

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

UNPUBLISHED
December 13, 2011

v

WILLIAM B. EDMONDS,

Defendant-Appellee.

No. 300276
Macomb Circuit Court
LC No. 2009-004648-FC

Before: O'CONNELL, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

Defendant pleaded no contest to assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. Pursuant to a *Cobbs*¹ agreement, he was sentenced to a two-year term of imprisonment for the felony-firearm conviction, to be followed by five-year probationary term for the assault conviction. The prosecutor appeals by delayed leave granted, challenging defendant's probationary sentence. We vacate defendant's sentences and remand for further proceedings.

I. FACTS

Defendant's convictions arise from an incident in which defendant, while intoxicated, pointed a loaded gun at his friend and twice pulled the trigger. The gun did not fire, but a live round was ejected when defendant cycled the action. Defendant later told the victim that he intended to shoot him and another man who was present, and then commit suicide. When defendant was sentenced for this offense, he was also sentenced for a separate offense involving his son, which occurred approximately one month before the incident with the victim.² In the other case, defendant's son returned home and encountered defendant, who was pointing a handgun at his son and said something to the effect of "This can blow your head off, you know?"

¹ *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

² Although the sentence in the case involving defendant's son is not at issue in this appeal, because the trial court considered defendant's son's and his mother's views on the sentence (to the extent they had any view), we briefly describe the facts from that case.

Defendant's son reported that many similar incidents had occurred in the past. Defendant was convicted of felonious assault and felony-firearm in the case involving his son.

Pursuant to a *Cobbs* agreement in both cases, the trial court conditionally agreed to sentence defendant to a flat two-year term of imprisonment for each felony-firearm conviction, to be served concurrently, if both complaining witnesses agreed. The sentencing guidelines range for the assault with intent to commit murder offense was 135 to 225 months. After considering a letter from defendant's son, and statements from both the child's mother and from the victim in this case, the trial court explained its sentences as follows:

It is an extremely difficult case. The Defendant's actions were beyond serious. He took a loaded hand gun, pointed at the complainant and pulled the trigger; but for a misfire this could be a murder case of some type, not an assault with intent to commit murder.

The guidelines, as the Court noted, are extremely high at 135 to 225. It gives this Court great pause to so dramatically depart downward.

Much of the prosecutor's argument has merit. However, at the end of the day the Court has chosen to give great weight to the wishes of the complainant, the primary complainant . . . and the mother of Defendant's son, who also was a complainant in a separate file. And based on that, the Court will follow the Cobb's agreement.

The Court's rationale for departing downward is the wishes of the complainants, the fact that while it wasn't readily apparent at the beginning or even near the end of this case, the defendant does seem to have accepted responsibility for his actions and expressed remorse and in fact, apologized to the victim.

The prosecutor now challenges defendant's probationary sentence, arguing that the trial court did not articulate substantial and compelling reasons for its downward departure from the guidelines and did not justify the extent of the departure.

II. ANALYSIS

A sentencing court may depart from the sentencing guidelines range if it "has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). Only objective factors that are verifiable provide substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *People v Smith*, 482 Mich 292, 299, 303; 754 NW2d 284 (2008); *People v Babcock*, 469 Mich 247, 258; 666 NW2d 231 (2003). Objective and verifiable factors are "actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed." *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). A substantial and compelling reason to depart from the guidelines is a reason that "keenly or irresistibly grabs our attention" and is "of considerable worth in deciding the length of a sentence." *Babcock*, 469 Mich at 258 (internal quotations omitted).

This Court reviews the existence of a particular factor supporting a departure for clear error, the determination whether the factor is objective and verifiable de novo, and whether a reason is substantial and compelling for an abuse of discretion. *Babcock*, 469 Mich at 264-265. “An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes.” *Id.* at 274.

The trial court relied in part on defendant’s expression of remorse as a basis for departure. However, an expression of remorse is not an appropriate factor for a court to consider in determining whether to depart from the guidelines range because “an appellate court cannot effectively or objectively review the sincerity of such an expression of remorse.” *People v Daniel*, 462 Mich 1, 11; 609 NW2d 557 (2000).

The trial court also gave “great weight to the wishes of the complainant” to justify its departure from the guidelines. A victim’s recommendation can be objective and verifiable because it is “external to the minds of the judge, defendant, and others involved in making the decision,” and is “capable of being confirmed.” *Abramski*, 257 Mich App at 74. And, because the record indicates that the victim expressed agreement with defendant’s sentences, albeit reluctantly, the trial court did not clearly err in finding that this factor existed. *Babcock*, 469 Mich at 264-265. However, the victim’s reasons for agreeing with the recommendation must be considered to determine whether this factor constitutes a substantial and compelling reason for a departure, i.e., a reason that “keenly or irresistibly grabs our attention” and is “of considerable worth in deciding the length of a sentence.” *Id.* at 258 (internal quotations omitted).

Here, the record reveals that the victim vacillated for approximately two weeks about the appropriateness of a two-year prison sentence followed by probation. He explained that he was ultimately agreeing with the recommendation because he was “physically and emotionally tired,” not because of any belief that defendant was remorseful or because the nature of the crime warranted this sentence. Indeed, the victim admitted to the prosecutor and probation officer that he was scared for his life once defendant was released in two years, and was afraid of being hurt by defendant or defendant’s family or friends. During questioning by the prosecutor concerning his views, the victim interjected, “Now, if what I say two years, if the judge, if the judge thinks it should be more. I mean, I just don’t want to be the one to say this is it. I am just, I really am tired.” The victim also acknowledged telling the prosecutor earlier that morning that he “might just say two years because I don’t want to have, this thing might go to trial[.]” The victim explained that part of his thinking process “is his child, his father, you know. Is he, can he be rehabilitated at one point in time[.]” The victim further explained, “When I think about what he did to me, no, two years is not enough time. But when I think of everything together, two years plus the five years[’] I can live with.”

It is apparent from the record that the victim’s views reflected his physical and emotional fatigue, concerns for his personal safety, his reluctance to testify, and his disinclination to be the reason defendant received a longer sentence. None of these reasons reflect a belief that defendant was worthy or deserving of leniency. The only arguably positive reason the victim cited for his acquiescence to the recommended sentence was his concern for defendant’s son and questioning whether defendant could be rehabilitated. A substantial and compelling reason for a departure should be one that leads the court “to believe that a sentence within the guidelines range is not proportionate to the seriousness of the defendant’s conduct and to the seriousness of

his criminal history,” such that a departure would result in “a more proportionate criminal sentence than is available within the guidelines range.” *Babcock*, 469 Mich at 264. The victim’s explanation for his willingness not to oppose the trial court’s proposed sentence does not have any bearing on the seriousness of defendant’s conduct or his criminal history.³ Under these circumstances, those views cannot be characterized as “keenly or irresistibly grab[bing]” a court’s attention, or of being “of considerable worth in deciding the length of a sentence.” *Id.* at 258 (internal quotations omitted). Accordingly, the trial court abused its discretion in deciding that the victim’s wishes should “be given great weight” to justify a departure from the guidelines. Moreover, the trial court failed to justify the extent of the departure as required by *Smith*, 482 Mich at 292.

Because the trial court did not articulate substantial and compelling reasons for departing from the guidelines and did not comply with the mandates of *Smith*, we vacate defendant’s sentences and remand for resentencing, consistent with *Smith*, 482 Mich at 319. If, on resentencing, the trial court cannot articulate substantial and compelling reasons for a departure from the guidelines, or justify the extent of the agreed departure, it shall permit defendant to withdraw his plea. *Cobbs*, 443 Mich at 283.

Defendant’s probationary sentence is vacated and the case is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O’Connell
/s/ Christopher M. Murray
/s/ Pat M. Donofrio

³ In fact, the trial court’s finding that the significant downward departure was based on “the wishes of the victims” is not necessarily accurate. The record supports a finding that the victim in this case “went along with” the sentence, but certainly did not advocate or “wish for” this sentence.