

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 29, 2013

v

BRANDIE LYNN MALEK,

Defendant-Appellant.

No. 310946
Gratiot Circuit Court
LC No. 11-006294-FH

Before: SAAD, P.J., and K. F. KELLY and GLEICHER, JJ.

PER CURIAM.

Defendant Brandie Malek pleaded no contest to a charge of failure to stop at the scene of an accident resulting in serious impairment or death, MCL 257.617(2). The circuit court sentenced defendant to 38 months to 5 years in prison. This represented an upward departure from the legislative minimum sentencing guidelines range. Because the circuit court relied on factors already taken into consideration when scoring the guideline variables and failed to articulate whether those factors were given inadequate consideration, we must vacate and remand for resentencing.

I. BACKGROUND

On the evening of July 21, 2011, defendant was driving on Washington Road in Newark Township. She struck 14-year-old Brandon Rummer who was riding his bicycle down the street. Defendant continued driving home. A Good Samaritan discovered Rummer lying on the side of the road. He died in an ambulance en route to the hospital. Three days after the accident, defendant turned herself in to police. Defendant admitted that she “knew that she hit something” that night, “but did not stop to check it out” because “she had been drinking earlier . . . and was scared.” Defendant later changed her story and implied that she may have been sending a text message or talking on her cell phone at the time of the accident.

When defendant arrived home that night, she told her boyfriend that she had hit a deer. The following day, defendant tried to cover up the damage to her vehicle. She threw pieces of her broken headlight into a trash can. She and her boyfriend moved the vehicle into a shed on the property. Defendant tried to wipe or scrub away evidence on the vehicle with an abrasive material. Defendant claims that she did not learn that she had hit Rummer until she saw a television report on July 22. Defendant was so distraught that she attempted to commit suicide

by ingesting a bottle of unidentified pills. When that failed, she told her family what happened and they assisted her in turning herself in to authorities.

Defendant pleaded no contest to the Class E felony charge against her. The Department of Corrections prepared a sentencing information report for the circuit court's review, placing defendant in PRV Level C and OV Level IV. The minimum sentencing guidelines range was calculated at 5 to 23 months. The prosecutor asked the court to depart upward from the guidelines range. In support of this request, the prosecutor argued that defendant "went to great lengths to conceal the evidence by putting the vehicle into that shed and second of all, the issue with regard to perhaps, wiping evidence off of the vehicle." The prosecutor also contended that defendant's "obvious alcohol consumption" had not "been factored into the sentencing guidelines here," nor had her cell phone use. The prosecutor asserted that defendant's prior criminal history had not been given adequate weight under the guidelines, particularly that she had previously been involved in an unreported motor vehicle accident and then tried "to pull one over on the insurance company, lying." Moreover, the prosecutor believed that defendant was lying in the current case and that she actually knew that she had struck a person at the time of the accident.

The circuit court imposed a minimum sentence of 38 months, 15 months more than the top of the legislative minimum sentencing guidelines range. The court noted that there was some evidence that defendant had been drinking on the day in question but believed that the prosecutor's office forewent an alcohol-related charge because there was insufficient evidence to prove the fact beyond a reasonable doubt. The court also found insufficient evidence to consider defendant's alleged cell phone use against her. The court nevertheless departed upward, reasoning as follows:

The range that the Legislature has given me for this—for this tragedy, is the 5 to 23 months. This is a five year offense that you pled guilty to, and I think that we could all talk until we're blue in the face about how 5 years is but a drop in the bucket for the loss of life. But that's the range that we have all come to, and that is I certainly cannot do anything beyond that 5 year maximum range.

. . . The Court has heard about, and I do find that it is objectively verifiable, that you hid your vehicle in a garage for three—three days after this offense happened. That you knew you hit something, and that's why you pull over, it doesn't matter if it's a car-deer, you hit something and you can't deny based upon the objective and verifiable damage that was done to your vehicle that it was substantial and you should have immediately pulled over. You had a cell phone on you and you could have called somebody, 911 or somebody, immediately. You didn't do that, instead you hid your vehicle, you failed to report the accident for three days, and then when law enforcement was able to track down your vehicle as previously noted, there were what they believed to be scratches of sandpaper on the hood of your—of your vehicle.

But even if I discard that last point, there were at least two facts that the Court finds to be substantial and compelling reasons to deviate downward on the OV level. And if I were to deviate downward on the OV level,^[1] as a—as a C, again talking only about OVs, that brings me to an OV level 6, which has a maximum—a minimum and maximum of 12 to 24. But the Court doesn’t find that that move is sufficient in your particular case, and that is because of the prior behavior, the prior conduct, that you have engaged in, the fraud that you have engaged in. And I do find that your failure to report a prior accident, as well as your fraud or attempted fraud on an insurance company, further justify the Court moving over an additional two steps on the PRV level. And by doing that with those two objective and verifiable facts, that level gives me a minimum of 22 months and a maximum of 38 months. And I am going to use that maximum here.

