

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARIO MONTRELL MITCHELL,

Defendant-Appellant.

UNPUBLISHED

May 15, 2012

No. 303272

Macomb Circuit Court

LC No. 2010-003184-FH

Before: MURPHY, C.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Defendant was convicted of unlawful possession of a controlled substance (Xanax), MCL 333.7403(2)(b)(ii), possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, reckless discharge of a firearm, MCL 752.863a, and resisting or obstructing a police officer, MCL 750.81d(1). Defendant was sentenced to 1 to 2 years' imprisonment for the drug possession conviction, 2 years' imprisonment for the felony-firearm conviction, 224 days in jail for the reckless discharge of a firearm conviction, and 1 to 2 years' imprisonment for the resisting or obstructing conviction. The felony-firearm sentence is to be served preceding and consecutive to the remaining sentences, which are to be served concurrently to each other. The trial court departed from the sentencing guidelines, and defendant appeals as of right, challenging only the court's departure decision not the convictions themselves. We affirm.

Defendant's convictions arise out of an incident in which he recklessly fired a gun multiple times in a populated neighborhood. After a brief verbal exchange with three Waste Management employees who were in the neighborhood collecting trash, defendant entered a home and came back outside a short time later with a gun in his hand. Defendant waved the gun around wildly and fired multiple shots into the ground and air. A bullet was later retrieved from the siding underneath the front window of a neighborhood home, wherein four children were present at the time of the shooting. A number of other individuals were in the neighborhood when defendant commenced shooting, including several people in defendant's home and a neighborhood youth who was standing directly behind defendant. When police arrived, defendant failed to comply with numerous requests to lay down on the ground, and defendant forcefully resisted the officers' attempts to handcuff him. As defendant was being led away by

officers, he made verbal threats to the Waste Management employees.¹ Defendant also threatened one of the arresting officers at the police station later that day. In the home accessed by defendant, officers found a Glock semiautomatic handgun, shell casings, prescription pill bottles containing Vicodin and Xanax, and a bullet-resistant vest.

On appeal, defendant challenges his one-to-two-year concurrent sentences for possession of Xanax and resisting or obstructing a police officer. The recommended minimum sentence range under the legislative guidelines was 2 to 17 months. Where, as here, the upper limit of the minimum sentence range is 18 months or less, the trial court must impose an intermediate sanction unless the court states on the record substantial and compelling reasons to sentence the defendant to the jurisdiction of the department of corrections. MCL 769.34(4)(a); *People v Harper*, 479 Mich 599, 617-618; 739 NW2d 523 (2007). MCL 769.31(b) defines an “intermediate sanction” as “probation or any sanction, other than imprisonment in a state prison or state reformatory, that may lawfully be imposed.” “An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.” MCL 769.34(4)(a).²

In *People v Smith*, 482 Mich 292, 299-300; 754 NW2d 284 (2008), our Supreme Court set forth the proper analytical framework for examining a sentencing departure:

[A] . . . sentence that departs from the sentencing guidelines recommendation requires a substantial and compelling reason articulated on the record. In interpreting this statutory requirement, the 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.” 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

¹ Defendant’s rant directed at the sanitation workers was nonsensical. He was angry at the workers for failing to challenge or beat up a passing motorist who had cursed at the workers for blocking the street with their truck.

² We note that the two-year mandatory sentence for the felony-firearm conviction, which is the first sentence to be served and runs consecutively in relationship to the other sentences, MCL 750.227b(1) and (2), already places defendant in the jurisdiction of the department of corrections. However, we must still determine whether the departure sentences to be served thereafter, which are prison-length and not jail-length terms, are supported by substantial and compelling reasons.

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.”

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. [Citations omitted; omission in original.]

Furthermore, “[t]o be objective and verifiable, a reason must be based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed.” *People v Horn*, 279 Mich App 31, 43 n 6; 755 NW2d 212 (2008) (citation omitted).

At sentencing, the trial court, after noting that defendant’s reckless and repeated discharge of the gun resembled a terrorist attack, observed and ruled:

It was like an unbelievable thing that you’d only see on the news --- or not on the news, but [i]n a . . . movie. . . . It was frightening. Right in front of a little kid, we’re shooting a gun. The poor little kid doesn’t know what’s coming off. He’s probably thinking he’s dreaming. . . . And you’re right, . . . that bullet would have went right into the front of that lady’s house, and that’s frightening.

* * *

It is the sentence of this Court that you serve --- and the Court is going to find compelling reasons to deviate from the guidelines Those compelling reasons as previously enunciated by the Court, [were] that you committed these offenses while on probation, total disregard for the safety and well-being of the individual citizens of the city of Eastpointe, as well as the police officer. . . .

I believe that your past history of violent behavior and/or convictions of that behavior were not accurately considered in the sentencing guidelines as they were established by the legislature; the bizarre behavior and terms of putting the safety of the citizens at risk, I don’t think was adequately covered by the sentencing guidelines. And as such, I’m finding compelling reasons to deviate in my sentence.

