

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOHN WILLIAM YENGLIN,

Defendant-Appellee.

UNPUBLISHED
November 20, 2012

No. 307675
Bay Circuit Court
LC No. 10-011079-FC

Before: TALBOT, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

Plaintiff appeals by delayed leave granted from the sentence of 55 to 180 months imposed on defendant John William Yenglin's plea-based conviction of armed robbery, MCL 750.529, arguing that the trial court failed to articulate substantial and compelling reasons for deviating below the guidelines. We vacate defendant's sentence and remand for resentencing.

Defendant and a codefendant pleaded guilty to the armed robbery of an Advance America store. After correction of the sentencing variables to account for two subsequent breaking and entering offenses committed by defendant, the court calculated that the proper sentencing guidelines were 81 to 135 months. However, the trial court found substantial and compelling justifications to depart below the sentencing guidelines:

I do believe, as I stated in the other case, that this is motivated by a drug addiction, which is not an excuse.

Because of your age, I believe there is reason to believe that you can be rehabilitated. Sending you for a longer period of time does not really protect the community because, whether I send you for 55 months or 51 months, or a 100 months, you will be released. . . . So I think that the goal here is to try to have you released under circumstances that enhances your ability to be rehabilitated and to find a different way to lead your life.

The sentence I am going to impose is not a minor sentence. I do find substantial and compelling reasons to deviate from the recommended guidelines, being downward, being your extreme youth and, also, the absence of a record before -- I don't mean before this event, because you obviously had involvement in Wexford County, which is a matter of record in the PSI, but what I mean is, this appears to

have been over a period of months and it appears to have been motivated by a drug addiction and your association with Mr. Anderson, and his association with you.

So, I believe your youth does offer the potential for rehabilitation. I think that the guidelines are somewhat affected by all of this happening together and, therefore, it doesn't adequately consider your youth or your chances for rehabilitation.

On appeal, the prosecution claims that the trial court improperly deviated below the sentencing guidelines on the basis of defendant's age and potential for rehabilitation, neither of which is a substantial and compelling reason to justify the departure. We agree.

A trial court may depart from the properly calculated sentencing guidelines range only if it has substantial and compelling reasons to do so and states these reasons for the departure on the record. MCL 769.34(3). Factors for departure must be objective and verifiable, keenly attract the court's attention, and be of considerable worth in deciding the length of a sentence. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). We review for clear error the existence of a particular factor for departure, as a matter of law the determination that a factor is objective and verifiable, and for an abuse of discretion the trial court's determination that the objective and verifiable factors present constitute substantial and compelling justifications for departure. *Id.* at 264-265. An abuse of discretion has occurred when the resulting sentence is not within the "principled range of outcomes." *Id.* at 269. We defer to the "trial court's extensive knowledge of the facts and that court's direct familiarity with the circumstances of the offender." *Id.* at 270.

A defendant's age is a proper factor in determining a sentence; however, departure may not be justified upon a defendant's age alone. See *People v Young*, 276 Mich App 446, 457; 740 NW2d 347 (2007). The inquiry to be made when considering a defendant's age and criminal history is whether the defendant's age is "particularly old to not yet have a more lengthy criminal record." *Id.*, quoting *People v Claypool*, 470 Mich 715, 727; 684 NW2d 278 (2004). This is a high burden to meet. In *Young*, where the defendant was 22 years old with no prior juvenile or adult offenses, this high burden was not met. *Id.* at 457. Additionally, in *Claypool*, where the defendant was 26 years old with one prior conviction for misdemeanor retail fraud, this burden was unmet. *Claypool*, 470 Mich at 727. In the case at bar, defendant fails to meet the burden set by *Young* and *Claypool*. Defendant was 18 years old at the time of this offense. As such, he was considerably younger than the defendants in *Young* and *Claypool*. In addition, he had already accumulated a criminal record. At the time defendant committed the instant offense, he had four convictions as an adult. And, at the time of sentencing, he had convictions as an adult on at least four additional charges. In short, defendant's age and criminal history did not present substantial and compelling justification to depart from the sentencing guidelines.

To the extent the trial court relied on defendant's age alone in determining rehabilitative potential, we cannot agree. To allow a court to find on the basis of age alone that a defendant had rehabilitative potential warranting departure from the sentencing guidelines would strip *Young* of its meaning. That is, a trial court that wishes to depart on the basis of age alone could subsume it into rehabilitative potential. To the extent that the trial court found rehabilitative potential from more than simply defendant's age, its findings were unclear. A trial court's

departures must be on the basis of objective and verifiable fact and clearly stated on the record. *Babcock*, 469 Mich at 257-258.

Defendant's age and criminal history were not substantial and compelling justifications for departing from the sentencing guidelines. To the extent that rehabilitative potential was determined upon defendant's age alone, it was improper; furthermore, any objective facts supporting this finding were lacking from the record. Because the trial court failed to present any substantial and compelling justifications warranting departure from the sentencing guidelines, we must remand for resentencing. See MCL 769.34(11).

Defendant's sentence is vacated and the matter is remanded for resentencing. In resentencing, the court shall reconsider the scoring of offense variable 13 in light of *People v Pearson*, 490 Mich 984; 807 NW2d 45 (2012), which was released approximately three months after defendant's sentence was imposed. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Jane M. Beckering
/s/ Michael J. Kelly