

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS DARNELL MATHIS,

Defendant-Appellant.

UNPUBLISHED

August 21, 2003

No. 240005

Wayne Circuit Court

LC No. 01-006433

Before: Jansen, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v). Defendant was sentenced to thirty to forty-eight months' imprisonment. We affirm defendant's conviction, but vacate his sentence and remand for resentencing.

Defendant argues that there were not substantial and compelling reasons for the trial court to depart from the statutory sentencing guidelines. We agree.

I. Standard of Review

Any factor relied upon by a trial court for departure from the statutory sentencing guidelines must be objective and verifiable, and the existence of any such factor is considered a factual matter to be reviewed by this Court for clear error. *People v Babcock*, __ Mich __; __NW2d__ (Docket No. 121310, issued 7/31/03) (*Babcock*) slip op p 18, citing *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000) (*Babcock I*). The determination that a particular factor is objective and verifiable should be reviewed as a matter of law. *Babcock*, *supra* citing *Babcock I*, *supra*. The trial court's determination that the objective and verifiable factors represent a substantial and compelling reason for departure is reviewed for an abuse of discretion. *Id.*

II. Departure from Statutory Sentencing Guidelines

The offense in this case occurred on May 18, 2001, therefore, the statutory sentencing guidelines apply. MCL 769.34(1) and (2); *Babcock*, *supra* at slip op p 6. The trial court departed from the statutory sentencing guidelines range of zero to nine months and sentenced defendant to thirty to forty-eight months' imprisonment. In addition, the trial court failed to

complete a departure evaluation form detailing its reasons for the departure, which is required for all departures. *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001).

The factors relied upon by the trial court for departing from the statutory sentencing guidelines must, first, be objective and verifiable. *Babcock, supra* at slip op p 8. In order for a particular factor to be objective and verifiable “the facts to be considered by the judge in determining substantial and compelling reasons must be actions or occurrences which are external to the minds of the judge, defendant and others involved in making the decision and must be capable of being confirmed.” *People v Hill*, 192 Mich App 102, 112; 480 NW2d 913 (1991); see also *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

At sentencing, the trial court listed as reasons for its departure from the statutory sentencing guidelines defendant’s repetitive pattern of criminal behavior, defendant’s lifetime probation status, and a belief that, at some point, society should be concerned about repeat offenders. Specifically, the trial court stated:

I’m going to sentence the defendant above the guidelines here. I understand that the guidelines are what they are here, but the fact remains that we have a pattern of behavior here with the defendant engaging in the same offense. He was on lifetime probation when this particular offense occurred in which he’d been convicted, you know, by a juror [sic], and I think that at some point society has to be concerned about people just being able to walk in here and walk out and do the same things all over again.

Two of the three factors relied upon by the trial court, defendant’s prior criminal history and probation record, are objective and verifiable. *Abramski, supra* at 74; *Hill, supra* at 112. Defendant had two prior drug convictions for drug related offenses. Specifically, defendant was previously convicted of delivery of a controlled substance under twenty-five grams on or about September 16, 1996, and for delivery of a controlled substance under fifty grams on or about December 22, 1998. Defendant was also on lifetime probation at the time of the current sentencing. The trial court’s view that “at some point society has to be concerned about people just being able to walk in here and walk out and do the same things all over again,” is neither objective nor verifiable because it is a statement incapable of being confirmed. See *Abramski, supra* at 74; *Hill, supra* at 112.

Ultimately, this Court must review for an abuse of discretion whether the stated objective and verifiable factors constitute substantial and compelling reasons for departure from the statutory sentencing guidelines. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001); *Babcock, supra* at slip op p 18. Therefore, we must determine whether the trial court abused its discretion in relying upon defendant’s previous convictions and his lifetime probation status, the only objective and verifiable factors, as substantial and compelling reasons for departure. See *Abramski, supra* at 74; *Hill, supra* at 112.

