

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILLIP DREW MITCHELL,

Defendant-Appellant.

UNPUBLISHED

October 31, 2006

No. 265290

Wayne Circuit Court

LC No. 02-010934-01

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

PER CURIAM.

In this appeal after remand,¹ defendant appeals a life sentence imposed by the trial judge after a jury convicted him of unarmed robbery, MCL 750.530. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Unarmed robbery is a 15-year Class C felony subject to the statutory guidelines. MCL 777.16y. The guidelines as scored placed defendant in the F-I category, for which the minimum sentence range is 29 to 57 months. MCL 777.64. As an habitual offender, fourth offense, MCL 769.12, the upper limit is doubled, MCL 777.21(3)(c), making the minimum sentence range 29 to 114 months. The trial court imposed a life sentence, citing defendant's extensive criminal history and the statutory authorization for life sentences under the habitual offender statute.

A trial court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is permitted. MCL 769.34(2). The court may depart from the guidelines if it "has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). "The court may depart from the guidelines for nondiscriminatory reasons where there are legitimate factors not considered by the guidelines

¹ In a prior appeal, this Court concluded that the trial court "never acknowledged that its sentence was a departure from the guidelines or explicitly articulated substantial and compelling reasons for the departure." *People v Mitchell*, unpublished opinion per curiam of the Court of Appeals, issued August 17, 2004 (Docket No. 247129), slip op p 7. Accordingly, this Court remanded to the trial court for resentencing, directing the trial court to "comply with the applicable court rules and statutory requirements governing sentencing, including. . . sentence departures, as well as the sentencing requirements prescribed in *Babcock, supra*." *Id.*

or where factors considered by the guidelines have been given inadequate or disproportionate weight.” *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001); see MCL 769.34(3)(a) and (b).

“[T]he Legislature intended ‘substantial and compelling reasons’ to exist only in exceptional cases.” *People v Fields*, 448 Mich 58, 68; 528 NW2d 176 (1995). Only objective factors that are capable of verification may be used to assess whether there are substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003). Objective and verifiable factors are “actions or occurrences that 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 Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). A departure is appropriate “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,” such that a departure would result in “a more proportionate criminal sentence than is available within the guidelines range.” *Babcock, supra* at 264.

The trial court’s determination regarding the existence of a reason or factor warranting departure is a factual determination that is reviewed on appeal under the clearly erroneous standard. *Id.* at 273. The determination that a particular factor is objective and verifiable is reviewed by this Court as a matter of law. *Id.* The trial court’s determination that objective and verifiable factors present a substantial and compelling reason to depart from the statutory minimum sentence is reviewed for an abuse of discretion, which “occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes.” *Id.* at 274. See also *Abramski, supra*. If the trial court articulates multiple reasons for a departure, some of which are substantial and compelling and some of which are not, this Court must determine whether the trial court would have departed from the guidelines to the same extent had it considered only the substantial and compelling factors. If this Court is unable to make such a determination, it must remand for resentencing or re-articulation. *Babcock, supra* at 271.

As the trial court correctly noted, any felony punishable by five or more years in prison becomes punishable by “life or for a lesser term” when the defendant is an habitual offender fourth. MCL 769.12(1)(a). However, a life sentence is not within the guidelines even though authorized by the habitual offender statute unless it is also included in the applicable grid cell for the sentencing offense. *People v Houston*, 473 Mich 399, 410 n 22; 702 NW2d 530 (2005); *People v Greaux*, 461 Mich 339, 345; 604 NW2d 327 (2000). In other words, while the court could lawfully impose a life sentence under MCL 769.12, it nonetheless was required to “follow the departure rules because the sentencing guidelines did not recommend a sentence of life in prison.” *People v Johnigan*, 265 Mich App 463, 473-474; 696 NW2d 724 (2005). Therefore, the fact that the habitual offender statute authorizes a life sentence is not itself a valid basis for a departure.

The fact that defendant has committed several other offenses is taken into account by the prior record variables and accounted for his placement in Level F, the highest level in the grid. However, the guidelines do not take into account the following objective facts contained in the presentence report: (1) defendant’s criminal history covers his entire adult life; (2) the revolving-door pattern of defendant’s contacts with the criminal justice system; and (3) the four pending charges in district court which, though minor, underscore defendant’s inability to

conform his conduct to the rules of society. Therefore, the trial court did not err in finding substantial and compelling reasons to depart from the guidelines.

Once the court has a valid basis for departing from the guidelines, the reasons cited by the court must justify the particular departure. *Babcock, supra* at 273; *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001). In other words, the extent of the departure must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Babcock, supra* at 264. “The amount a trial court departs from the guidelines is reviewed to determine whether the trial court abused its discretion.” *Abramski, supra*.

Clearly, defendant is a career criminal who routinely engages in criminal behavior. He had been sentenced to: (1) time served in three prior cases; (2) jail terms in four district court cases; (3) prison terms in two other cases; and (4) lesser punishments in yet two other cases. Despite this record, he refuses to refrain from criminal activity. Under the circumstances, the trial court did not abuse its discretion in imposing a life sentence.

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Bill Schuette