

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

MARCUS FRANKLIN JOHNSON,

Defendant-Appellant.

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UNPUBLISHED

July 12, 2002

No. 237729

Genesee Circuit Court

LC No. 01-007554-FC

Before: Hood, P.J., and Saad and E. M. Thomas\*, JJ.

MEMORANDUM.

Defendant appeals by delayed leave granted from a sentence of 35 to 60 years' for second-degree murder, MCL 750.317. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The statutory guidelines established a minimum sentence range of thirteen and one-half to twenty-two and one-half years' or life. MCL 777.61. The court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is permitted. MCL 769.34(2). The court may depart from the guidelines if it "has a substantial and compelling reason for that departure and states on the record the reasons for the departure." MCL 769.34(3). The court may depart from the guidelines for nondiscriminatory reasons where there are legitimate factors not considered by the guidelines or where factors considered by the guidelines have been given inadequate or disproportionate weight. MCL 769.34(3)(a), (b).

"[T]he Legislature intended 'substantial and compelling reasons' to exist only in exceptional cases." *People v Fields*, 448 Mich 58, 68; 528 NW2d 176 (1995). Only objective factors that are capable of verification may be used to assess whether there are substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *People v Babcock*, 244 Mich App 64, 75; 624 NW2d 479 (2000). "The determination regarding the existence, or nonexistence, of a particular reason or factor is reviewed on appeal under the clearly erroneous standard." *People v Perry*, 216 Mich App 277, 280; 549 NW2d 42 (1996). The determination that a particular factor is objective and verifiable is reviewed by this Court as a matter of law. *Babcock*, *supra* at 76. The trial court's determination that objective and verifiable factors present a substantial and compelling reason to depart from the statutory minimum sentence is reviewed for an abuse of discretion. *Id.*

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\* Circuit judge, sitting on the Court of Appeals by assignment.

We find that the trial court articulated substantial and compelling reasons for its departure from the guidelines, the excessive brutality of the murder and the trauma to the members of the victim's family. Although these factors are covered by the guidelines, the trial court expressly found that the statutory sentencing guidelines did not adequately address these factors. A court may base a departure on something already taken into account if the courts finds from the facts that the characteristic has been given inadequate weight. MCL 769.34(3); *People v Babcock*, \_\_MichApp\_\_, \_\_NW2d\_\_ (No. 235518, issued March 19, 2002).

Affirmed.

/s/ Harold Hood

/s/ Henry William Saad

/s/ Edward M. Thomas