

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
July 7, 2011

v

RICHARD JAMES FARRELL,  
Defendant-Appellant.

No. 297318  
Oakland Circuit Court  
LC No. 2006-206284-FH

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Before: METER, P.J., and CAVANAGH and SERVITTO, JJ.

PER CURIAM.

After a second resentencing, defendant again appeals by right the sentence imposed on his jury conviction of manslaughter with a motor vehicle, MCL 750.321. He was resentenced to 84 months to 22½ years in prison, which is a departure from the scored guidelines of 29 to 71 months. We affirm.

Defendant argues that on resentencing, the sentencing court again relied on inappropriate factors to justify its departure sentence. We disagree.

On appeal, courts review the reasons given for a [sentence] 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. [*People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008) (citations omitted).]

A trial court must impose a minimum sentence within the sentencing guidelines range unless there are substantial and compelling reasons for a departure and the court states those reasons on the record. MCL 769.34(3); *People v Lowery*, 258 Mich App 167, 170; 673 NW2d 107 (2003). To be “substantial and compelling,” a reason must be both objective and verifiable. *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003). Additionally, the reason must “keenly” or “irresistibly” grab a court’s attention and be of “considerable worth” in deciding the length of a sentence. *Id.* A trial court may not base its departure on an offense characteristic that was already taken into account in calculating the appropriate guidelines range unless it finds that the characteristic has been given inadequate or disproportionate weight. MCL 769.34(3)(b).

The offense variables pertaining to defendant's sentencing were scored as follows: OV 3 (physical injury to victim)<sup>1</sup> at 25 points, OV 5 (psychological injury to victim's family member) at 15 points, OV 6 (intent to kill or injure another) at 25 points, OV 9 (number of victims) at 10 points, and OV 19 (defendant interfered with the administration of justice) at 10 points. The trial court then imposed a sentence that departed by 13 months from the sentencing guidelines.

In his first appeal, defendant challenged the scoring of OV 6 and 19 and this Court affirmed those scores. Defendant also challenged his departure sentence, primarily arguing that the factors the trial court considered were already taken into account in the scoring of the offense variables. This Court concluded that defendant's poor driving record, as well as the number of witnesses, including children, to the victim's death were proper factors supporting the trial court's upward departure. However, the court improperly relied on some offense characteristics already taken into account in scoring OV 6; namely, defendant's speed, failure to brake, and familiarity with the route. Thus, the matter was remanded for resentencing or rearticulation of the reasons for departure. *People v Farrell*, unpublished opinion per curiam of the Court of Appeals, issued February 26, 2008 (Docket No. 273907). However, again, the trial court relied on the same invalid three factors and this Court, after defendant's second appeal, remanded the matter to the trial court for resentencing before a different judge. *People v Farrell*, unpublished opinion per curiam of the Court of Appeals, issued November 3, 2009 (Docket No. 288144).

In this, defendant's third appeal, he argues that the sentencing court again failed to articulate substantial and compelling reasons to justify his departure sentence. The rationale for the sentencing court's decision to render the same departure sentence as the initial sentencing judge was as follows:

The court is departing from the guidelines due to the fact that the life of a young child was taken here. In addition to her life being taken there were other children that were put in potential danger of being hurt or harmed due to the defendant's actions.

In addition to that they witnessed this horrific act. The defendant did not appear to slow down, he violated the traffic laws in what he was doing. His traffic record is an example of the fact that he has no regard for the traffic laws of this state and had he slowed down and not attempted to pass I believe that the child in this matter would be alive today. And based upon those factors this court is deviating from the sentencing guidelines.

Thus, the specific factors cited by the sentencing court included: (1) the fact that the victim who was killed was a young child, (2) the other people who were in potential danger because of defendant's actions were also children, (3) witnesses to this "horrific act" were children, and (4) at the time defendant struck the victim, he was violating traffic laws as he had several times in the past, illustrating his lack of regard for the traffic laws in this state which directly led to the victim's death.

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<sup>1</sup> See *People v Houston*, 473 Mich 399, 405-407; 702 NW2d 530 (2005).

First, defendant argues that the sentencing court relied on the same invalid reasons cited twice before—defendant’s speed and failure to brake. However, the court’s statements in that regard were not, as defendant suggests, a third improper attempt to use factors scored under OV 6 as a reason to depart. See *Farrell*, unpub op at 5. Instead, when read in context, this was part of the sentencing court’s analysis of the egregious circumstances of this crime that involved a school bus that had its flashing yellow warning lights activated at the time defendant attempted to pass it by entering into the center lane in violation of the law. The court noted that defendant’s actions were consistent with his prior traffic record which illustrated his lack of regard for traffic laws, and that his disregard for traffic laws directly led to the victim’s death. This is akin to agreeing with the initial sentencing court that defendant’s very poor driving record was an objective and verifiable reason to depart. And the court did not abuse its discretion in concluding that this reason was substantial and compelling enough to justify a departure sentence. See *Smith*, 482 Mich at 300.

Second, defendant argues that the trial court should not have considered “that the life of a young child was taken here” and that other children were put in danger. Defendant claims that the death of a person was already considered in the guidelines and as an element of the offense. And, defendant argues, the fact that other persons were placed in danger was considered in OV 9.

However, neither OV 3 nor MCL 750.321 takes into account the age of the victim who was killed. And OV 9 does not take into account the young ages of the other victims who were placed in danger. Thus, these characteristics were not already taken into consideration in calculating the guidelines. See MCL 769.34(3)(b). Further, age is both objective and verifiable. See *Babcock*, 469 Mich at 257-258. And the young age of all of the victims involved, in light of the egregious circumstances presented, could keenly grab a court’s attention and be of considerable worth in deciding the length of the sentence. See *id.* at 272. Again, a school bus had its flashing yellow warning lights activated at the time defendant entered into the center lane in an attempt to pass the bus in violation of the law, struck the child, and dragged her body 138 feet in front of all of the other children that had been waiting for, and that were on, the bus. The record reflects that the sentencing court clearly considered the offense variables of the guidelines insufficient to account for the “horrific” circumstances presented in this case. We conclude that the sentencing court did not abuse its discretion when it held that substantial and compelling reasons justified the departure sentence rendered in this matter. See *Smith*, 482 Mich at 300.

Affirmed.

/s/ Patrick M. Meter  
/s/ Mark J. Cavanagh  
/s/ Deborah A. Servitto