

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DANIEL JAMES THOMAS,

Defendant-Appellee.

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UNPUBLISHED

October 26, 2006

No. 262555

Oceana Circuit Court

LC No. 04-004728-FH

Before: Whitbeck, C.J., and Saad and Schuette, JJ.

PER CURIAM.

Defendant pleaded guilty to two counts of operating a motor vehicle while intoxicated (OUIL) causing death, MCL 257.625(4)(a). The court sentenced defendant to 360 days in jail and 36 months of probation; this is a downward departure from the minimum sentence range of 43 to 86 months in prison. Plaintiff appeals by leave granted. We vacate defendant's sentences and remand for resentencing and rearticulation.

While driving, defendant fell asleep, his vehicle left the road and as a result, he killed two people. A blood analysis revealed the presence of cannabinoids in defendant's blood. Defendant admitted that he had smoked marijuana the night before the accident. However, he says he did not use marijuana on the day of the accident. Defendant stated that he had worked twelve ten-hour days on a construction job immediately before the accident, and, on the day of the accident he awoke at 3:00 a.m.

Plaintiff argues on appeal that the court's reasons for departure were not substantial and compelling. In reviewing a departure from the guidelines range, "whether a factor exists is reviewed for clear error, whether a factor is objective and verifiable is reviewed de novo, and whether a reason is substantial and compelling is reviewed for abuse of discretion." *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003). An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes. *Id.* at 269.

A sentencing court must order a minimum sentence within the sentence guidelines range unless "the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). A "substantial and compelling reason" in the context of sentencing departures is an objective and verifiable reason that keenly or irresistibly

grabs the attention of the court, is of considerable worth in deciding the length of a sentence, and exists only in exceptional cases. *Babcock, supra* at 257. Objective and verifiable facts are external to the minds of those involved in making the decision and are capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). When a trial court departs from the sentencing guidelines, it must consider whether the substantial and compelling reasons would contribute to a more proportionate criminal sentence than is available under the sentencing guidelines. *Babcock, supra* at 264. “If there are substantial and compelling reasons that lead the trial court to believe that a sentence within the guidelines range is not proportionate to the seriousness of the defendant’s conduct and to the seriousness of his criminal history, the trial court should depart from the guidelines.” *Id.*

The trial court articulated several reasons for departing downward from the minimum sentencing guidelines range:<sup>1</sup> (1) defendant’s lack of criminal history and antisocial behavior; (2) defendant’s expression of remorse; (3) the small amount of marijuana in defendant’s blood; (4) the contribution of other factors causing the accident; and (5) defendant’s lack of risk to the community did not justify spending community funds to imprison defendant.

We agree with plaintiff that defendant’s lack of criminal history is not a substantial and compelling reason to depart from the sentencing guidelines. MCL 769.34(3)(b) forbids a court from basing a departure on the prior criminal record of the offender unless the court finds from the facts contained in the record that it has been given inadequate or disproportionate weight. The court abused its discretion when it departed downward based on defendant’s lack of criminal history without finding that it had been given inadequate weight. We also agree that the court abused its discretion when it departed for the reason that defendant, who was 18 years old at the time of the offense, had no history of antisocial behavior. This factor is not exceptional and does not irresistibly or keenly attract the court’s attention. *Babcock, supra* at 258, 261; see also *People v Claypool*, 470 Mich 715, 727; 684 NW2d 278 (2004). Finally, we agree with plaintiff that defendant’s expression of remorse is not an appropriate reason for the departure because “an appellate court cannot effectively or objectively review the sincerity of such an expression of remorse.” *People v Daniel*, 462 Mich 1, 11; 609 NW2d 557 (2000).

We disagree, however, with plaintiff’s arguments that the remaining reasons are not substantial and compelling because they are not objective and verifiable. At sentencing, the court stated:

. . . the basis for the charge essentially in this case was the fact that when the blood test was done the presence of THC or the residue of marihuana was found in the blood stream in a very . . . small amount.

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<sup>1</sup> We note that the departure form required under *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987) cannot be located in the lower court record. Therefore, the reasons articulated by the court at sentencing are used for analysis. Instructions for remand include the ministerial task of completing the departure form. *People v Armstrong*, 247 Mich App 423, 426; 636 NW2d 785 (2001).

Given the circumstances and the explanation of . . . what the defendant has allocated . . . and what had happened actually, I think that there's other explanations as to whether or not marihuana in this particular case was a cause of this accident or whether just plain error and falling asleep at the wheel is equally at fault. . . .

The next thing the Court has to consider is the fact of the allocation of community assets to correction given risk. . . . [T]he commitment of some \$25,000.00 a year for a period of a few years is going to make any difference to this community in the sense of the risk that the defendant would pose.

The court's statement that the presence of THC found in the defendant's blood was a "small amount" is a factual finding that we review for clear error. After a review of the record, we are not left with a definite and firm conviction that a mistake has been made. *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991). Also, it is appropriate to defer to the trial court's expertise in concluding that the amount of marijuana found in defendant's blood is relatively small; further, this finding is external to the mind of the judge and capable of verification. *Abramski, supra* at 74. Finally, the court did not abuse its discretion on this issue because it reached a reasoned and principled outcome. *Babcock supra* at 269. We also hold that the court did not abuse its discretion when it cited the objectively verifiable mitigating circumstances surrounding the offense to be substantial and compelling reasons for departure. Our Supreme Court recognized that in evaluating whether a case presents substantial and compelling reasons to depart below minimum sentencing guidelines, a court should place particular emphasis on mitigating circumstances surrounding the offense. This should be done to achieve a more proportionate sentence, particularly under facts "which fall short of warranting a finding of innocence but render the defendant less culpable . . ." *People v Fields*, 448 Mich 58, 76; 528 NW2d 176 (1995). We agree with the trial court that the seriousness of defendant's conduct in this case is mitigated in particular by the fact that defendant had been awake since 3:00 a.m. on the day of the accident following a rigorous work schedule over the previous several days, and that defendant did not have any marijuana paraphernalia in his vehicle at the time of the accident.

Plaintiff's final argument is that defendant's risk is not objective and verifiable and therefore the court erred when it departed for the reason that the defendant does not pose sufficient risk to the community to justify imprisonment. We find that a defendant's potential risk to the community is a substantial and compelling reason to depart from the sentencing guidelines when the determination is supported by objective and verifiable facts. Cf. *Daniel, supra* at 7 (approving of the use of objective factors evidencing a defendant's potential for rehabilitation or reformation as substantial and compelling reasons for departure). Even factors arising after a defendant's arrest may be properly considered. *Id.* However, although the court properly cited defendant's lack of risk to the community as a reason for departure, it failed to articulate objective factors supporting its conclusion.

When an appellate court determines that some of the reasons articulated by the sentencing court are substantial and compelling, but some are not, we must determine whether the trial court would have departed to the same degree on the basis of the substantial and compelling reasons alone. *Babcock, supra* at 260; MCL 769.34(3). Because we are unable to determine from the record that the trial court would have departed to the same degree, we vacate defendant's sentences and remand for resentencing and rearticulation. *Id.* at 260-61; MCL

769.34(11). Upon remand, the court may impose the same sentence if it articulates substantial and compelling reasons to justify the departure. *Id.* at 261. Upon remand, the court is also instructed to complete the required departure form. *Armstrong, supra* at 426.

Vacated and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Henry William Saad

/s/ Bill Schuette