

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
January 12, 2012

v

GARLAND MALONE, JR., a/k/a GARLAND
ALEXANDER MALONE, JR.,

No. 299873
Wayne Circuit Court
LC No. 05-002229-FC

Defendant-Appellant.

Before: DONOFRIO, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (victim was at least 13 but less than 16 years old). Defendant was originally sentenced to 19 to 30 years' imprisonment as a third habitual offender, MCL 769.11.

Defendant then appealed to this Court. This Court rejected defendant's ineffective assistance of counsel argument and affirmed in a memorandum opinion. *People v Malone*, unpublished memorandum opinion of the Court of Appeals, issued December 14, 2006 (Docket No. 264284).

Defendant filed an application for leave to appeal in the Michigan Supreme Court. The Michigan Supreme Court vacated defendant's sentence and remanded to the trial court for resentencing because the parties had misstated the sentencing guidelines range to the trial court. *People v Malone*, 479 Mich 858; 735 NW2d 270 (2007). On remand, defendant was resentenced to 19 to 30 years' imprisonment.

For the second time, defendant appealed to this Court. This Court vacated defendant's sentence and remanded to the trial court for a second resentencing because the trial court stated "inappropriate reasons" for departing from the guideline range and it could not "conclude that the [trial] court would have departed from the guidelines to the same extent" had it only considered substantial and compelling reasons for the departure. *People v Malone*, unpublished opinion per curiam of the Court of Appeals, issued December, 29, 2009 (Docket No. 288669).

On remand, defendant was sentenced to 19 to 30 years' imprisonment, for a third time. Defendant now appeals as of right. We affirm.

Defendant argues that, at the second resentencing, the trial court did not state, on the record, its reasons for departing from the guidelines range to the extent it did and that the sentence was not proportionate to the offense and the offender. We disagree.

This Court reviews a trial court's reasons for departing from the sentencing guidelines for clear error. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). A trial court should depart from the guidelines when there is a substantial and compelling reason that leads it to believe that a sentence within the guidelines is not proportionate to "the seriousness of the defendant's conduct and to the seriousness of his criminal history." *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). If the trial court departs from the guidelines, it must state its substantial and compelling reasons, on the record, for *that* particular departure. *Id.* at 260. "The trial court must articulate one or more substantial and compelling reasons that justify the departure it made and not simply *any* departure it might have made." *Smith*, 482 Mich at 318. Also, "[t]he court must explain why the substantial and compelling reason or reasons articulated justify the minimum sentence imposed." *Id.* at 318. "A reviewing court may not substitute its own reasons for departure. Nor may it speculate about conceivable reasons for departure that the trial court did not articulate or that cannot reasonably be inferred from what the trial court articulated." *Id.* at 318.

We hold that a reviewing court could reasonably infer from the record the trial court's reasons for departing from the guidelines range to the extent that it did and the reasons for its conclusion that the sentence it imposed is more proportionate than a sentence that is within the guidelines range. The trial court implied that the extent of the departure was correct. It stated that: it reviewed the entire record, it was aware of the recommended range, the activity was "heinous," defendant had *numerous* prison tickets and it believed that 19 to 30 years' imprisonment was just. The *Smith* court advises that the trial judge explain the departure in terms of "a comparison of a defendant's characteristics and those of a hypothetical defendant" or by referencing the sentencing grid to justify the departure. By referencing defendant's 11 tickets received in prison, the court was comparing this defendant to the hypothetical average defendant. Upon conducting that comparison, the court concluded that the slight departure from the guidelines was more suitable than a sentence within the guidelines range. We cannot find that the court erred.

Next, defendant argues that the resentencing court paid improper deference to the original judge's improper sentence. We disagree.

On remand, when the entire sentence is invalid, the trial court should resentence de novo. *People v Parish (On remand)*, 282 Mich App 106, 108; 761 NW2d 441 (2009). The trial court should treat the sentencing like it would if defendant was in a presentence posture. *People v Rosenberg*, 477 Mich 1076; 729 NW2d 222 (2007).

We hold that the trial court did not pay improper deference to the original judge's sentence. The trial court sentenced defendant de novo. The trial court emphasized that it reviewed the entire record and that it was sentencing defendant as if he had never been sentenced before. It then determined the just sentence to be 19 to 30 years' imprisonment. As stated above, that sentence was justified and proportionate. The mere fact that this trial court's

sentence was identical to the previous trial court's sentence does not demonstrate that the trial court failed to act independent of any previous decision.

Affirmed.

/s/ Pat M. Donofrio
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause