

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

YOLANDA LIMMITT,

Defendant-Appellant.

UNPUBLISHED

November 19, 2002

No. 232002

Wayne Circuit Court

LC No. 99-006829

Before: Fitzgerald, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

Defendant was charged with two counts of assault with intent to commit murder, MCL 750.83, one count of first-degree home invasion, MCL 750.110a(2), and one count of malicious destruction of property over \$1,000 but less than \$20,000, MCL 750.377a(1)(b)(i). Following a jury trial, defendant was found guilty of one count of assault with intent to do great bodily harm less than murder, MCL 750.84, one count of assault with a dangerous weapon (felonious assault), MCL 750.82, and one count of malicious destruction of property over \$1,000 but less than \$20,000. Defendant was sentenced to sixty months' to ten years' imprisonment on the assault with intent to do great bodily harm conviction, two to four years' imprisonment on the felonious assault conviction, and two to five years' imprisonment on the malicious destruction conviction. On appeal, defendant challenges the sentence imposed for her conviction of assault with intent to do great bodily harm less than murder. We vacate defendant's sentence for assault with intent to do great bodily harm and remand.

Defendant's conviction stems from an incident that occurred on February 26, 1999.¹ The victims were Timothy Robinson and Mae Thomas. Defendant and Robinson lived across the hall from each other in a Detroit apartment building. On the night of the assault, Thomas was a guest in Robinson's apartment. When Robinson and Thomas arrived at his apartment, defendant asked and was granted permission to use Robinson's telephone. Sometime later, defendant's daughter also asked to use Robinson's telephone. Thomas told the girl that her mother needed to ask Robinson for permission. Minutes later, defendant confronted Thomas. When defendant did not respond to Robinson's asking her to leave, Robinson forced defendant into the hall and triple

¹ Pursuant to MCL 769.34(1) and (2), the new legislative sentencing guidelines are applicable because the crime was committed after January 1, 1999.

locked his apartment door. Soon thereafter, defendant forced open the locked door, ripping it from the doorframe. Defendant rushed toward Robinson and Thomas, and a struggle ensued between Robinson and defendant. Soon thereafter, defendant entered the apartment's kitchen, where she picked up a large kitchen knife. In the ensuing skirmish, Robinson was stabbed in the upper arm, and Thomas was stabbed in the back as she and Robinson tried to escape down the apartment stairs. Defendant's conviction for assault with intent to do great bodily harm less than murder relates to the attack on Thomas.

The sentencing guidelines provided for a minimum sentence range of twenty-nine to fifty-seven months' imprisonment. When sentencing defendant, the trial court made the following remarks:

Miss Limmitt, the court must sentence you according to the law and the sentence guidelines in this case. You were convicted by a jury of assault with intent to do great bodily harm less than murder, felonious assault, and malicious destruction of property. Your attorney really, I believe given the circumstances, did an outstanding job in defending you.

However, clearly you, yourself, were your own worst enemy. In testifying you were not in any way believable. You did not even claim to see a weapon in the other person's hand. You came back after an opportunity to withdraw from this situation, and came back and stabbed two people, and you have a record of felonious assault.

Before the complainants in this case even spoke, it was clear to this court, as I'm sure it was to the jury, that they tried to use restraint in this situation

I believe you are a dangerous person. I believe that in the very serious nature of the injury to Miss Thomas, you punctured a lung with a knife in your hand, shows the extent of your intent and extent of your dangerousness.

It's the sentence of this court that you serve 60 months to ten years on the assault with intent to commit great bodily harm less than murder

Defendant argues that her assault with intent to do great bodily harm conviction violates the principle of proportionality. *People v Milbourn*, 463 Mich 630; 461 NW2d 1 (1990). Defendant's argument, however, neither acknowledges the new legislative sentencing guidelines, MCL 777.1 *et seq.*, nor references the statutory standard of review of a sentence that departs from these guidelines, MCL 769.34(11). The prosecution counters that the principle of proportionality no longer applies in appellate sentencing review. Instead, the prosecution contends that pursuant to MCL 769.34(11), appellate review is limited to whether the trial court had substantial and compelling reasons for the departure.

Both parties have misstated the standard of review. MCL 769.34(3) provides that a trial court "may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." If after reviewing the lower court record, this Court "finds the trial court did not have a substantial and compelling reason for departing from the

appropriate sentence range, [we] shall remand the matter to the sentencing judge or another trial court judge for resentencing under this chapter.” MCL 769.34(11).

In *People v Babcock*, 244 Mich App 64; 624 NW2d 479 (2000) (hereinafter *Babcock I*), af rem 250 Mich App 463; 648 NW2d 221 (2002) (hereinafter *Babcock II*), this Court construed the “substantial and compelling” standard in accord with the analysis set forth in *People v Fields*, 448 Mich 58; 528 NW2d 176 (1995):²

In *Fields*, our Supreme Court recognized that “the words ‘substantial and compelling’ constitute strong language,” and found it “reasonable to conclude that the Legislature intended ‘substantial and compelling reasons’ to exist only in exceptional cases.” “[T]he reasons justifying departure should ‘keenly’ or ‘irresistibly’ grab our attention, and we should recognize them as being ‘of considerable worth’ in deciding the length of a sentence.” It is not enough for a factor to be merely substantial; it must be both substantial and compelling before departure is permitted, and the Legislature is presumed to “have consciously elevated the burden of proof” by its choice of the term “compelling.” In keeping with the language of the statute and the intent of the Legislature, the *Fields* Court also determined that the factors relied on by the trial court must be objective and verifiable. We believe the same interpretation, with its implicit reliance on reason and common sense, is appropriate here. [*Babcock I*, *supra* at 75, quoting *Fields*, *supra* (citations omitted).]

Babcock I also relied on *Fields* when formulating the applicable standards of review:

For the same reasons, we also conclude that the Legislature intended that appellate courts employ the standards of review set forth in *Fields*. In *Fields*, the Court held that

“the existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. The determination that a particular factor is objective and verifiable should be reviewed by the appellate court as a matter of law. A trial court’s determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion.” [*Id.* at 75-76, quoting *Fields*, *supra* at 77-78.]

The *Babcock I* Court also determined that under the new statutory scheme, sentence length is no longer reviewed under the principle of proportionality. *Babcock I*, *supra* at 78. The validity of this interpretation of legislative intent was questioned by our Supreme Court in *People v Hegwood*, 465 Mich 432, 437, n 10; 636 NW2d 127 (2001):

² The *Fields* Court defined identical language found in section 7401(4) of the controlled substance act, 333.7101 *et seq.*

The Court of Appeals indicated in *Babcock*[I] that the principle of proportionality is not part of the legislative guidelines, and that there will be no appellate review of sentence length in cases in which there is a substantial and compelling reason to depart from the recommended minimum stated in the legislative guidelines. . . . [W]e do not believe that the Legislature intended, in every case in which a minimal upward or downward departure is justified by “substantial and compelling” circumstances, to allow unreviewable discretion to depart as far below or as far above the guideline range as the sentencing court chooses. Rather, the “substantial and compelling” circumstances articulated by the court must justify the *particular* departure in a case, i.e., “that departure.” [Emphasis in original.]

The *Babcock II* Court read *Hegwood* as “indicat[ing] that there can be varying degrees of substantial and compelling circumstances that must be considered in reviewing the extent of a departure [from the sentencing guidelines.]” *Babcock II, supra* at 468. *Babcock II* further concluded that *Hegwood* stands for the proposition “that the principle of proportionality can be considered concerning the extent of a departure.” *Id.* at 468-469.³ Accordingly, the extent of any departure, be it upward or downward, shall be reviewed for proportionality to the offense committed and the offender.

As described in *Milbourn*, the principle of proportionality is not simply a rule of sentencing review. Rather, it is a construct employed to describe the sentencing paradigm and underlying rationale that is embodied in the legislative scheme for criminal sentencing. See *Milbourn, supra* at 650-654. Proportionality is by no means the only sentencing rationale or goal that is expressed in our legislative scheme. For example, mandatory sentencing for certain offenses is not based on principles of proportionality. Nonetheless, the limits proportionality places on the sentencing process should always be respected.

Milbourn concluded that the existence of the principle of proportionality in the legislative scheme was evidenced by two characteristics of that scheme: (1) the fact that “the Legislature has endeavored to provide the most severe punishments for those who commit the most serious crimes;” and (2) the fact that “offenders with prior criminal records are likewise subject to harsher punishment than those with no prior convictions, as reflected in the general and specific habitual offender provisions of the penal statutes.” *Id.* at 650. These characteristics, the *Milbourn* Court concluded, established a “general” organizing principle that should be adhered to by the judiciary when it imposes specific sentences within the established legislative boundaries:

Because the Legislature in addressing criminal punishment in general has subscribed to the principle of proportionality . . . we believe it is reasonable to conclude that the Legislature, in setting a range of allowable punishments for a single felony, intended persons whose conduct is more harmful and who have

³ *Milbourn* recognized that in the context of the judicial sentencing guidelines, “the extent of the departure (rather than the fact of the departure itself) may embody a violation of the principle of proportionality.” *Milbourn, supra* at 660.

more serious prior criminal records to receive greater punishment than those whose criminal behavior and prior record are less threatening to society.

We believe that judicial sentencing discretion should be exercised, within the legislatively prescribed range, according to the same principle of proportionality that guides the Legislature in its allocation of punishment over the full spectrum of criminal behavior. [*Id.* at 651.]

The adoption of the legislative sentencing guidelines only serves to support the *Milbourn* analysis. In addition to establishing the “general” organizing principle identified in *Milbourn*, the legislative scheme now also provides for “specific” minimum sentencing ranges within the provided range of punishment for each enumerated felony. As with the “general” legislative scheme, this more “specific” organization also evidences legislative adherence to the principle of proportionality and validates the assumptions made by *Milbourn* regarding sentencing within the legislatively prescribed range for a given felony.

Like the judicial guidelines, the legislative guidelines take into account several specific characteristics of the offense and the offender. These characteristics are divided into two groups: offense variables (OV) and prior record variables (PRV). Each variable is scored on a graduated point scale, with points being allocated according to specific statutory criteria. The scores thus created place the offender on a grid of prescribed punishment, which is divided into several cells that correspond to the scores calculated. The minimum sentence range for each offender is found in the cell located at the intersection of the OV and PRV scores. The existence of a minimum sentence range itself recognizes and accounts for disparities in circumstances between offenders with similar guideline scores. For the most part, a trial court’s discretion is limited to imposing a minimum sentence within the prescribed cell. In other words, the court possesses the discretion to consider the circumstances before it and determine where in the prescribed continuum of punishment the sentence should fall.

The legislative scheme also recognizes that any such guidelines cannot possibly account for the untold number of circumstances and individuals the penal system will encounter. Thus, the Legislature has provided that where “substantial and compelling” reasons exist, the sentencing court has discretion to impose a sentence outside the guideline range. This authority, however, must clearly be understood as being an exception to the rule. Unlike the judicial sentencing guidelines, which did not carry the force of law, adherence to the new sentencing guidelines must be circumspect. *Hegwood, supra* at 438. In accord with its constitutional authority over the sentencing process, Const 1963, art 4, § 45,⁴ the Legislature has now mandated a procedure that categorizes blameworthiness according to identified criteria. We believe that departures from those guidelines should be even more carefully scrutinized than were departures from the judicial sentencing guidelines. See generally *id.* at 439.

⁴ “The legislature may provide for indeterminate sentences as punishment for crime and for the detention and release of persons imprisoned or detained under such sentences.” Const 1963, art 4, § 45.

While the extent of this departure is slight (three months), it is not evident from the lower court record that the trial court recognized that its discretion to depart from the legislative guidelines is carefully circumscribed and restricted under the new legislative scheme. *Hegwood, supra* at 440. At no time during the sentencing hearing did the court state on the record that it had identified “substantial and compelling reasons” for the departure. MCL 769.34(3). Given that the sentencing court did not have the benefit of *Hegwood* and *Babcock II*, it is not surprising that the court did not acknowledge that the extent of any departure was subject to proportionality review. *Babcock II, supra* at 468-469.

The court identified defendant’s “dangerousness” as a reason for imposing the sentence that it did. This factor is not, in and of itself, objective and verifiable. However, the court did link the concept to an objective and verifiable fact, i.e., the wound inflicted on Thomas. The court also indicated that the wound was evidence of “the extent of [defendant’s] . . . intent.” MCL 777.33(1) provides that offense variable 3 (OV-3) should be scored at twenty five points if a “[l]ife threatening or permanent incapacitating injury occurred to a victim,” and at ten points if “[b]odily injury requiring medical treatment occurred to a victim.” Defendant was scored ten points on OV-3. There is no assertion that OV-3 was incorrectly scored. MCL 769.34(10). It is not clear from the record that the court believed that this characteristic had been given inadequate weight under the circumstances of the case at bar. MCL 769.34(3)(b). We do not believe that we, as an appellate court, have the authority to reinterpret or restate the court’s reasoning so as to make such an argument. MCL 769.34(3) plainly and clearly provides that it is the duty of the trial court to make such a record. See *People v Borchard-Ruland*, 460 Mich 278, 284; 597 NW2d 1 (1999).⁵

For the same reason, we will not speculate whether the court also concluded that defendant’s conduct at trial and the fact that defendant had removed herself from the altercation before returning, were circumstances that supported this departure.

Therefore, we vacate defendant’s sentence for assault with intent to do great bodily harm, and remand to the circuit court for resentencing consistent with this opinion and the legislative scheme. If the court concludes that a departure is warranted, the court shall specifically identify the substantial and compelling reasons justifying such a departure. The court shall also consider whether the extent of the departure imposed violates the principle of proportionality. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Richard Allen Griffin

⁵ There is also no indication in the record that the trial court advised “defendant orally and in writing that . . . she may appeal the sentence as provided by law on grounds that it is longer or more severe than the appropriate sentence range,” as it was required to do under MCL 769.34(7). This also evidences a failure to recognize and fully apply the new legislative sentencing scheme. Further, given that appellate review of sentence departures is significantly different than under the judicial guidelines, we believe that in the interim period of transition between the legislative guidelines and the judicial guidelines, the importance of the requirement that a trial court clearly and definitively advise a defendant of his or her appellate options cannot be overstated.