

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 27, 2012

v

MAXWELL DOTSON,
Defendant-Appellant.

No. 305755
Wayne Circuit Court
LC No. 11-003236-FC

Before: RONAYNE KRAUSE, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right the sentences imposed for his bench trial convictions of two counts of felonious assault, MCL 750.82. Defendant was also convicted of one count of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of 6 to 48 months' imprisonment for the felonious assault convictions, to be served consecutive to two years' imprisonment for the felony-firearm conviction.¹ We vacate defendant's felonious assault sentences and remand to the trial court for resentencing on the same.

Defendant's convictions arise from a confrontation with a neighbor in front of defendant's house, during which he fired five shots from his revolver, striking a complainant once, and allowed his pit bull dogs to be released from his house. On appeal, defendant challenges only the sentences imposed with respect to his felonious assault convictions. Defendant argues that the trial court erred by failing to impose an intermediate sanction, without stating on the record a substantial and compelling reason for doing so. We agree.

Under the statutory sentencing guidelines, "the trial court is required to choose a sentence within the guidelines range, unless there is a 'substantial and compelling' reason for departing from this range" and states on the record the reasons for departure. *People v Babcock*, 469 Mich 247, 255-256; 666 NW2d 231 (2003); MCL 769.34. Reasons for departure must be "objective and verifiable," should be recognizable as being "of considerable worth," and should "keenly or irresistibly grab the court's attention." *Babcock*, 469 Mich at 257.

¹ Defendant was found not guilty of two counts of assault with intent to murder, MCL 750.83.

This Court reviews the reasons given for a departure for clear error. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). Whether a reason is objective and verifiable is a conclusion that this Court reviews de novo. *Id.* “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.” *Id.* “If, upon a review of the record, the court of appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, the court shall remand the matter to the sentencing judge or another trial court judge for resentencing . . .” MCL 769.34(11).

In the instant matter, defendant was convicted of two counts of felonious assault, MCL 750.82. Each count carries a four-year maximum sentence, designating the offense as class F. MCL 777.16d. Defendant’s Sentencing Information Report initially indicated a sentencing guidelines range of zero to 9 months for defendant’s felonious assault conviction(s). However, the prosecutor pointed out at defendant’s sentencing that Prior Record Variable (PRV) 7 had been erroneously scored at “0,” points when it should have been scored 10 in order to account for a subsequent or concurrent conviction. See MCL 777.57. Defense counsel did not object to the apparent rescoring of PRV 7 at 10 points. The court responded “all right” to the correction.

The prosecutor also, however, incorrectly stated that the above change would mean that defendant’s “overall guidelines would change from the zero to nine to 5 to 23” and the trial court appears to have relied on that statement. In fact, the additional points would bring defendant’s total PRV score to 10 while his Offense Variable (OV) score would remain at 35 points. The sentencing grid for class F offenses indicates that a PRV score of 10 amounts to a level of C and an OV score of 25 amounts to a level of III, which corresponds to a guidelines range for defendant of 2 to 17 months.² See MCL 777.67. This guidelines range falls within an intermediate sanction cell. MCL 769.34(4)(a) provides, “If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines . . . is 18 months or less, the court *shall* impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. 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.” Imprisonment is not an intermediate sanction, see MCL 769.31(b); *People v Lucey*, 287 Mich App 267, 271; 787 NW2d 133 (2010).

Nevertheless, the trial court sentenced defendant as follows:

All right. It is the sentence of the Court that on the charge of felony[-]firearm that Mr. Dotson be committed to the Michigan Department of Corrections for a period of two years. Credit for 105 days spent in custody. On the two charges of felonious assault it is the sentence of the Court that the defendant be committed to the Michigan Department of Corrections for a period of not less than six months,

² It appears that the prosecutor’s error derived from looking at the cell—which corresponded to OV level IV and PRV level C—immediately below the correct one.

a period not greater than four years. That's consecutive to the felony[-]firearm charge.

The judge then advised defendant of his right to appeal, but did not specify that the appeal could be based on the fact that his sentence was "longer or more severe than the appropriate sentence range." MCL 769.34(7).

Because an intermediate sanction does not include imprisonment, the trial court departed from the sentencing guidelines when it sentenced defendant to 6 to 48 months' imprisonment for his felonious assault convictions. The trial court did not articulate substantial and compelling reasons for its departure. Consequently, we vacate defendant's sentences for felonious assault.

Because defendant has not challenged his convictions, the same are not addressed on appeal, nor is his sentence for felony firearm. Defendant's felonious assault sentences are vacated, and this case is remanded to the trial court for resentencing for the same. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro