

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 20, 2012

v

BRIAN MARVIN TJAPKES,

Defendant-Appellant.

No. 302342
Muskegon Circuit Court
LC No. 10-058862-FH

Before: RONAYNE KRAUSE, P.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his sentence imposed after his jury conviction of unlawfully driving away a motor vehicle, MCL 750.413. Defendant was sentenced to 6 to 25 years' imprisonment. We affirm.

Around midnight on January 8, 2010, the victim was driving her van between sites of her job cleaning office buildings. It was cold and snowy and defendant was out with his dog. He asked the victim to give him a ride to a gas station. The weather was snowy and cold, so the victim agreed because she felt sorry for the dog. The first gas station was closed and defendant had the victim drive to two additional locations. While driving around, the victim began to believe that defendant had her "on a wild goose chase" and she became nervous. She told defendant she had cancer because she thought it would make him sympathetic. At the last place they had stopped, defendant leaned across the victim, opened the driver's door, and pushed her out of the van with both his hands. The victim landed on her back and rolled away from the van because she was afraid she was going to get run over. Defendant drove away. The victim's van was recovered about a mile away, as was defendant. The keys to the victim's van were in defendant's pocket.

At sentencing, the recommended minimum sentence range under the legislative guidelines was 12 to 48 months and the trial court imposed a sentence of 6 to 25 years for five reasons. The trial court stated:

[t]his lady picked you up on a cold night to give you a favor and I think you probably had the dog there to manipulate nice people like this. After she gave you a ride and after she told you she was a cancer survivor you opened her car door and pushed her out in a parking lot on a cold winter night.

The other reasons the trial court gave for the upward departure were:

[n]umber two, you have 18 parole violations Mr. Tjapkes. Number three, the agent says you did not put any effort into your program, you were merely going through the motions. Number four, you have a very high relapse and high recidivism rate and number five, in Allegan County you're convicted of malicious use of a telecommunications device where you actually threatened to cut her [defendant's current spouse's] head off.

As to proportionality, the trial court stated:

[m]oreover, the Court believes this sentence is proportionate to the seriousness of your conduct and record and produces a proportionate criminal sentence regardless of any potential errors in scoring the sentencing guidelines that may affect the recommended sentencing guidelines range. So what's not scored in the guidelines, number one, I've already done it, the victim's condition on a cold winter night; her being – you taking advantage of her after the cancer thing is revealed; the horrible parole record –

The trial court was then interrupted by defendant, and did not return to its statement about the proportionality of the imposed sentence.

Defendant argues that the five reasons for the upward departure were neither objective nor verifiable and were not substantial and compelling to justify the departure and that the sentence is not proportionate.

This Court reviews a trial court's finding that a reason supporting a departure is objective and verifiable de novo and the determination that the reasons are substantial and compelling for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003).

When a trial court imposes a minimum sentence that exceeds the minimum guidelines, there must be a substantial and compelling reason that is objective and verifiable stated on the record. MCL 769.34(3); *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). To be "objective and verifiable," the reasons should be supported by "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) (citation omitted). Substantial and compelling reasons "should keenly or irresistibly grab the court's attention." *Smith*, 482 Mich at 299 (citation omitted). A departure may not be based on a characteristic already taken into account in determining the sentencing range unless the court makes a finding that the characteristic was not given adequate weight. MCL 769.34(3)(b). This Court may uphold a sentence based on some valid and some invalid reasons if it can be determined that the trial court would have made the same departure based on the valid reasons alone. *People v Johnigan*, 265 Mich App 463, 469; 696 NW2d 724 (2005) (citation omitted).

First, defendant argues it is not objective and verifiable that he used the dog to manipulate the victim. However, the trial court also noted that the victim picked up defendant on a cold night and that she was doing him a favor: she gave him a ride, she told him she was a cancer survivor, and he shoved her out of her car. These objective and verifiable facts were

capable of “keenly or irresistibly grab[bing] the court’s attention,” and therefore, justified the trial court’s departure. *Smith*, 482 Mich at 299 (citation omitted); *Abramski*, 257 Mich App at 74. Defendant has not shown the trial court abused its discretion in relying on that articulated reason even where the trial court speculated about the use of the dog. *Babcock*, 469 Mich at 264-265.

Second, as to the 18 parole violations, a “violation itself is objective and verifiable” and is “worthy of independent consideration.” *People v Schaafsma*, 267 Mich App 184, 185-186; 704 NW2d 115 (2005). Defendant’s 18 parole violations grabbed the trial court’s attention, and we find that defendant has not shown the trial court abused its discretion in determining the violations were a substantial and compelling reason to depart from the statutory minimum sentence. *Babcock*, 469 Mich at 264-265.

Third, the statement that defendant did not make an effort in a rehabilitation program is “external to the minds of the judge” and others involved and is capable of being confirmed; thus, it is objective and verifiable. *Abramski*, 257 Mich App at 74 (citation omitted). This is also a substantial and compelling reason for an upward departure. *Smith*, 482 Mich at 299; *Babcock*, 469 Mich at 264-265.

Fourth, the presentence investigation report classified defendant as a “Very High Relapse and High Recidivism” case. A trial court’s opinion of defendant’s criminal propensity is not objective and verifiable, but aggravating factors underlying that opinion can be. *People v Horn*, 279 Mich App 31, 44-46; 755 NW2d 212 (2008). This articulated reason is objective and verifiable on the record because it is based on actions or occurrences external to the judge’s mind that are capable of being confirmed. *Abramski*, 257 Mich App at 74. It is similarly substantial and compelling and may warrant an upward departure. *Smith*, 482 Mich at 299; *Babcock*, 469 Mich at 264-265.

Fifth, defendant argues the Allegan County conviction should not have been considered as a justification for the trial court’s departure from the sentencing guidelines because it was already considered in scoring the prior record variable. As such, its consideration was contrary to MCL 769.34(3)(b). We agree with this aspect of defendant’s argument. However, the circumstances of that conviction were not adequately addressed, if at all, in the prior record variable score. Defendant was convicted of malicious use of a telecommunications device, MCL 750.540e. In some cases, this type of conviction may rest on an individual’s repeated phone calls and hang-ups, MCL 750.540e(1)(e); in others, this type of conviction may rest on an individual’s threat of physical harm to the listener, MCL 750.540e(1)(a). In defendant’s case, he made specific threats over the phone that he would cut off the victim’s—his wife’s—head. The trial court properly considered these circumstances in its departure from the sentencing guidelines. These circumstances were not only objective and verifiable, but also inadequately addressed by the sentencing guidelines. *Abramski*, 257 Mich App at 74; MCL 769.34(b); *Horn*, 279 Mich App at 45. The trial court’s reliance on them was justified.

Finally, defendant raises the issue of proportionality. “When departing, the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been.” *Smith*, 482 Mich at 304. The trial court clearly explained the factors that constituted substantial and compelling reasons, which inferentially established why the imposed sentence was more proportionate than a sentence falling within the

recommended minimum sentence range under the properly scored legislative guidelines. It even began the record by indicating that it knew the sentence was two years over the guidelines and that the substantial and compelling reasons it articulated were not scored in the guidelines. MCL 769.34(b); *People v Castillo*, 230 Mich App 442, 448; 584 NW2d 606 (1998).

Affirmed.

/s/ Amy Ronayne Krause

/s/ Pat M. Donofrio

/s/ Karen Fort Hood