

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN RAY DUDDLES,

Defendant-Appellant.

UNPUBLISHED

March 10, 2005

No. 251824

Kalkaska Circuit Court

LC No. 01-002134-FH

Before: Murray, P.J., and Markey and O’Connell, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted, challenging the fifteen- to thirty-year prison sentence imposed after he was found guilty of violating probation on his convictions of operating a vehicle under the influence of intoxicating liquor (OUIL), third offense, MCL 257.625(8), and habitual offender, fourth or subsequent offense, MCL 769.12. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded guilty of OUIL, third offense, and acknowledged his status as a fourth or subsequent offender. The statutory sentencing guidelines established a minimum term range of ten to forty-six months.¹ The trial court, after delaying sentencing to allow defendant to enter a substance abuse treatment program, sentenced defendant to one year in the treatment program and to a term of five years’ probation.

Defendant pleaded guilty of violating probation by using cocaine and being dismissed from the substance abuse treatment program. At sentencing the trial court declined to apply the sentencing guidelines, and sentenced defendant to fifteen to thirty years in prison.

The statutory sentencing guidelines apply to a sentence imposed after a probation violation. *People v Hendrick*, 261 Mich App 673, 679-680; 683 NW2d 218 (2004). A trial court

¹ Under the statutory sentencing guidelines, if the upper limit of the established minimum sentence range exceeds eighteen months and the lower limit is twelve months or less, the sentencing court must, absent a departure, sentence the defendant to imprisonment with a minimum term within that range, or to an intermediate sanction which may include a term of imprisonment of not more than twelve months. MCL 769.34(4)(d).

may depart from the established guidelines range if it has a substantial and compelling reason to do so, and clearly articulates that reason on the record. MCL 769.34(3). A substantial and compelling reason for departing from the guidelines must be objective and verifiable, must irresistibly attract the attention of the court, and must be of considerable worth in deciding the length of the sentence. A substantial and compelling reason articulated by a trial court to merit a departure from the sentencing guidelines must justify the particular departure at issue. *People v Babcock*, 469 Mich 247, 257-260; 666 NW2d 231 (2003).

We review the determination of the existence of a factor for departing from the guidelines for clear error, the determination that a factor is objective and verifiable for error, and the determination that objective and verifiable factors merited departure from the guidelines for an abuse of discretion. *Id.* at 264-265. A trial court may depart from the guidelines range for nondiscriminatory reasons based on an offense or offender characteristic which was already considered in calculating the guidelines range if the trial court concludes that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Babcock, supra* at 265-269.

Defendant's minimum term of fifteen years constituted a significant upward departure from the minimum guidelines range of ten to forty-six months. Although the trial court, without the benefit of *Hendrick*, did not believe it needed to comply with the sentencing guidelines, it nonetheless articulated its reasons for the lengthy sentence imposed on defendant. We conclude that the reasoning articulated by the trial court constituted substantial and compelling reasons for exceeding the guidelines. Defendant's prior record and status as a parole violator were accounted for in the calculation of the guidelines, MCL 777.51; MCL 777.52; MCL 777.56, but the trial court found that the guidelines gave defendant's prior record inadequate weight because they did not take into consideration the fact that he had five prior OUIL convictions. MCL 769.34(3)(b). The trial court based its sentencing decision on the nature and extent of defendant's prior record, including his status as a parole violator, and his failure to utilize the opportunity afforded him to rehabilitate himself in the substance abuse treatment program. These reasons were objective and verifiable, irresistibly attracted the attention of the trial court, and were of considerable worth in determining the length of the sentence. The trial court did not abuse its discretion by determining that those reasons constituted substantial and compelling reasons for exceeding the sentencing guidelines. *Babcock, supra* at 257-261. Defendant's sentence is proportionate, *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), and thus does not constitute cruel or unusual punishment. *People v Drohan*, 264 Mich App 77, 92; 689 NW2d 750 (2004).

Affirmed.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Peter D. O'Connell