Defendant’s violent criminal history, as reflected in the presentence investigation report (PSIR), his probationary status at the time of the shooting, the endangerment of others and the risk created by defendant’s conduct, and defendant’s total disregard for the safety of citizens and police officers are all objective and verifiable factors. And there was no clear error in the trial court’s factual findings. Defendant had prior misdemeanor convictions for aggravated assault and discharge of a firearm. In addition, only six months before committing the instant offense, defendant pleaded nolo contendere to charges of aggravated domestic violence and attempted resisting and obstructing. He was still on probation for those crimes at the time of the instant

offenses. As a result of these prior offenses, defendant was scored ten points for prior record variable (PRV) 5, MCL 777.55, which is the score to be applied when an offender has three or four prior misdemeanor convictions, MCL 777.55(1)(c), and he received a score of five points for PRV 6, MCL 777.56, which reflected that he was on probation at the time of the offenses, MCL 777.56(1)(d). However, neither of these scores account for the pattern of violent behavior or the similarity between defendant's prior convictions and the convictions in the instant case. See *People v Petri*, 279 Mich App 407, 421-422; 760 NW2d 882 (2008) (departure supported by "trial court's determination that the guidelines failed to adequately consider the similar nature of defendant's pattern of . . . crimes, and the aggravating circumstances."). Defendant's PRV score also does not reflect the fact that defendant was convicted of similar crimes only six months before committing the instant offenses, in which he placed the lives of people in an entire neighborhood in danger, verbally threatened citizens and a police officer, and forcefully resisted officers' attempts to arrest him. See *People v Hicks*, 259 Mich App 518, 535-536; 675 NW2d 599 (2003) (no abuse of discretion where court departed because of the defendant's predatory conduct, serious prior convictions, aggravated nature of the sentencing offenses, and the short time interval between the end of parole and new acts of victimization).

The trial court's conclusion that defendant's demonstrated, reckless, and total disregard for the safety of citizens and police officers constituted substantial and compelling reasons for departure was not an abuse of discretion. Defendant's actions in wildly waving the gun around, firing multiple shots into the ground and air, and in physically resisting the responding police officers supported the trial court's reasonably drawn inference that defendant acted with disregard for the safety of citizens and police officers. *Petri*, 279 Mich App at 422 (requirement that a departure be based on objective and verifiable factors does not preclude a court from drawing and relying on reasonable inferences about a defendant's behavior arising from objective evidence). Defendant poses a threat to the public as evidenced by his behavior, and his criminal history indicates that past punishment has not been a deterrence. *People v Solmonson*, 261 Mich App 657, 671-672; 683 NW2d 761 (2004) (upheld departure from an intermediate sanction where the defendant had an extensive criminal history reflecting that past sentences of probation, jail, and prison were no deterrence and where the trial court had a legitimate concern for the protection of society).

Defendant's criminal history and behavior keenly or irresistibly grab our attention; we agree with the trial court's comparison of the incident to a terrorist attack and characterization of the offense as "an unbelievable thing" that you would see in a movie. As the trial court aptly noted, someone could easily have been killed if one of the bullet's trajectories had varied by only a few inches. The seriousness of the offenses was not adequately reflected by the guidelines. The resisting or obstructing offense, a class G offense, MCL 777.16d, formed the basis for the scoring of the guidelines and implicated the sentencing grid found in MCL 777.68. Defendant received a total offense variable (OV) score of 55 points, placing him at the highest level of the grid, level III, for purposes of OV scoring. Pursuant to MCL 777.68, a defendant is placed at level III of the grid when the defendant has a total OV score of 16 or more points. Defendant's total OV score exceeded the minimum score required for level III by 39 points, more than three times the 16 points required. Where, as here, the OV score vastly exceeds the score necessary to

reach the highest level of offense severity, the discrepancy indicates that the offense variables were given inadequate weight. *People v Stewart*, 442 Mich 937, 937-938; 505 NW2d 576 (1993).³

In light of defendant's pattern of violent and undeterred criminal behavior, the similarity between defendant's prior convictions and the convictions in the instant case, the fact that defendant was on probation for similar crimes at the time of the offenses, and defendant's actions in placing an entire neighborhood, including a number of children, in danger, the trial court's decision to impose a term of imprisonment, on top of the felony-firearm sentence, falls within the range of reasonable and principled outcomes. There was no abuse of discretion in departing from the guidelines, nor did the court abuse its discretion relative to the extent of the departure. Defendant's sentence was proportionate both to the seriousness of defendant's conduct and his criminal history.

Affirmed.

/s/ William B. Murphy
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan

³ Defendant argues that OV 1, MCL 777.31 (aggravated use of a weapon), was erroneously scored at 15 points and that OV 2, MCL 777.32 (lethal potential of weapon), was erroneously scored at 5 points; therefore, his overall OV score should have been 35 points instead of 55 points, diminishing the discrepancy between the 16 points needed to reach OV level III and the points scored. We first note that even 35 points is more than double the 16 points needed for OV level III. Further, at the sentencing hearing, defendant affirmatively voiced that there were no objections to the scoring of the OVs other than OV 19. Accordingly, appellate challenges regarding OV 1 and 2 were effectively waived. *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000). Defendant also appears to suggest that OV 12, MCL 777.42 (contemporaneous felonious criminal acts), was improperly scored because he was acquitted of some charges that were counted under OV 12. Again, the issue was waived and, regardless, a contemporaneous felonious criminal act is only to be scored if no conviction on the act occurred. MCL 777.42(2)(a)(ii). In sum, even assuming scoring errors as alleged by defendant, we still find that the trial court did not abuse its discretion in departing from the guidelines for the other reasons recited in this opinion.