommended a minimum sentence of 57 to 95 months for the possession with intent to deliver offense, but the trial court departed downward and imposed a minimum term of six months. This minimum term of six months was just over ten percent of the low end of the guidelines. The trial court did not specify why it concluded that a six-month minimum term would be more proportionate to the offense and defendant's circumstances than a minimum term within the guidelines.

The trial court abused its discretion by departing downward from the guidelines range based on factors that were not substantial and compelling. We vacate defendant's sentence for the conviction of possession with intent to deliver cocaine and remand this case for resentencing for that conviction. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood