

Court of Appeals, State of Michigan

ORDER

PEOPLE OF MI v HAROLD LEONARD STANDBERRY

Docket No. 258632

LC No. 02-005926-01

Joel P. Hoekstra
Presiding Judge

Janet T. Neff

Donald S. Owens
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued February 23, 2006, is hereby VACATED. A new opinion is attached to this order.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

APR 18 2006

Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HAROLD LEONARD STANDBERRY,

Defendant-Appellant.

UNPUBLISHED

April 18, 2006

No. 258632

Wayne Circuit Court

LC No. 02-005926-01

Before: Hoekstra, PJ, and Neff and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of manslaughter, MCL 750.321, and possession of a firearm during the commission of a felony, MCL 750.227b, in connection with the brutal shooting death of defendant's girlfriend, who was the mother of defendant's young son. The victim was shot while in her bathtub. The trial court departed from the minimum sentencing guidelines range of nineteen to thirty-eight months and sentenced defendant to a prison term of four to fifteen years for his manslaughter conviction. In a prior appeal, this Court affirmed defendant's convictions, but remanded for rearticulation of the trial court's reasons for departing from the sentencing guidelines range, or resentencing. *People v Standberry*, unpublished opinion per curiam of the Court of Appeals, issued July 29, 2004 (Docket No. 246886). On October 1, 2004, the trial court rearticulated its reasons for departing from the guidelines. Defendant appeals as of right. We affirm, but remand for correction of the amended judgment of sentence.

When the trial court initially departed from the sentencing guidelines range, it imposed a minimum sentence of 48 months, citing defendant's failure to take responsibility, his lack of remorse, and how easily he was provoked as reasons for the departure. This Court affirmed defendant's convictions, and ruled that evidence of defendant's lack of remorse could be considered when sentencing defendant. However, this Court concluded that resentencing or rearticulation was necessary:

The trial court noted in imposing sentence that for defendant to have shot the victim multiple times in the bathtub, having provided as his only explanation that the victim provided him the gun and provoked him, showed how "easily provoked" defendant was. To the extent the trial court concluded that defendant's lack of remorse and easy provocation signaled that his rehabilitation potential is poor, we find no error. However, the court did not specifically address

defendant's rehabilitation potential, and clarification is required. [*Standberry, supra*, slip op at 4.]

This Court also concluded that the trial court's reliance on defendant's failure to accept responsibility was problematic. *Id.*

On remand, defendant's counsel informed the trial court that it could either rearticulate the reasons for the upward departure or resentence defendant. Counsel asked the court to resentence defendant within the guidelines range. The trial court declined to resentence defendant. Rather, it rearticulated the reasons for its departure, stating:

The lack of remorse issue had additional significance to this Court because I recall the different versions that the defendant gave as to what happened to the deceased in this case. I also recall credible witnesses testifying and giving credible evidence opposite that of the defendant's version. And I really concluded in my mind that the defendant was just lying. Not making a mistake, not under extremely emotional state of being where he was confused and giving different statements. I concluded that he was just outright lying.

And, so, for those reasons once again, I'm going to depart because 38 months for the death of a person in a situation like this, to me, just is inappropriate, unjust, and unfair. I even think that the ten month departure upward was a minor departure. It really was. And, it's been, I think, what, a couple of years? Since then I've thought about this case a little bit. When I got the opinion back from the Court of Appeals, before I read the opinion, I really thought that I had departed more than ten months. And then when I read the opinion and I saw that I only departed ten months - - even though, you know, one day is a departure. I was surprised that I hadn't departed more than I did because the evidence strongly suggest[ed] that this was a merciless killing.

So, once again, for the lack of remorse, for this Court's opinion that the defendant just simply lied - - and lied because he did it, not lied because he was confused or because he felt bad in any way. And, it's true, that there are children left without a mother. And one of the defendant's lies centered around what he said or did with the baby, I think, after the deceased was killed. And there was a witness - - I can't remember her name - - a female witness who came in and gave very clear testimony that that was not the case, that the defendant's version of what he told the child, what he did with the child before and after the shooting, this clearly, in this Court's mind, was not the case. It must not have been the case in the jurors' minds either because they found him guilty of the Manslaughter conviction.

So, those are my reasons; the children left without their mother, the defendant deliberately lying about what happened in this case and therefore showing no remorse for it. And, I just believe that the guidelines were just superiorly inadequate for a situation like this. They send it back and tell me to sentence the defendant within the guidelines, I'll do that. But, I think it's truly

unjust. So, once again, the sentence is 19 months to 48 months - - I'm sorry, 48 months to 15 years in the State Prison of Southern Michigan.

The trial court also filed a written sentencing departure evaluation,¹ which indicated that it was departing from the guidelines because defendant lied about incident; defendant showed no remorse, so rehabilitation was unlikely; the victim's two children were left without a mother and this caused a burden on society; and the victim was shot in the back of the head. The trial court did not, at any time, opine or consider defendant's failure to accept responsibility when rearticulating the sentence.

On appeal, defendant argues that the trial court, once again, failed to articulate substantial and compelling reasons to justify the ten-month departure. Defendant argues that the only reasons cited were his lack of remorse and the fact that two children lost their mother as a result of defendant's crime. With respect to the lack of remorse, defendant argues that this reason is not objective and verifiable, and further, it cannot be a substantial and compelling reason for departure absent a tangible link between the lack of remorse and defendant's prospect for rehabilitation. Defendant argues that the trial court failed to identify any objective evidence to support a lack of remorse and did not refer to rehabilitation. With respect to the children's loss of their mother, defendant argues that the scoring of the guidelines already account for psychological damage to the children. Thus, unless the trial court found that the guidelines did not give adequate weight to this factor, it cannot be used as a basis to depart from the sentencing guidelines range. Defendant contends that there is no evidence that the sentencing guidelines failed to give adequate weight to the losses suffered by the children.

A departure from the sentencing guidelines is allowed only if there is a substantial and compelling reason for the departure. *People v Babcock*, 469 Mich 247, 255; 666 NW2d 231 (2003). A "substantial and compelling" reason is an objective and verifiable reason that keenly or irresistibly grabs our attention, is "of considerable worth" in determining the length of the sentence, and exists only in exceptional cases. *Id.* at 257.

"[T]he 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 an abuse of discretion." [*Id.* at 264-265, quoting *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995).]

When a trial court articulates multiple "substantial and compelling" reasons for departure, we must determine whether the alternate reasons are substantial and compelling, and if some are not,

¹ On appeal, defendant does not refer to the trial court's written departure evaluation. His argument is based only on the statements made at the time of rearticulation.

we must determine whether it would have departed to the same degree on the strength of the substantial and compelling reasons alone. *Id.* at 260. An abuse of discretion occurs when the trial court chooses an outcome falling outside the principled range of outcomes. *Id.* at 269.

In defendant's prior appeal, this Court acknowledged that the lack of remorse may be considered when determining an individual's potential for rehabilitation. *People v Wesley*, 428 Mich 708, 711; 411 NW2d 159 (1987). Rehabilitation or reformation is a necessary consideration in fashioning an appropriate sentence. *People v Daniel*, 462 Mich 1, 7 n 8; 609 NW2d 557 (2000).² This Court also previously concluded that there was no error in the trial court's consideration of defendant's lack of remorse, but remanded the case to the trial court because it articulated a lack of remorse without addressing defendant's rehabilitation potential in light of the lack of remorse.

On remand, the trial court again articulated that defendant's lack of remorse was a substantial and compelling reason for the upward departure. There was no clear error in the trial court's conclusion that lack of remorse existed. At sentencing, defendant declined to speak and offered no expression of remorse for shooting and killing his girlfriend of many years and the mother of two children, one of whom belonged to defendant. Moreover, after the crime, defendant told differing versions of events, and his claims contradicted those of other witnesses. His initial claims also contradicted his written confession. The record supports the trial court's determination that defendant lied about the crime and that his lies were deliberate. The trial court appropriately concluded that, because defendant chose to lie and failed to express any remorse, he lacked remorse.

Additionally, the trial court clearly indicated in its written departure evaluation that defendant's lack of remorse affected his rehabilitation potential. The necessary link between lack of remorse and potential for rehabilitation was therefore addressed. Further, the trial court did not abuse its discretion in determining that defendant's lack of remorse was a substantial and compelling reason to depart from the guidelines. This factor keenly and irresistibly grabs our attention in this situation where defendant killed his girlfriend, the mother of two children. One of the children was defendant's own, and defendant's actions effectively removed both parents from that child's life. Under the circumstances, we find no abuse of discretion in the trial court's reliance on defendant's lack of remorse, demonstrating low rehabilitation potential, as a substantial and compelling reason to upwardly depart from the sentencing guidelines range.

² In *Daniel*, *supra* at 6-8, the Court expressly held that expressions of remorse are not objective and verifiable factors that may be considered in determining whether to depart from the recommended minimum sentence range under the legislative guidelines. Expressions of remorse, specifically oral or written representations, may be objective, but the defendant's state of mind in expressing remorse is subjective and cannot be confirmed. *Id.* at 8 n 9. While expressions of remorse fail as a matter of law to be objective and verifiable factors permitting departure, case law has not treated lack of remorse in a similar fashion. Lack of remorse is an indicator of an individual's potential for rehabilitation. *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003), citing *Wesley*, *supra*.

On remand, the trial court additionally articulated as a substantial and compelling factor that two children lost their mother as a result of defendant's crime. This factor was not only objective and verifiable, but it too irresistibly grabs our attention and is not considered by the guidelines. Offense variable (OV) 5, MCL 777.35, is scored for serious psychological injury to members of the victim's family, necessitating professional treatment. The factor accounts for psychological injuries, but it does not account for other losses attendant to the loss of a parent such as the loss of the family unit, the loss of love, or the loss of nurturing. See, e.g., *People v Armstrong*, 247 Mich App 423, 425-426; 636 NW2d 785 (2001). Offense variable 5 was scored in this case because of the trauma suffered by the victim's family members related to her violent murder, not because of the children's loss of their mother.³ In sum, the guidelines considered psychological damage to the children but not the other suffering attendant to the loss of their mother. Moreover, the guidelines clearly did not account for the societal burden now existing because the two children no longer have a parent to care for them. The trial court was entitled to rely on the children's loss of their mother as a substantial and compelling reason to depart from the sentencing guidelines range. There was no abuse of discretion.⁴

Defendant next argues that the trial court violated his right to allocution on remand. We disagree. This Court remanded for resentencing *or rearticulation*. It did not vacate defendant's prior sentence and order a full resentencing. If resentencing had taken place, defendant would have had the right to allocute. When a defendant is resentenced, his case is placed in a presentence posture. See *People v Ezell*, 446 Mich 869; 522 NW2d 632 (1994). Every aspect of the sentence is to be considered by the trial court de novo. *People v Williams (After Second Remand)*, 208 Mich App 60, 65; 526 NW2d 614 (1994). Allocution is a right provided to a defendant when being sentenced. MCR 6.425(E)(1)(c). At the time of his initial sentencing, defendant was afforded the right to articulate on two separate occasions and chose not to. But there is no right to allocution where a resentencing does not take place. *People v Strunk*, 172 Mich App 208, 211; 431 NW2d 223 (1988). See also *People v Foy*, 124 Mich App 107, 111-112; 333 NW2d 596 (1983), where this Court indicated that allocution and an updated presentence report were unnecessary when the defendant was, for all intents and purposes, not actually resentenced. Because defendant was not resentenced, he was not entitled to allocution.

Finally, defendant argues that the trial court erred by failing to award him full credit for time already served when it reissued the judgment of sentence on October 1, 2004. We agree. On remand, the trial court ruled that defendant would receive "credit for the time that he has served." The trial court was unsure how much credit had accrued but indicated that "[w]hatever it is he'll get the appropriate credit." The judgment of sentence, dated October 1, 2004, contains a notation that "[a]ll credit is to be applied to Count 2." Thereafter, on February 10, 2005, the

³ We note that the copy of the sentencing information report (SIR), which was forwarded to this Court with the presentence investigation report, is inaccurate. It does not show the changes made by the trial court at the time of the initial sentencing. The correct copy of the SIR is located within the lower court file.

⁴ Defendant does not challenge the trial court's written departure evaluation reference to the victim being shot in the back of her head. Nor does defendant argue that the extent of the departure was outside the principled range of outcomes.

trial court issued an amended judgment of sentence, specifically awarding defendant 665 days of credit, the length of time defendant was incarcerated between the first judgment of sentence on December 6, 2002 and the second judgment of sentence (following remand) issued October 1, 2004. Because the amended judgment of sentence omits the amount of jail credit to which defendant is entitled for time served prior to December 6, 2002, we remand for correction of the amended judgment of sentence.

Affirmed, but remanded for correction of the amended judgment of sentence. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Janet T. Neff

/s/ Donald S. Owens