

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LATOSHA ANN CARTER,

Defendant-Appellee.

UNPUBLISHED
February 10, 2009

No. 279911
Kalamazoo Circuit Court
LC No. 05-002384-FH

Before: Servitto, P.J., and Donofrio and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of delivery of 50 or more but less than 450 grams of cocaine, MCL 333.7401(2)(a)(iii). She was sentenced to two years' probation, with a suspended sentence of one year in jail. The prosecutor appeals defendant's sentence as of right. We vacate defendant's sentence and remand for resentencing. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant engaged in two controlled buys, selling approximately four ounces of cocaine to a confidential informant working with the police. Defendant had previously sold a lesser amount of cocaine to the informant, conduct for which she was not charged. Defendant agreed to a fourth transaction at which she and her boyfriend planned to rob the informant, but backed out at the last minute. The sentencing guidelines range for defendant's convictions was 51 to 85 months. MCL 777.63. The trial court departed from this range based on a number of factors, including the probation department's recommendation of probation, defendant's age and minimal criminal record, and defendant's personal success since the offenses.

A court must impose a minimum sentence within the appropriate guidelines range unless a departure from that range is permitted. MCL 769.34(2). The court may depart from the guidelines range if it "has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). A court may not base a departure on discriminatory reasons or on factors already considered by the guidelines unless those factors have been given inadequate or disproportionate weight. MCL 769.34(3)(a) and (b); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001). A departure is appropriate "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," such that a 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).

“[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. *Babcock*, *supra* at 257. 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).

“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.” *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

The first factor cited by the trial court, the probation department’s recommendation, is objective and verifiable only to the extent that a specific recommendation was in fact made; the recommendation itself is simply a reflection of the agent’s opinion of what constitutes a proportionate sentence and thus is not an objective and verifiable factor. Therefore, the trial court erred in finding that the recommendation was a valid basis for departure.

The second factor cited by the trial court was defendant’s age. Defendant’s was 19 years old when the crimes were committed and 22 years old when she was sentenced. Defendant’s age is an objective and verifiable factor not considered by the guidelines, but it alone is not so substantial and compelling to warrant a departure from the guidelines. *People v Young*, 276 Mich App 446, 457; 740 NW2d 347 (2007). However, the court may give limited consideration to “a defendant’s age in terms of other permissible and relevant individual factors such as the absence or presence of a prior record.” *People v Fleming*, 428 Mich 408, 423-424 n 17; 410 NW2d 266 (1987). Here, the court cited defendant’s “relative absence of a prior record.” At the time defendant committed the instant offenses, she had a juvenile record of two misdemeanor adjudications. Consequently, defendant received zero points for prior record variables 1, 2, 3, and 4, and five points for PRV 5. Given that the court noted that defendant’s prior record, considered in light of her age, was taken into account by the guidelines but did not find that it was given inadequate or disproportionate weight, the trial court abused its discretion in finding that defendant’s age and minimal prior record provided a substantial and compelling reason for departure. *Young*, *supra* at 455-457.

The third factor cited by the trial court, defendant’s personal success, was apparently a reference to her employment, community work, and pursuit of a college education. Defendant’s employment is an objective and verifiable factor not considered by the guidelines, but is not a substantial and compelling reason for departure unless it is “particularly lengthy or noteworthy.” *Id.* at 456-457. The presentence report indicates that defendant had worked part time at Borgess

Medical Center for the past 2-1/2 years. This is not so exceptional to warrant a departure from the guidelines and thus the court abused its discretion in finding that defendant's employment history warranted a departure.

Defendant's education is an objective and verifiable factor not considered by the guidelines and a defendant's pursuit of a post-secondary education is a factor that may be considered in deciding whether a departure is warranted. Likewise, defendant's involvement in volunteer work is an objective and verifiable factor not considered by the guidelines that may be considered by the court. *People v Krause*, 185 Mich App 353, 358-359; 460 NW2d 900 (1990), overruled in part on other grounds by *Fields, supra* at 77. These factors boded well for defendant's rehabilitative potential and thus the court did not abuse its discretion in finding that these factors constituted substantial and compelling reasons to depart from the guidelines.

In determining whether the departure is proportionate, the court may compare the departure sentence to the recommended minimum sentences for the applicable sentencing class. *Smith, supra* at 293. For a Class B felony, an intermediate sanction such as probation, MCL 769.31(b), is permitted only for those defendants who place in the A-I category (zero PRV points and zero to nine OV points), the A-II category (zero PRV points and 10 to 24 OV points), or the B-I category (1 to 9 PRV points and zero to nine OV points), MCL 777.63, all of which involve scores significantly lower than those for the C-V category (10 to 24 PRV points and 50 to 74 OV points). Probation is a significant departure from the defendant's guidelines range of 51 to 85 months and, in light of the circumstances of the case, including the uncharged offense and the intended robbery, was not justified by defendant's education and community service. The trial court abused its discretion in imposing a probationary sentence. Accordingly, we vacate defendant's sentence and remand for resentencing, which is to occur within 90 days of the date of entry of this opinion. We do not retain jurisdiction.

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