

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHELLY KAY LAIDLAW,

Defendant-Appellant.

UNPUBLISHED

August 6, 2009

No. 281867

Oakland Circuit Court

LC No. 2007-212601-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL CHESTER GAGNIER,

Defendant-Appellant.

No. 281868

Oakland Circuit Court

LC No. 2007-212596-FC

Before: Murray, P.J., and Gleicher and M.J. Kelly, JJ.

GLEICHER, J. (*concurring in part and dissenting in part*).

I concur with the majority’s resolution of all issues, except whether the trial court’s departures from the sentencing guidelines qualify as proportionate. Because the trial court failed to articulate any basis for the extent of the departures, independent of the reasons invoked in support of the departures, I believe that the trial court should resentence both defendants.

A defendant’s “appropriate sentence range is determined by reference to the principle of proportionality; it is a function of the seriousness of the crime and of the defendant’s criminal history.” *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). “The ‘principle of proportionality ... defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed.’” *People v Smith*, 482 Mich 292, 304; 754 NW2d 284 (2008), quoting *Babcock*, *supra* at 262. In *Smith*, our Supreme Court emphasized that “the very purpose of the sentencing guidelines is to facilitate proportionate sentences.” *Id.* at 305. And when a trial court departs from the sentence calculated under the sentencing guidelines, “the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been.” *Id.* at 304. This Court may

not uphold a sentence when “the connection between the reasons given for departure and the extent of the departure is unclear.” *Id.*

With regard to defendant Shelly Laidlaw, the trial court failed to offer an explanation for its decision to impose a minimum sentence more than double that calculated under the guidelines.¹ According to the sentencing guidelines, Laidlaw’s minimum sentence range fell between 7 and 46 months. The trial court sentenced Laidlaw to a term of imprisonment between 96 and 240 months. The 96-month minimum sentence range well exceeds the upper limits of the sentencing grid for Class E felonies like third-degree fleeing or eluding a police officer, MCL 750.479a(3). Consequently, Laidlaw’s sentence constitutes a substantial departure from the recommended minimum sentence range, and enters a sentencing realm that the Legislature reserved for the most egregious Class E offenses and the most hardened criminals. *Babcock, supra* at 263.

Because the trial court offered no explanation how the *extent* of the departure was proportionate to the nature of the offense and Laidlaw’s background, I believe that the court should resentence Laidlaw. Her crime and her extensive history of convictions, primarily misdemeanors, support an upward departure. But just as this Court may not substitute its own reasons for a sentence departure, *Babcock, supra* at 258-261, *Smith* counsels that appellate courts must refrain from justifying the extent of a departure when the sentencing court has failed to do so. *Id.* at 318. An appellate court simply cannot substitute its own judgment regarding the extent of a departure for that of the trial court. *Id.* at 304.

The trial court sentenced defendant Paul Gagnier to a term of 20 to 40 years’ imprisonment (240 to 480 months), despite that application of the guidelines yielded a minimum sentence range between 43 and 172 months, after enhancement for Gagnier’s status as a fourth habitual offender. As in Laidlaw’s case, the trial court entirely neglected to articulate any rationale for the extent of the sentence departure it imposed. Although I agree that substantial and compelling reasons existed for an upward departure of Gagnier’s sentence, I respectfully disagree with the majority’s innovative mathematical effort to create proportionality in the face of a record lacking this justification. The majority suggests that an appellate court may manufacture proportionality by imagining that the trial court scored additional points for an offender’s prior record or offense variables. In my view, this method of blatantly bypassing the rules set forth in *Smith* serves to nullify the Legislature’s determination of proportionate sentences. Our Legislature

has subscribed to [the] principle of proportionality in establishing the statutory sentencing guidelines. Under the guidelines, offense and prior record variables

¹ The majority opines that Laidlaw “has not challenged the degree of the trial court’s departure . . .” *Ante* at 2 n 2. I respectfully disagree. Laidlaw’s brief on appeal asserts that her prior convictions “did not warrant a sentence that was more than twice the top level of the guidelines.” The prosecutor interpreted Laidlaw’s appeal as stating a proportionality claim, and briefed this issue. In my view, this Court should address proportionality both because the issue has been preserved, and because the extent of the sentence departure raises serious concerns about its proportionality.

are scored to determine the appropriate sentence range. ... Therefore, the appropriate sentence range is determined by reference to the principle of proportionality; it is a function of the seriousness of the crime and of the defendant's criminal history. [*Babcock, supra* at 263-264.]

In my view, neither this Court nor a trial court has the authority to refashion the legislative point system to justify a sentence falling well outside the statutorily prescribed range.

I would remand for resentencing so that the trial court may articulate on the record why the particular degrees of departure selected in both defendants' cases are warranted.

/s/ Elizabeth L. Gleicher