II. CONTROLLING LEGAL PRINCIPLES

Generally, a court must impose a sentence within the minimum sentencing guidelines range. In “exceptional cases,” however, the court may depart from that range if it articulates on the record substantial and compelling reasons supporting the particular departure. *People v Babcock*, 469 Mich 247, 255-257; 666 NW2d 231 (2003), citing MCL 769.34(3).

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.” [*People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008), quoting MCL 769.34(3)(b).]

The court may only rely upon factors that are “objective and verifiable.” *Babcock*, 469 Mich at 257. Further, to warrant a departure, the factors used must be “of considerable worth in deciding the length of a sentence.” *Id.* (quotation marks and citation omitted). “[C]ommonplace repercussions of criminal activity do not support departures” as the guidelines were designed “to promote uniformity in criminal sentencing” with such concepts already in mind. *Smith*, 482 Mich at 302. We may not affirm a departure sentence based on our assumption of the circuit court’s reasoning; rather, the circuit court must state its reasoning regarding the particular departure on the record. *Babcock*, 469 Mich at 258-259. “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 existence . . . of a particular factor is a factual determination” that we review for clear error. *Babcock*, 469 Mich at 264. As recently stated by our Supreme Court, “Under the sentencing guidelines, the circuit court’s factual determinations are reviewed for clear error and

¹ It appears the court was referring to moving physically downward on the sentencing grid, not imposing a downward departing sentence.

must be supported by a preponderance of the evidence.” *People v Hardy*, ___ Mich ___; ___ NW2d ___ (Docket No. 144327, decided July 29, 2013), slip op at 6. Whether a factor is objective and verifiable is reviewed de novo as a matter of law. Whether those objective and verifiable factors constitute a substantial and compelling reason to justify a particular departure, and the extent of the departure, are reviewed under the abuse of discretion standard. *Smith*, 482 Mich at 300; *Babcock*, 469 Mich at 264-265.

III. ANALYSIS

The circuit court cited objective and verifiable factors in support of its sentencing decision. Defendant admitted that she hid her car in a shed to avoid detection. Defendant also conceded that she knew she hit something at the time of the accident. As noted by the court, defendant should have stopped regardless of what she thought she had hit. Defendant’s prior plea-based conviction for falsely filing an insurance claim for a nonexistent car-deer collision was also objective and verifiable from the court documents produced during that proceeding.

These factors were taken into consideration, however, in assigning scores for the various applicable prior record and offense variables. The circuit court assigned 10 points for OV 19, representing that defendant “interfered with or attempted to interfere with the administration of justice.” MCL 777.49(c). When defendant objected to the scoring of OV 19 at the sentencing hearing, the court specifically noted defendant’s failure to immediately report the accident and subsequent attempts to hide her involvement. The court did not state on the record that these facts were given inadequate weight in scoring OV 19 as required by MCL 769.34(3)(b).

Defendant’s prior fraud conviction was counted in assigning 10 points for PRV 5, representing that defendant “has 3 or 4 prior misdemeanor convictions.” MCL 777.54(1)(c). Again, the circuit court made no comment regarding the adequacy of the weight given this factor.

Moreover, the circuit court failed to explain how the selected minimum sentence was more proportionate than the sentencing range selected by the Legislature as required by *Smith*, 482 Mich at 304. Sentencing is based on “the principle of proportionality; it is a function of the seriousness of the crime and of the defendant’s criminal history.” *Babcock*, 469 Mich at 264. The sentencing guidelines were enacted as an equalizing factor to ensure that all defendants receive proportional sentences. *Smith*, 482 Mich at 305. When a court departs from the guidelines range, it must therefore clearly explain its decision. If “the connection between the reasons given for departure and the extent of the departure is unclear,” then we must remand for resentencing. *Id.* at 304.

Here, the circuit court used the sentencing grid to determine a minimum sentence that it deemed more proportionate for defendant’s offense. This method was suggested by our Supreme Court in *Smith*, 482 Mich at 306. The circuit court did not, however, explain why it was proper to treat defendant as having a higher OV and PRV score. The court merely cited the list of factors that had already been taken into account in scoring the guidelines without connecting them to the particular sentence imposed. This was insufficient to justify the particular departure.

We are not permitted to divine alternate reasons supporting the circuit court's upwardly departing sentence, nor may we presume the connection between the particular sentence imposed and the reasons given. *Babcock*, 469 Mich at 258-259. Accordingly, we must vacate defendant's sentence and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher