

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PIERRE EDWARD JORDAN, a/k/a PIERRE
WILSON,

Defendant-Appellant.

UNPUBLISHED

May 11, 2010

No. 290974

Wayne Circuit Court

LC No. 06-004916-FC

Before: TALBOT, P.J., and FITZGERALD and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his sentence on a plea-based conviction of unarmed robbery. MCL 750.530. After it revoked defendant's probation, the trial court elected to depart from the minimum sentencing guidelines range of 12 to 24 months and sentenced defendant to serve 5 to 15 years in prison. Because we conclude that there were no sentencing errors warranting relief, we affirm.

On appeal, defendant challenges both the trial court's decision to depart from the sentencing guidelines and the extent of the departure.

A court must impose a minimum sentence within the guidelines range. MCL 769.34(2); *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). However, it may elect to depart from the guidelines range 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 where there are legitimate factors not considered under the guidelines or where the trial court determines that the factors considered under the guidelines have been given inadequate or disproportionate weight. MCL 769.34(3)(a) and (b); *Young*, 276 Mich App at 450-451. A departure is appropriate "if there are substantial and compelling reasons that lead the trial court to believe that a sentence within the guidelines ranges 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." *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003).

"[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. *Babcock*, 469 Mich at 257. In order to be objective and verifiable, a trial court's reason for departure must be based on actions or occurrences that are external to the court's mind and are capable of being confirmed. *Young*, 276 Mich App at 450.

This Court reviews the trial court's factual findings in support of its departure for clear error, but reviews de novo, as a question of law, whether the factor is objective and verifiable. *Young*, 276 Mich App at 448. Finally, this Court reviews the trial court's determination that the objective and verifiable factors constitute a substantial and compelling reason to depart from the recommended minimum sentence for an abuse of discretion. *Id.*

The trial court articulated several substantial and compelling reasons for the departure. The trial court noted that defendant was originally charged with armed robbery—a life offense, see MCL 750.529, but allowed to plead guilty to the less serious offense of unarmed robbery. This was an objective and verifiable fact confirmed by the record and constitutes a valid basis for departure. *People v Brzezinski (After Remand)*, 196 Mich App 253, 256; 492 NW2d 781 (1992).

The trial court also found the nature of the physical harm inflicted on the victim relevant. Defendant participated in severely beating the victim of the robbery, which factor should have been scored under OV 7, MCL 777.37, but was not.¹

Finally, the trial court found defendant's conduct while on probation to be a significant factor for sentencing. Defendant was initially sentenced to probation under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq.* Yet he repeatedly violated probation: he was convicted of a controlled substance offense and was arrested for two other offenses while on probation. We agree with the trial court that defendant's record while on probation was "dismal" and, as well as the violation itself, provided a valid basis for departure. See, e.g., *People v Hendrick*, 472 Mich 555, 565; 697 NW2d 511 (2005). In addition, following his arrest for the controlled substance offense, defendant used the name Pierre Wilson in an attempt to obtain a probationary sentence under HYTA for the very conviction that led to the revocation of his HYTA status in this case. When his deception was discovered, he initially told the court that he was not the Pierre Jordan who had pleaded guilty to unarmed robbery.²

We conclude that these factors were all objective and verifiable and clearly supported the trial court's decision to depart from the guidelines. The trial court did not abuse its discretion when it determined that these factors were substantial and compelling reasons for departing from the recommended minimum sentence. *Young*, 476 Mich App at 448.

¹ Defendant denies participating in the beating. However, his participation is documented in the presentence report. A presentence report is presumed accurate and may be relied on by the trial court unless effectively challenged by the defendant. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997). Further, defendant acknowledged at sentencing that the report was factually accurate.

² Although defendant now denies having lied to the court, the judge recalled that "he stood right in front of me and said that." Defendant has not submitted any record support for his assertion that the court was in error.

While the extent of the departure appears excessive in comparison to the minimum sentence range recommended by the guidelines as scored, it is clear that many facts and circumstances were not taken into account under the guidelines as scored. Considering the seriousness of defendant's conduct and his continuing criminal behavior, the trial court's decision to impose a minimum sentence of five years was proportionate and, therefore, did not constitute an abuse of discretion. *People v Smith*, 482 Mich 292, 300, 304-305; 754 NW2d 284 (2008).

We find no merit to defendant's claim that the trial court improperly based its departure decision on facts not found by a jury in violation of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Our Supreme Court has repeatedly held that Michigan's indeterminate sentencing scheme does not violate *Blakely*. *People v McCuller*, 479 Mich 672, 676-678; 739 NW2d 563 (2007); *People v Harper*, 479 Mich 599, 603-604; 739 NW2d 523 (2007).

There were no sentencing errors warranting relief.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Michael J. Kelly