

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARLAND MALONE, JR.,

Defendant-Appellant.

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UNPUBLISHED

December 29, 2009

No. 288669

Wayne Circuit Court

LC No. 05-002229-FC

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

A jury convicted defendant of third-degree criminal sexual conduct, MCL 750.520d(1)(a), and the trial court sentenced him as an habitual offender, third offense, MCL 769.12, to a prison term of 19 to 30 years. In a prior appeal, our Supreme Court vacated defendant's sentence and remanded for resentencing because the parties had incorrectly informed the trial court that the sentencing guidelines range was 99 to 240 months when the correct range was actually 87 to 217 months. *People v Malone*, 479 Mich 858; 735 NW2d 270 (2007). On remand, the trial court again sentenced defendant to a prison term of 19 to 30 years. Defendant appeals as of right, arguing that the trial court failed to state substantial and compelling reasons to justify its departure from the sentencing guidelines range. We vacate defendant's sentence and remand for resentencing. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The trial court's scoring of the sentencing guidelines placed defendant in the E-V cell of the applicable sentencing grid, for which the minimum sentence range is 87 to 217 months for a third habitual offender. At defendant's original sentencing, the trial court exceeded the guidelines range without stating substantial and compelling reasons for a departure, apparently because the parties had misrepresented the guidelines range to be 99 to 240 months. Defendant was resentenced by a different judge, who imposed the same sentence of 19 to 30 years but acknowledged that the sentence was a departure from the appropriate guidelines range. The principal reasons given for the departure were defendant's seven previous convictions, his 11 misconduct citations in prison, and his "extreme danger to the public." The court also referred to the need to give deference to the determination of the original sentencing judge and to the description of defendant's conduct given by the victim's family at the original sentencing hearing.

A court must impose a minimum sentence within the sentencing guidelines range unless a departure from the guidelines is permitted. MCL 769.34(2). A court may depart from the guidelines if it “has a substantial and compelling reason for that departure and states on the record the reasons for departure.” MCL 769.34(3). The court may depart from the guidelines for nondiscriminatory reasons where there are legitimate factors not considered by the guidelines or where factors considered by the guidelines 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 ranges 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 257-258. 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).

Once the court has a valid basis for departing from the guidelines, it must articulate those reasons on the record and explain why those reasons justify the particular departure chosen by the court. *Babcock*, *supra* at 272; *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001). In other words, when the trial court departs from the guidelines, it “must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been.” *People v Smith*, 482 Mich 292, 304; 754 NW2d 284 (2008).

“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.” *Id.* at 300 (footnotes omitted).

The trial court erred in paying deference to its predecessor’s sentencing decision, which was based on an incorrect minimum sentence range. Further, once defendant’s original sentence was vacated and the case remanded, the case stood in a “presentence posture,” *People v Ezell*, 446 Mich 869; 522 NW2d 632 (1994), and it was as if defendant were being sentenced for the first time.

The trial court also erred in relying on the family’s description of defendant’s conduct. According to the trial court, the family indicated that if defendant had sexually assaulted but not killed the victim, “then he abandoned her in a place where she would be vulnerable to someone coming to kill her and that would have been something that put her in dire jeopardy.” However, there is no objective, verifiable evidence in the record that defendant abandoned the victim in a place where she was vulnerable to attack. It is simply unknown how the victim came to be killed or how she ended up in the abandoned house, and it is unknown whether defendant had any

contact with the victim between the time he allegedly last saw her on April 1 and the time she was killed.

The court partially erred in finding that defendant's "seven previous convictions are not reflected in the guidelines." Defendant's criminal record is objective and verified by the presentence report. It shows that defendant has a total of seven convictions, including the instant offense and two subsequent offenses. Therefore, he had only four previous convictions. Further, PRV 3, MCL 777.53, and PRV 7, MCL 777.57, were scored to reflect the actual number of defendant's prior juvenile adjudications and subsequent convictions, and the trial court did not explain why the scoring of these variables were not given adequate weight by the guidelines.

The trial court did not err in finding that defendant's behavior in prison was a substantial and compelling reason for departure. Defendant's prison record is objective and was apparently verified by the "misconduct report" referenced by the court. It is not accounted for by the guidelines, which consider only the defendant's prior record and the circumstances surrounding the sentencing offense, and is something that is properly considered by the court in deviating from the guidelines. *People v Thomas*, 263 Mich App 70, 79; 687 NW2d 598 (2004); *People v Watkins*, 209 Mich App 1, 6; 530 NW2d 111 (1995).

Finally, the trial court erred in departing from the guidelines on the ground that defendant poses a danger to the community. Such a general conclusion, if not based on specific objective circumstances unique to the defendant, is not an objective and verifiable factor and thus is not a valid basis for a departure. *People v Solmonson*, 261 Mich App 657, 670; 683 NW2d 761 (2004).

Given the number of inappropriate reasons cited by the trial court, we are unable to conclude that the court would have departed from the guidelines to the same extent had it considered only those objective and verifiable factors not considered by or given inadequate weight by the guidelines. Consequently, we must remand for resentencing. *Babcock, supra* at 271.

The judgment of sentence is vacated and the case is remanded for resentencing. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher  
/s/ E. Thomas Fitzgerald  
/s/ Kurtis T. Wilder