

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LORIE ANN STUER,

Defendant-Appellant.

UNPUBLISHED

July 22, 2021

No. 354464

Isabella Circuit Court

LC No. 2019-000596-FH

Before: FORT HOOD, P.J., and MARKEY and GLEICHER, JJ.

GLEICHER, J. (*dissenting*)

Lorie Ann Stuer pleaded guilty to financial crimes arising from her use of false billings to bilk Bandit Industries, Inc. out of more than three million dollars. Over seven years, Stuer submitted fraudulent bills to Bandit for her husband’s trucking services. Stuer used a substantial portion of the money to keep her husband’s trucking business solvent and spent the rest on luxury items. The question presented is whether Stuer’s departure sentence is reasonable.

The minimum sentencing guidelines range for the most serious of the crimes to which Stuer pleaded guilty—using false pretenses to obtain \$100,000 or more, MCL 750.218(7)(a)—is 36 to 60 months (three to five years). The court almost doubled the top end of that range, imposing a nine-year minimum sentence. According to the court, several reasons justified this substantial departure: the size of the sum involved, Stuer’s “abuse” of Bandit’s trust, “deterrence,” and the court’s finding that Stuer “harmed” people “in our community” who work at Bandit. The court emphasized:

That company is a [sic] advantageous company to have in our community, they help a lot of people. They give people good jobs, and your conduct really threw a monkey wrench into their operation and I hope that the company will thrive going into the future because we want our people working with good jobs. But your conduct sure made that a lot harder.

I would vacate Stuer’s departure sentence and remand for resentencing. The court abused its discretion by violating the principle of proportionality set forth in *People v Milbourn*, 435 Mich

630, 461 NW2d 1 (1990), and by relying on a “harm to the community” rationale for supporting the departure.

I. PROPORTIONALITY

The statutory sentencing guidelines are “a useful tool” in selecting a proportionate sentence, as they “embody the principle of proportionality.” *People v Dixon-Bey*, 321 Mich App 490, 524; 909 NW2d 458 (2017) (quotation marks and citation omitted). In determining whether a departure sentence is more proportionate than a guidelines sentence, relevant considerations include: “(1) whether the guidelines accurately reflect the seriousness of the crime, (2) factors not considered by the guidelines, and (3) factors considered by the guidelines but given inadequate weight.” *Id.* at 525 (citations omitted). “[D]epartures from the guidelines, unsupported by reasons not adequately reflected in the guidelines variables, should . . . alert the appellate court to the possibility of a misclassification of the seriousness of a given crime by a given offender and a misuse of the . . . sentencing scheme.” *Milbourn*, 435 Mich at 659. The Court explained:

Where there is a departure from the sentencing guidelines, an appellate court's first inquiry should be whether the case involves circumstances that are not adequately embodied within the variables used to score the guidelines. A departure from the recommended range in the absence of factors not adequately reflected in the guidelines should alert the appellate court to the possibility that the trial court has violated the principle of proportionality and thus abused its sentencing discretion. Even where some departure appears to be appropriate, the extent of the departure (rather than the fact of the departure itself) may embody a violation of the principle of proportionality. [*Id.* at 659-660.]

OV 16 assigns a maximum of 10 points when the property involved in a crime in the same class as Stuer's has a value of more than \$20,000. MCL 777.46(1)(d). Five points are scored for property crimes in which the property is valued at more than \$1,000, but less than \$20,000. MCL 777.46(1)(e). I agree that OV 16 inadequately weights the magnitude of Stuer's theft, and that a property crime involving far more than \$20,000 could support a departure. Yet it is important to bear in mind in making a departure assessment that the Legislature selected \$20,000 as the high-end for this relevant variable, despite that crimes against property involving vastly larger sums are not uncommon.¹ Under the federal sentencing system, the offense level for a crime such as Stuer's is increased according to a graduated system. If a loss exceeds \$3,500,000, the court adds 18 levels. See United States Sentencing Guidelines, § 2.B1.1(b)(1)(J). Our Legislature did not adopt that approach and has not increased the guideline thresholds since their establishment in 1999.

While a departure based on the amount of money involved is justifiable, the court failed to explain how or why it selected a departure of four years, almost doubling Stuer's maximum

¹ In a different case involving another large sum obtained under false pretenses (more than \$600,000), the defendant was sentenced to a 60-day jail term that was held in abeyance pending successful completion of 5 years' probation. *People v Lee*, 314 Mich App 266, 270-271; 886 NW2d 185 (2016).

guidelines' sentence, other than to explain that because the maximum sentence for the offense is 20 years, the longest permissible minimum would be between 12 and 13 years under the two-thirds rule. See *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972). But why is an enhancement of 80% more proportionate than an additional two years of incarceration? The trial court did not say.

Using the guidelines as a point of reference further illustrates the arbitrariness of Stuer's sentence. The highest number of points that can be scored under OV 16 is 25. That score applies to a conviction under MCL 750.50, which relates to the cruel and inhumane treatment of animals.² Assuming hypothetically that Stuer could have been assessed 25 points under OV 16, her total offense variable score would increase by 15, moving her from OV level III to OV level IV and resulting in a revised minimum sentence of 45 to 75 months—still a far cry from 9 years. Indeed, with Stuer's PRV score of 20 and with maxed-out OV scores, the sentencing grid for a first-time offender convicted of a property crime tops out at 57 to 95 months (4.75 to 7.91 years).

II. "HARM TO THE COMMUNITY"

William Zehnder, Bandit's controller, addressed the court during Stuer's sentencing hearing. Zehnder described the hours of paperwork required after Stuer's fraud was discovered and that the company had to reassure its lenders and employees that Bandit remained financially sound. Stuer's crime came as a "shock," Zehnder added, because the company had always operated "like a big family," even with its vendors. Zehnder did not mention that Stuer's crime caused any specific financial harm to the workers. The trial judge inquired, "I had the impression that for instance like the last year employees didn't get a bonus because of this, is that true?" Zehnder replied, "No, . . . we were able to give them a bonus," but agreed with the court that it was "less" than it would have been absent the fraud. Zehnder offered no additional information.

Predicating an enhanced sentence on a court's determination of generalized "harm to the community" is a potentially dangerous and misguided proposition. A proportionate sentence focuses on the specific offender and the specific offense. Many crimes harm other people (and those effects are usually subsumed within the guidelines), and most crimes harm our communities directly or indirectly. But community reaction to a crime is not an objective benchmark of the nature of the offense or the character of the offender. Our system of justice is designed to shield the process of passing sentence from the anger, fear, or prejudices of the community. By requiring judges to begin every sentencing analysis with the guidelines, we encourage a punishment decision driven by rules, general parity, and evidence rather than passions. The community's condemnation is subsumed in the legislative sentencing guidelines and the maximum sentences prescribed by statute. Enhancing punishment based on a judge's estimation of the magnitude of a community's "harm" is an invitation to sentencing inequity.

² If the property involved was 25 or more animals, 25 points must be scored under OV 16. MCL 777.46(1)(a).

III. CONCLUSION

While I agree that the facts of this case justify a departure, the trial court inadequately explained why an additional 4 years' imprisonment was proportionate to the offense and the offender. Because the sentence imposed bears no relationship to the guidelines and was partially based on an improper criterion, I would deem it unreasonable and would remand for resentencing.

/s/ Elizabeth L. Gleicher