STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED November 16, 2010
v	No. 293926 Tuscola Circuit Court
JIMMIE RAY ROGERS, JR., Defendant-Appellee/Cross-Appellant.	LC No. 09-011196-FH

Before: BECKERING, P.J., and JANSEN and TALBOT, JJ.

PER CURIAM.

Defendant pleaded guilty to operating a motor vehicle while intoxicated, third offense, MCL 257.625, and admitted three prior felony convictions for enhancement purposes. The trial court sentenced defendant, as a fourth habitual offender, MCL 769.12, to five years of probation and 365 days of incarceration. Of the 365 days, the court ordered 180 days deferred, 90 days of residential treatment, and 90 days on an alcohol tether. Defendant's sentence was to be served consecutive to the sentence he was on parole for at the time of the instant offense. The prosecution appeals by delayed leave granted[1] the court's decision to depart downward from the applicable sentencing guidelines range. On cross-appeal, defendant challenges the scoring of offense variable (OV) 9 at 25 points and raises a claim of ineffective assistance of counsel. We vacate the sentence imposed by the trial court and remand for further proceedings consistent with this opinion.

[1] The prosecution filed a claim of appeal in this Court, and defendant filed a motion to dismiss the claim on the basis that neither party had an appeal as of right from a sentence following a guilty plea. A panel of this Court denied the motion to dismiss, and, on its own motion, ordered that the prosecution's claim of appeal be treated as a delayed application for leave to appeal, which the panel granted. *People v Rogers*, unpublished order of the Court of Appeals, entered December 22, 2009 (Docket No. 293926).

I. FACTS AND PROCEDURAL HISTORY

According to defendant's presentence investigation report (PSIR) and a sentencing memorandum prepared by the prosecution, on the evening of April 18, 2009, two police officers were in a vehicle on patrol in the village of Caro, Michigan. At approximately 11:28 p.m., the officers received a "be on the lookout" (BOL) for a pick-up truck traveling northbound on M-24. The truck was reported to be "all over the roadway" and running other vehicles off the road. The officers responded to the BOL and observed the truck traveling all over, from the curb to the center lane. They followed the truck west and then north in Caro, and, at some point, clocked the truck traveling 50 to 55 mph in a 30 mph zone. The officers activated their overhead lights and were eventually able to make a traffic stop. Defendant was the driver and only occupant of the truck. He appeared intoxicated, admitted having "too much" to drink, and there was an open container of alcohol in the truck. The officers arrested defendant for drunk driving. A blood test subsequently revealed that his blood alcohol level was .27 percent.

Defendant was ultimately charged with six alcohol and driving related offenses.[2] He subsequently pleaded guilty to operating a motor vehicle while intoxicated, third offense, and admitted three prior felony convictions for enhancement purposes. The prosecution agreed to dismiss the remaining charges. The parties further agreed to a minimum sentence of 19 to 76 months, pursuant to the sentencing guidelines, and a reduced maximum sentence of 20 years.[3] At sentencing, the trial court departed downward from the applicable sentencing guidelines range and sentenced defendant to five years of probation and 365 days of incarceration, as described.

After the prosecution filed its claim of appeal, defendant filed a claim of cross-appeal in this Court and a motion for resentencing in the trial court. In his motion for resentencing, defendant argued that the trial court erred in scoring OV 9 at 25 points. Defendant also argued that his trial counsel was ineffective for failing to object to the scoring. The trial court entertained arguments by both parties and held an evidentiary hearing on the issue of ineffective assistance of counsel. Thereafter, the court issued an opinion and order holding that OV 9 was properly scored and that defendant's trial counsel was not ineffective for failing to object to the score.

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[2] The offenses included: operating a motor vehicle while intoxicated, third offense; operating a motor vehicle with license suspended, revoked, or denied, MCL 257.904; unlawful use of a license plate, MCL 257.256; transportation or possession of an open container of alcohol in a motor vehicle, MCL 257.624a; operating an unregistered vehicle, MCL 257.215; and operating a motor vehicle without security, MCL 500.3102.

[3] At the plea proceeding, defense counsel stated: "Your Honor, he's going to plead Count I with three prior felonies. . . . Remaining counts to be dismissed. The minimum is 19 to 76 months. The maximum is 20 years." The trial court then asked defendant: "Has anybody told you what I would actually sentence you to other than the sentence bargain with a range reduction of the max to 20 years and a minimum under the guidelines of 19 to 76?" The defendant responded: "No, sir."

II. ANALYSIS

At the plea proceeding, defendant advised the trial court that he had entered into a plea agreement with the prosecution. The agreement provided that defendant would be sentenced under the guidelines to a minimum of "19 to 76 months." At sentencing, however, the trial court departed downward from the range agreed to by the parties. In *People v Siebert*, 450 Mich 500, 504; 537 NW2d 891 (1995), our Supreme Court held "that a court may not accept a plea bargain containing a sentence agreement but impose a lower sentence than that agreed to. Because such action trespasses on the prosecutor's charging authority, the people must be given an opportunity to withdraw from the agreement." The prosecution "is entitled to learn that the judge does not intend to impose the agreed-upon sentence, to be advised regarding what the sentence would be, and given an opportunity to withdraw from the plea agreement." *Id*. at 510. Further, "[n]othing precludes the parties from reaching a new agreement or from convincing the judge to impose a sentence that will satisfy the prosecutor and the defendant." *Id*. at 516. In this case, there is no indication in the record that the prosecution was afforded the opportunity to withdraw from the plea agreement or renegotiate the agreement in light of the trial court's decision to downwardly depart. Accordingly, we remand this case for the prosecution to be afforded such an opportunity.

Given our decision to remand on this issue, we need not address the parties' claims on appeal at this time, as they may become moot. Considering, however, that the prosecution may decline to withdraw from or renegotiate the plea agreement, we will address the parties' appellate claims for the sake of judicial economy.

A. THE TRIAL COURT'S DOWNWARD DEPARTURE

On appeal, the prosecution argues that the trial court abused its discretion in departing downward from the applicable sentencing guidelines range. A trial court may depart from the guidelines range if it has a substantial and compelling reason to do so, and it states on the record the reasons for departure. MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). "Substantial and compelling reasons for departure exist only in exceptional cases." *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). Factors meriting departure must justify the particular departure made, must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth. *Id*. at 299, 303. To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *People v Horn*, 279 Mich App 31, 43; 755 NW2d 212 (2008). A departure from the guidelines range must render the sentence proportionate to the seriousness of the defendant's conduct, his prior criminal history, and any other relevant characteristics of the defendant. *Smith*, 482 Mich at 300, 318.

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 as a matter of law, the determination that the factor constituted a substantial and compelling reason for departure is reviewed for an abuse of discretion, and the amount of the departure is reviewed for an abuse of discretion. *Id*. at 300. An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Id*. In ascertaining whether the departure was proper, we must defer to the trial

court's direct knowledge of the facts and familiarity with the defendant. *People v Babcock*, 469 Mich 247, 270; 666 NW2d 231 (2003).

In this case, the trial court judge indicated that he was departing downward from the guidelines range because although defendant is a "menace to society" when he is driving drunk, "as far as I can tell, no meaningful treatment has ever been given to you [defendant] to get you in control of your alcoholism and your life," "I every once in awhile run into an individual that I see eye to eye with and they recognize that they have a problem and they want to do it and they need the help," and "the Legislature is living in a dream world in the state of Michigan" in that the court "is looking at wholesale release of people from prison . . . that really ought to stay in prison because they truly are rapists, murderers, burglars, CSCers and they haven't done anything about their life as far as altering, changing, amending their behavior," whereas "you have save one problem. That's alcohol. We're going to work with you to eliminate your need and desire to consume alcohol."

Taking all of the trial court's statements at sentencing together, it appears the court believed that while defendant posed a danger to himself and the public as a drunk driver, his alcoholism differentiated him from those who "belong" in prison, defendant sincerely desired to break his alcohol addiction, and he would not be provided the treatment necessary to achieve that goal if he were merely incarcerated and rather quickly released. Accordingly, the court sentenced defendant to five years of probation and 365 days of incarceration, with 180 days deferred, 90 days of residential treatment, and 90 days on an alcohol tether. Some of the factors relied on by the court, however, were clearly not objective and verifiable or "external to the mind" of the trial court judge, see *Horn*, 279 Mich App at 43, particularly the court's statements that he could "see eye to eye" with defendant regarding defendant's subjective desire to change and that the Legislature was "living in a dream world" in the "wholesale release" of prisoners who belong in prison due to the type of criminal they are and the fact that they have done nothing to change their behavior. On the other hand, some of the factors relied on by the court were objective and verifiable and a court may draw inferences from objective evidence. See *People v Petri*, 279 Mich App 407, 422; 760 NW2d 882 (2008). Defendant's history of substance abuse and treatment was included in his PSIR. The PSIR stated that defendant had abused alcohol since 1970, and since that time, he had attended Alcoholics Anonymous "off and on." In 1996, he participated in, but did not complete, intensive outpatient treatment, and in 2000, he completed a one-month residential treatment. The court's conclusion that defendant had not been provided with sufficient, meaningful treatment was based, at least in part, on this evidence. The treatments available to defendant if he were incarcerated were also objective and verifiable.

Considering only the objective and verifiable factors identified by the trial court, it is unclear whether the court would have found them to be substantial and compelling enough to qualify this case as one of the "exceptional cases" that justifies a downward departure. Given

defendant's extensive drunk driving record,[4] the fact that he was on parole for operating a motor vehicle while intoxicated, third offense, at the time of the instant offense, and that he could have sought out more intense substance abuse treatment on his own if he was sincerely committed to breaking his alcohol addiction, we cannot be certain that the objective and verifiable factors identified by the trial court would have, standing alone, so keenly attracted its attention as to warrant downward departure. See *Smith*, 482 Mich at 299. As noted, a departure from the guidelines range must render the sentence proportionate to the seriousness of the defendant's conduct, his prior criminal history, and any other relevant characteristics of the defendant. *Id*. at 300, 318.

Assuming that this issue does not become moot as a result of the prosecution's decision to withdraw or renegotiate the plea agreement between the parties, the trial court must reconsider its decision to depart below the applicable sentencing guidelines range. If the court determines that downward departure is warranted, it must articulate substantial and compelling reasons for the departure. See MCL 769.34(3); *Buehler*, 477 Mich at 24. The cited reasons for departure must be objective and verifiable, keenly attract the court's attention, be of considerable worth, and justify the particular departure made. *Smith*, 482 Mich at 299, 303.

B. THE SCORING OF OV 9

On cross-appeal, defendant argues that the trial court erred in scoring OV 9 at 25 points. We agree, as the evidence of record only supports a score of ten points.[5]

Defendant first raised this issue in his motion for resentencing, which the trial court denied. We review a trial court's denial of a motion for resentencing for an abuse of discretion. *People v Puckett*, 178 Mich App 224, 227; 443 NW2d 470 (1989). We review a trial court's scoring decision "to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). "Scoring decisions for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). Evidence that may be considered by a sentencing court includes, but is not limited to, the contents of a PSIR and admissions made by a defendant during a plea proceeding. *People v*

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[4] According to defendant's driving record, which was included in his PSIR, and the criminal history in his PSIR, between 1983 and 2005, he was convicted of impaired driving once, operating while intoxicated seven times, and operating while intoxicated, third offense, three times.

[5] It is arguable that because the parties agreed to sentence defendant within the guidelines to "19 to 76 months," defendant cannot now challenge the scoring of OV 9. The prosecution has not asserted on appeal, however, that defendant is precluded from raising a scoring challenge. In fact, defendant challenged the scoring of more than one prior record variable (PRV) at sentencing and challenged the scoring of OV 9 in his motion for resentencing without any objection from the prosecution that he was precluded from raising a scoring challenge.

Althoff, 280 Mich App 524, 541; 760 NW2d 764 (2008). Any findings of fact made by a trial court at sentencing are reviewed for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

A trial court should score 25 points for OV 9 if "10 or more victims . . . were placed in danger of physical injury or death[.]" MCL 777.39(1)(b). Ten points should be scored if "2 to 9 victims . . . were placed in danger of physical injury or death," and zero points should be scored if "fewer than 2 victims . . . were placed in danger of physical injury or death." MCL 777.39(1)(c), (d). Each person placed in danger must be counted as a victim. MCL 777.39(2)(a). Defendant argues that there was no evidence establishing that any identifiable person, let alone ten or more identifiable people, was placed in any actual danger by his conduct. Thus, according to defendant, OV 9 should have been scored at zero points. The prosecution argues that OV 9 was properly scored at 25 points because every person on the road at the time of defendant's drunk driving was placed in danger of physical injury or death "by the very nature of . . . defendant's conduct and the person's proximity to the danger."[6]

Defendant's PSIR states that his blood alcohol level was .27 percent. At approximately 11:28 p.m., defendant's truck was reported to be "all over the roadway." The two police officers who responded to the BOL observed the truck traveling all over, from the curb to the center lane, and, at some point, clocked the truck traveling 50 to 55 mph in a 30 mph zone. There is no indication in the PSIR, or elsewhere in the record, of how many other vehicles or pedestrians, if any, were on or near the roadway. The prosecution emphasizes that defendant's truck was also reported to be running other vehicles off of the road, although it does not specify how many "other vehicles" there were, or how many people were in those alleged vehicles. Defendant argues that this fact should not be considered in the scoring of OV 9, and we agree. There is no record evidence that defendant ran other vehicles off of the road. The prosecution points to its

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[6] The prosecution acknowledges that it could find no cases that directly support its position and analogizes this case to *People v Laidlaw*, unpublished opinion per curiam of the Court of Appeals, issued August 6, 2009 (Docket Nos. 281867, 281868), and *People v Stallworth*, unpublished opinion per curiam of the Court of Appeals, issued February 8, 2007 (Docket No. 266833). As defendant points out, however, both of these cases involved multiple, clearly identifiable people who were placed in danger of physical injury or death. In *Laidlaw*, defendant Paul Chester Gagnier was convicted of bank robbery. The trial court scored OV 9 at ten points because each person in the bank at the time of the robbery was placed in danger and there were at least two people, in addition to the defendant, present in the bank. In *Stallworth*, the defendant was convicted of armed robbery, among other offenses. OV 9 was scored at 25 points because "there were five victims inside the store that was robbed, at least three police officers were directly involved in the police chase that led to [the] defendant's apprehension, and numerous other civilians were also placed in danger of injury during the police chase and resulting crash." Although this Court did not state the exact number of "other civilians" placed in danger, there were at least two such civilians, bringing the total number of people placed in danger to at least ten.

sentencing memorandum as such record evidence, but sentencing memoranda merely represent a party's arguments regarding the sentence that should be imposed. The prosecution has not presented any authority indicating that statements made in a sentencing memorandum constitute evidence that may be used to support a scoring decision, and a party may not leave it to this Court to search for authority in support of its position. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

We agree with the prosecution, and the trial court's findings on this issue, that any person in or near defendant's path was likely placed in danger, considering his level of intoxication, erratic swerving in the roadway, and speed. However, we must guard against an overly broad application of OV 9. The plain language of MCL 777.39(1) requires that a specific number of persons be placed in danger to warrant the scoring of points for OV 9. Here, there is at least some record evidence that two people—the two police officers who eventually stopped defendant—were placed in danger by his conduct. It is not unreasonable to conclude that had defendant's truck suddenly changed speeds or swerved, crashed, or otherwise stopped, the officers attempting to conduct a traffic stop might have been forced to suddenly stop, swerve, or crash themselves, potentially causing them injury. That said, however, there is no record evidence indicating how many additional people, if any, were in or near defendant's path at the time of his drunk driving.[7] Merely assuming that at least eight more people were placed in danger by defendant's conduct is improper. Therefore, if the prosecution does not withdraw or renegotiate the plea agreement between the parties, OV 9 must be rescored at ten points. Rescoring this variable would result in the guidelines range being reduced to 14 to 58 months. See MCL 777.66. The sentence imposed by the trial court would still have constituted a downward departure. Nonetheless, assuming the prosecution does not withdraw or renegotiate the plea agreement, the court should consider the altered sentencing range in determining whether it would impose the same sentence. See *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).[8]

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[7] Even if we were to consider the information in the sentencing memorandum prepared by the prosecution as record evidence, the memorandum only states that defendant's truck was "running vehicles off the road." The memorandum does not specify how many "other vehicles" there were, or how many people were in them. It could be safely assumed that there were at least two vehicles run off of the road and that there was at least one person in each vehicle, bringing the total number of people placed in danger to four, i.e., the two police officers and the two people driving the two vehicles run off of the road.

[8] Our finding that OV 9 should be scored at ten points renders it unnecessary to address defendant's ineffective assistance of counsel claim.

We vacate defendant's sentence and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Kathleen Jansen