

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LEVI J. DOOLITTLE,

Defendant-Appellee.

UNPUBLISHED

September 28, 2010

No. 292423

Isabella Circuit Court

LC No. 08-001705-FC

Before: MURPHY, C.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Defendant entered a plea of nolo contendere to assault with intent to do great bodily harm less than murder, MCL 750.84, for an incident in which he beat and choked his live-in girlfriend. The plea was tendered pursuant to an agreement in which other charges were dismissed, the minimum sentence range would be 19 to 38 months, and the minimum sentence, per the prosecutor's statement, would be capped at 27 months. The trial court departed downward from the guidelines, sentencing defendant to five years' probation with a number of conditions intended to rehabilitate him. Defendant was also sentenced to one year in jail with credit for 256 days served. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

A court may depart from the sentencing guidelines range if it has substantial and compelling reasons to do so and it states on the record the reasons for the departure. MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination subject to review for clear error, the determination that the factor is objective and verifiable is reviewed de novo, and the determination that a factor constituted a substantial and compelling reason for departure is reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). "Objective and verifiable" means "that the facts to be considered by the court must be 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). "Substantial and compelling" reasons must be exceptional circumstances. *Babcock*, 469 Mich at 257-258. In ascertaining whether the departure was proper, this Court must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Id.* at 270.

The trial court cited a number of bases for its departure, the primary one being “to make sure that the community, community members, including [the victim] are safe,” and its concern that putting defendant in prison for a few years would have no effect at all on his long-term rehabilitation. Indeed, although the trial court listed several factors that superficially appear to have been independent reasons for its departure, a closer analysis shows that they were simply intended to support the *real* reason for the departure. The trial court indicated that it was “concerned about how to get services to [defendant]” and that his guidelines sentence would more-or-less ensure that he would *not* receive the services necessary to keep the community safe. In the court’s view, the only way to ensure that the victim and the community would be safe from defendant is if defendant could be rehabilitated, which could not be accomplished with a prison sentence. The trial court took judicial notice of the fact that the rehabilitation, mental health, and substance abuse services available in the community were both more available and better than the ones available through the Department of Corrections.

Nonetheless, some¹ of the trial court’s other stated reasons could stand alone.

Defendant’s mental health and substance abuse history were independently documented for the court, and furthermore, the court may draw inferences about the defendant’s behavior from objective evidence. *People v Petri*, 279 Mich App 407, 422; 760 NW2d 882 (2008). We find these to be objective and verifiable considerations. While the cold record available to us does not irresistibly or keenly suggest to *us* that defendant’s mental health and substance abuse problems are substantial and compelling, we do not find an abuse of discretion in the trial court so finding. Something this personal to a defendant would inherently be something the trial court is in a vastly superior position to observe and evaluate, and there was some discussion on the record about how defendant’s medical records are “alarming,” and that he was on suicide watch for some time. The trial court’s finding was not an abuse of its discretion.

While characterizing any two individuals’ relationship with each other might have some inherently subjective elements, the fact that the relationship between defendant and the victim here was dysfunctional is objectively obvious simply from the level of violence involved. The prosecution properly points out that this should not mitigate defendant’s fault in any way, but some of the letters included in the PSIR suggest that the trial court’s reasoning was that defendant’s problems were context-specific. This supports the trial court’s conclusion that if defendant wound up back in the same situation after being released from incarceration, the same pattern would re-emerge. Finding the need to interrupt the pattern and change it to be substantial and compelling does not seem to us an abuse of the trial court’s discretion.

But as noted, it is clear to us that the trial court’s real concern was ensuring to the maximum extent possible that defendant would be a “changed man” after completing whatever sentence was imposed. Thus, it is also clear that the trial court would have departed from the sentencing guidelines solely on the basis of its finding that better and more readily available

¹ The trial court listed defendant’s lack of any prior criminal convictions, but noted that this was “covered by the guidelines,” and apparently was given neither inadequate nor disproportionate weight, which precludes its consideration for sentencing departure purposes. MCL 769.34(3)(b).

rehabilitation services would be available to—and required of—defendant under the departure. We find the trial court’s decision proper.

Whether a given rehabilitation program is available—theoretically or effectively—to a particular person in a particular situation is objective and verifiable. Whether any programs are superior to other programs could be based on subjective criteria, but it could also be based on objective and verifiable criteria, such as post-completion recidivism rates or other independent analysis. The trial court unambiguously was not basing its decision on a matter of personal taste or whether it “liked” the community programs more, or whether it had some “gut feeling” that a program might suit defendant better, but rather on objective factors like whether defendant could get into a rehabilitation program *at all* and whether, if defendant was enrolled, any particular program had a historically higher rate of successfully rehabilitating its enrollees. Whether the community programs actually *are* better, *whether* they are more available and *whether* they are superior “are external to the minds of the judge, defendant, and others involved in making the decision, and [are] capable of being confirmed.” *Abramski*, 257 Mich App at 74.

The reason why the trial court found substantial and compelling the better availability and quality of services in the community was because it concluded that the only way the community and the victim would, in the long run, be safe from defendant is if defendant was rehabilitated, not merely punished. As we have discussed, the trial court is in the vastly superior position to observe and evaluate not only the defendant, but the victim, the context, the community, and anyone else who might have an effect on or be affected by its sentencing decision. Here, the record amply supports the trial court’s conclusion that the defendant was a fairly context-specific danger, that he would not change if he was sentenced to prison, and that he was actually working on improving himself. We conclude that in an appropriate case it is within the trial court’s discretion and power to depart from a sentencing guidelines range and impose probation with conditions in order to rehabilitate a defendant. The trial court was clearly impressed that the defendant would continue to pose a danger unless rehabilitated, and the most effective way to do that was the sentence it imposed. We do not believe it was an abuse of discretion for the trial court to find that a substantial and compelling reason for its departure.

Affirmed.

/s/ William B. Murphy
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens