

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 20, 2011

v

DANIEL AARON REASONER,

Defendant-Appellant.

No. 301009
Jackson Circuit Court
LC No. 10-005107-FC

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

PER CURIAM.

Defendant appeals as of right his departure sentence following his jury convictions for assault with intent to do great bodily harm less than murder, MCL 750.84, and carrying a dangerous weapon with unlawful intent, MCL 750.226. We affirm.

On the evening of January 20, 2010, Charles Woodruff was notified that a woman had been stabbed outside of his restaurant. Woodruff went out to help the woman, before the police arrived, and found her clutching her side. The woman was defendant's alleged girlfriend. As Woodruff moved toward her, he heard a voice call out from the dark, ordering him to "get away from her or you're going to get the same thing she got." Then, defendant came running at full speed from across the street toward Woodruff. As defendant approached Woodruff, he swung at him with a knife in his hand, and grazed Woodruff's neck and throat areas. He then swung again at Woodruff's chest but, because Woodruff drew back to avoid the blow, defendant stuck Woodruff in the arm. Defendant then fled across the street to a field where the police found him huddled in a corner near a fence. The knife was found in the field. It was later determined that defendant's alleged girlfriend had been stabbed three times in her abdomen. Woodruff had a shallow knife slit across his throat, close to his jugular, and a 3-1/2 inch deep stab wound in his arm that narrowly missed an artery. Because of the serious nature of his wounds, coupled with chest pains and elevated blood pressure, Woodruff was hospitalized for three days. He required care after his release from the hospital and testified that he still suffered from nightmares and tremors as a result of the attack.

Defendant was charged with assault with intent to commit murder, MCL 750.83, and carrying a dangerous weapon with unlawful intent, MCL 750.226. The jury, however, found him guilty of the lesser included offense of assault with intent to do great bodily harm, as well as the second charge. The sentencing guidelines recommended a sentence of 29 to 57 months.

Woodruff testified at the sentencing hearing, telling the court the impact the attack had on him. He also told defendant, “you’ve taken almost everything away from me in my life.”

Before rendering its sentence, the court noted that defendant was very lucky that he missed Woodruff’s jugular by a fraction of an inch and that Woodruff moved so that the knife did not strike him in the chest; otherwise, this would have been a felony murder case. The court noted that Woodruff was merely being a good citizen by going out to try to assist a woman in his restaurant parking lot that had been stabbed when he also became defendant’s victim. Defendant admitted to the court that he had already stabbed his alleged girlfriend before he stabbed Woodruff. The court noted that, although she did not testify, defendant’s alleged girlfriend told police that, earlier that same evening, defendant had talked about how he was going to “blow up the child and kill her and even kill your child.” Defendant admitted that such statement was in the police report. The court also referenced Woodruff’s statement that defendant effectively took his life away—his normal life. The court held that the sentencing guidelines recommended range of 29 to 57 months did not “adequately reflect the gravity of the crime, the fact that you were on probation, the - - the extent/nature of the injuries, the fact that you almost killed this . . . victim, [and] the fact that there apparently was another victim.” Thus, the court imposed a sentence of 80 months to 120 months. This appeal followed.

Defendant argues that the sentencing court failed to provide substantial and compelling reasons for the upward departure from the sentencing guidelines and that the extent of the departure is disproportionate. We disagree.

In *People v Smith*, 482 Mich 292, 299-300; 754 NW2d 284 (2008), citing and quoting *People v Babcock*, 469 Mich 247, 257-269; 666 NW2d 231 (2003), our Supreme Court explained:

Under MCL 769.34(3), a minimum sentence that departs from the sentencing guidelines recommendation requires a substantial and compelling reason articulated on the record. In interpreting this statutory requirement, [this] Court has concluded that the reasons relied on must be objective and verifiable. They must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court’s attention. Substantial and compelling reasons for departure exist only in exceptional cases. “In determining whether a sufficient basis exists to justify a departure, the principle of proportionality ... defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed.” [quoting *Babcock*, 469 Mich at 262.] For a departure to be justified, the minimum sentence imposed must be proportionate to the defendant’s conduct and prior criminal history.

The trial court may not base a departure “on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.” [quoting MCL 769.34(3)(b).]

On appeal, courts review the reasons given for a 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. [*Smith*, 482 Mich at 299-300 (citations and quotation omitted).]

In this case, the sentencing court articulated several reasons that it was relying on to justify the departure sentence, including the “gravity of the crime.” Defendant contends that the gravity of the offense was accounted for in the combination scoring of 25 points for OV 1 (aggravated use of a weapon) and 5 points for OV 2 (lethal potential of weapon used). See MCL 777.31; MCL 777.32. We disagree. The court noted several facts related to the gravity of the crime, including that Woodruff was merely attempting to be a good citizen and assist defendant’s other stabbing victim (as defendant admitted) when he also became a victim. Woodruff had not engaged or provoked defendant in any way prior to being threatened, charged at, attacked, and stabbed twice by defendant who emerged unexpectedly from the darkness. These circumstances of the offense were not accounted for in the scoring of OV 1 and OV 2. For example, OV 1 contemplates that “a victim was cut or stabbed with a knife,” but does not contemplate a victim being stabbed twice or the circumstances surrounding the stabbing. See MCL 777.31(1)(a). This reason set forth by the sentencing court was not clearly erroneous, was objective and verifiable, of considerable worth, and keenly grabs this court’s attention. That is, the reason was substantial and compelling and not based on offense characteristics already taken into account in the guidelines scoring.

A second reason articulated by the court justifying its departure sentence was “the extent/nature of the injuries, the fact that you almost killed” Woodruff. Defendant argues that the nature and extent of the injuries was accounted for in the scoring of 25 points for OV 3 (degree of physical injury to a victim). See MCL 777.33. We disagree. The court noted that defendant missed striking Woodruff’s jugular by a fraction of an inch and did not succeed in stabbing Woodruff in the chest only because Woodruff moved to avoid the strike. Instead, defendant succeeded in causing a 3-1/2 inches deep stab wound in Woodruff’s arm that almost hit an artery. That is, defendant attempted to slit Woodruff’s throat and stab him in the chest and, by “luck,” did not succeed—in part because the victim moved. Further, Woodruff required hospitalization for his physical injuries but, as recalled by the court, Woodruff testified that defendant took “almost everything away from me in my life.” These circumstances of the offense were not accounted for in the scoring of OV 3, which does not, for example, contemplate the non-physical injuries suffered by Woodruff or defendant’s near-successful efforts to inflict fatal injuries. This reason set forth by the sentencing court was not clearly erroneous, was objective and verifiable, of considerable worth, and keenly grabs this court’s attention. That is, the reason was substantial and compelling and not based on offense characteristics already taken into account in the guidelines’ scoring.

A third reason articulated by the court was the fact that defendant’s alleged girlfriend was also a victim of defendant’s criminal episode—as defendant admitted at the sentencing hearing. Defendant argues the fact that a second victim was involved was accounted for in the scoring of 10 points for OV 9 (number of victims placed in danger of injury or death) and 5 points for OV

12 (number of contemporaneous felonious criminal acts). See MCL 777.39(1)(c); MCL 777.42(1)(c). We disagree. First, as the court noted, defendant's alleged girlfriend was stabbed three times and was not merely "placed in danger of physical injury or death." MCL 777.39(1)(c). Second, the court also referenced defendant's dire threats and actions against his alleged girlfriend—as set forth in the PSIR and police report—before he stabbed her three times in the abdomen.¹ The court was permitted to consider defendant's conduct during the criminal transaction that was not part of the offense, *People v McGraw*, 484 Mich 120, 129; 771 NW2d 655 (2009), as well as information contained in the court record and PSIR, MCL 769.34(3)(b). Accordingly, this reason set forth by the sentencing court is substantial and compelling and not based on offense characteristics already taken into account in the guidelines' scoring.

The fourth reason for the departure sentence articulated by the sentencing court was the fact that defendant was on probation at the time he committed these crimes. Defendant argues that his probationary status was accounted for in the scoring of 5 points for PRV 6 (offender's relationship to the criminal justice system). See MCL 777.56(1)(c). We tend to agree that this offender characteristic was accounted for in the scoring of the guidelines; thus, defendant's status as being on probation does not provide a substantial and compelling reason for an upward departure.

Accordingly, the sentencing court set forth three substantial and compelling reasons for departure and one invalid reason. Thus, we must determine whether the sentencing court "would have departed and would have departed to the same degree on the basis of the substantial and compelling reasons alone." See *Babcock*, 469 Mich at 260. We conclude, in light of the record evidence, that the sentencing court's reliance on defendant's probationary status was of minor importance compared to its reliance on the three substantial and compelling reasons articulated. Therefore, we are confident that the sentencing court would have departed from the guidelines' recommended sentence. Further, for the same reason, we conclude that the sentencing court would have rendered the same degree of departure based on the three substantial and compelling reasons relied upon. In fact, the sentencing court's initial intention was to exceed the guidelines by sentencing defendant to eight to ten years in prison. However, after it was brought to the court's attention that the eight year minimum sentence exceeded the two-thirds rule, the court sentenced defendant to a minimum sentence of 80 months saying, "I'm going to give you the maximum sentence I can." Next, we turn to the issue of proportionality.

Defendant argues that the extent of his departure sentence was disproportionate to the seriousness of the circumstances surrounding the offense and offender and, thus, constituted an abuse of discretion. We disagree.

¹ The PSIR indicates that defendant's alleged girlfriend "stated that she had just ended a romantic dating relationship with him earlier in the day and advised officers that he had tried to blow up a house earlier in the day where her child was staying by cutting the gas line."

As our Supreme Court explained in *Babcock*, 469 Mich at 262:

In determining whether a sufficient basis exists to justify a departure, the principle of proportionality—that is, whether the sentence is proportionate to the seriousness of the defendant’s conduct and to the defendant in light of his criminal record—defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed. The relevancy of proportionality is obvious. As in any civilized society, punishment should be made to fit the crime and the criminal. [*Id.*]

The *Babcock* Court further explained:

In other words, while “substantial and compelling” sets forth the quality of the reasons that must be set forth in support of a departure from the guidelines, the principle of “proportionality” defines the standard against which the decision to depart, and the particular departure imposed, must be assessed. [*Id.* at 262 n 20.]

Here, the sentencing court held that, in light of the substantial and compelling reasons, a sentence within the guidelines range would not be proportionate to the seriousness of defendant’s conduct and his criminal history. Thus, the court rendered a sentence that departed from the sentencing guidelines by 23 months. Review of the sentencing hearing record reveals the court’s explanation of why the substantial and compelling reasons justified the extent of departure imposed, including that (1) but for happenstance and a fraction of an inch, defendant would likely be facing a sentence of life in prison for murder, (2) defendant stabbed (as he admitted) his alleged girlfriend three times, but she would not cooperate in the prosecution so defendant was not charged with that crime and, thus, avoided a prison sentence, (3) the tremendous impact the crime had on Woodruff, i.e., defendant took his “normal” life, and (4) the evidence was sufficient for the jury to have convicted defendant as charged with assault with intent to murder which would have resulted in “more likely twenty years in prison.” We conclude that the sentencing court adequately justified the departure sentence of 80 to 120 months as more proportionate to the offense and the offender than the guidelines’ recommendation of 29 to 57 months would have been. See *Smith*, 482 Mich at 304. And the extent of departure did not constitute an abuse of discretion, i.e., the minimum sentence imposed does not fall outside the range of principled outcomes. See *id.* at 300. Defendant’s sentence is affirmed.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Patrick M. Meter