

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant/Cross-Appellee,

v

JIMMIE RAY ROGERS, JR.,

Defendant-Appellee/Cross-
Appellant.

UNPUBLISHED

November 16, 2010

No. 293926

Tuscola Circuit Court

LC No. 09-011196-FH

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

TALBOT, J. (*concurring in part, dissenting in part*).

While I concur in the result, I write separately because I do not believe there is any justification for the trial court's downward departure from the sentencing guidelines.

A trial court may only depart from the sentencing guidelines for substantial and compelling reasons that are explained on the record.¹ Further, a trial court's reasons for departing from the guidelines must be objective and verifiable.² "They must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention."³ Factors deemed to be objective and verifiable include: (a) "mitigating circumstances surrounding the offense," (b) "the defendant's prior record," (c) "the defendant's age," and (d) "the defendant's work history."⁴ "[I]f it is unclear why the trial court made a particular departure, an appellate court cannot substitute its own judgment about why the departure was justified."⁵ "A sentence cannot be upheld when the connection between the

¹ MCL 769.34(2), (3); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

² *Id.*

³ *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008).

⁴ *People v Daniel*, 462 Mich 1, 7; 609 NW2d 557 (2000).

⁵ *Smith*, 482 Mich at 304.

reasons given for departure and the extent of the departure is unclear.”⁶ When discussing a departure, “the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been.”⁷ The “principle of proportionality” is the standard by which a particular departure is to be evaluated.⁸ Proportionality is deemed to exist when, “everything else being equal, the more egregious the offense, and the more recidivist the criminal, the greater the punishment.”⁹

I agree with the majority opinion that the trial court’s references to the Legislature and Rogers’ alleged subjective desire to overcome his alcohol addiction when explaining its decision to impose a downward departure are neither objective nor verifiable and, therefore, cannot support the sentence imposed. While Rogers’ history of alcohol abuse and failed treatment are objective and verifiable, I fail to comprehend how they could serve to substantiate a downward rather than an upward departure from the guidelines.

Rogers has abused alcohol for 40 years. He has attended or participated in a variety programs, inpatient and outpatient, but has received no discernible benefit as shown by his extensive record of arrests for drunk driving. If anything, these objective and verifiable factors indicate a reduced potential for rehabilitation and that Rogers’ best hope for treatment is an extended incarceration where he has no alternative but to remain sober and cannot present a risk of harm or continue to be a “menace to society” as recognized by the judge at sentencing. The trial court’s decision for a downward departure is contradictory and inexplicably serves to negate Rogers’ objective and verifiable history of recidivism for committing alcohol related offenses and violates the principle of proportionality. Further, the trial court’s belief that Rogers’ could be successful in overcoming his addiction to alcohol if provided the proper treatment is completely subjective and not based on any objective or verifiable evidence. Rogers’ obvious and long-standing problem with alcohol does not comprise a particularly compelling reason to justify the imposition of a sentence below the guidelines nor a condition that exists only in exceptional cases. I would find the trial court’s explanation of its reasoning failed to support a downward sentencing departure and, on remand, would recommend reassignment to an alternative judge given the stated predisposition of the trial judge in this matter.

/s/ Michael J. Talbot

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 299-300.

⁹ *People v Babcock*, 469 Mich 247, 263; 666 NW2d 231 (2003).