The trial court is not permitted to “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.” MCL 769.34(3)(b), *Babcock, supra* at slip op p 10 n 12. There was no explicit finding

on the record that these factors, prior criminal history and probation record, were given inadequate weight. *Babcock I, supra* at 79. Even when a departure is exercised based on a particular characteristic being given inadequate or disproportionate weight, the extent of the departure is subject to review for proportionality. *Babcock, supra* at slip op pp 14-15; *Hegwood, supra* at 437. Specifically, in *Hegwood, supra* at 437 n 10, quoting MCL 769.34(3), our Supreme Court provided:

[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 prosecution argues that “[d]efendant received no extra points for a continuing pattern of criminal behavior because he did not fit any of the specific categories listed under offense variable 13.” We believe the statutory sentencing guidelines give adequate weight to defendant’s prior convictions and probation record. The trial court did not specify why the guidelines gave inadequate or disproportionate weight to defendant’s prior convictions or his probation record. Defendant’s cumulative Prior Record Variable (PRV) score of forty¹ reflects both his previous convictions and probationary record: (1) defendant received a score of twenty-five under PRV 1, which assesses points for prior high severity felony convictions, MCL 777.51; *People v Garner*, 215 Mich App 218, 219-220; 544 NW2d 478 (1996); and (2) defendant received a score of ten under PRV 6, which requires that points be assessed against an offender if, at the time of the instant offense, the defendant was on probation, MCL 777.56(1)(c); *People v Maben*, 208 Mich App 652, 653; 528 NW2d 850 (1995). Defendant’s prior convictions and probation record are factors that have already been accounted for and adequately weighed by the legislature, and therefore, cannot constitute substantial and compelling reasons for departure. Because we find that the trial court did not state substantial and compelling reasons for departing from the appropriate sentence range, the sentence should be vacated and the matter remanded for resentencing. MCL 769.34(11); *Babcock, supra* at slip op pp 11, 13. On remand, the trial court is free to impose any minimum sentence within the guidelines range, or to depart from that range if there is a substantial and compelling reason to do so and such reason is stated on the record. *Id.*

Defendant further contends that his sentence “places him on the border of an illegal minimum in violation of the two-thirds rule as set forth in *People v Tanner*, 387 Mich 683. . . .” The terms of any departure is governed by the limits set forth by the Legislature. *Hegwood, supra* at 439. The current law states: “The court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence.” MCL 769.34(2)(b).

¹ Defendant received five points under PRV 2, which assesses points for prior low severity felonies. MCL 777.52.

Although defendant's sentence exceeded the sentencing guidelines range, it did not exceed the two-thirds rule, as conceded by defendant. See *Tanner, supra* at 690. Thus, defendant's two-thirds rule argument is without merit.

Defendant further argues that his sentence was disproportionate. Given our resolution of the sentencing issue, *supra*, we need not consider this aspect of defendant's argument.²

III. Reassignment

Defendant also requests resentencing before a different trial judge. Reassignment is necessary if the trial judge exhibited "any prejudices or improper attitudes regarding this particular defendant." *Hegwood, supra* at 440-441 n 17. More specifically, "[a] case should be assigned to a different judge if it would be unreasonable to expect the trial judge, given her handling of the matter, to be able to previously expressed findings out of mind without substantial difficulty." *People v Pillar*, 233 Mich App 267, 270-271; 590 NW2d 622 (1998).

Defendant has failed to demonstrate that the trial judge had a prejudice or improper attitude rather than an incorrect understanding of limitations set upon judicial discretion in sentencing. See *Hegwood, supra* at 440-441 n 17. Therefore, no reason exists to assign a different judge to conduct the resentencing. *Id.* Finally, because we vacate defendant's sentence and remand for resentencing, we need not address defendant's claim that the sentence constituted cruel and unusual punishment.

We affirm defendant's conviction, vacate his sentence, and remand to the trial court for resentencing. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Janet T. Neff

/s/ Kirsten Frank Kelly

² With regard to the principle of proportionality, our Supreme Court, recently, provided "in considering whether to depart from the guidelines, the trial court must ascertain whether taking into account an allegedly substantial and compelling reason would contribute to a more proportionate criminal sentence than is available within the guidelines range." *Babcock, supra* at slip op p 17. Because the trial court failed to state substantial and compelling reasons for departure it is unnecessary to address the principle of proportionality in the present case. See *Id.*