

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
June 28, 2012

v

STAVRO ADIL HAMAMA,  
  
Defendant-Appellant.

No. 304527  
Oakland Circuit Court  
LC No. 2010-232794-FH

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Before: SERVITTO, P.J., and METER and FORT HOOD, JJ.

Servitto, J. (*concurring in part, dissenting in part*).

While I agree with the majority’s conclusion that the trial court properly precluded defendant from presenting medical evidence to establish a character trait of forgetfulness, I respectfully disagree with their determination that the trial court adequately articulated substantial and compelling reasons to support its upward departure from the sentencing guidelines in imposing sentence.

Before addressing the departure issue, I would note that defendant consistently presented his forgetfulness as a character trait and sought admission of this character trait pursuant to MRE 404(a). As such, he was limited in the methods in which he could prove such character trait by those set forth in MRE 405--specifically testimony as to reputation, testimony in the form of an opinion, or specific instances of his conduct. Defendant’s attempts at introducing medical records and testimony concerning prescriptions were clearly not within the methods allowed under MRE 405. Had defendant produced a witness, perhaps a doctor, to provide an opinion that he was forgetful since and/or as a result of the automobile accident, such testimony would likely have been allowable under MRE 405. Defendant did not, however, attempt to introduce the connection between his accident and his forgetfulness through opinion testimony.

Moving on to the issue of the sentencing departure, “[a] court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.” MCL 769.34(3). The trial court may not base a departure “on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.” *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

In sentencing defendant, the trial court stated as follows:

But this guy's got a history.

He has a history.

This isn't his first sexually related event . . .

This is a pattern.

He's a sexual predator . . .

And I'm not going to follow the recommendation because I think there's substantial, compelling reasons to go above it.

He's got a history.

He's a danger to the community.

He has no respect for the system.

. . . but he's got prior—you know, he—he's got prior offenses and I don't think he does get it and I'm concerned about him.

The above is the extent of the trial court's articulation of substantial and compelling reasons for a sentencing departure.

As indicated by the majority, the indication that defendant was a danger to the community is not a substantial and compelling reason to depart from the sentencing guidelines. The fact that defendant had a "history" and/or prior sex related offenses was reflected in the guidelines.<sup>1</sup> The majority indicates that defendant's past criminal behavior was given disproportionate and inadequate weight in the trial court's calculation of the guidelines, and that because defendant's prior incidents were committed while he was a juvenile, he was given relatively light sentences for the same. The majority also indicates that defendant failed to comply with the sex offender registry provision on multiple occasions following his 2002 conviction. However, the trial court did not articulate any of these facts on the record, or give any indication that these were considerations it took into account. The majority is rationalizing for the trial court. As indicated in *Smith*, 482 Mich at 318 "[a] reviewing court may not substitute its own reasons for departure." Based on the transcript, I would find that the trial court did not meet its initial burden of articulation of substantial and compelling reasons to justify a departure.

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<sup>1</sup> Though the current conviction may have overtones of a sexual nature it is classified as a crime against public order.

Moreover, the trial court gave no explanation whatsoever for the extent of the departure. Defendant's guidelines indicated an appropriate sentence of 0-17 months, and both the probation department and the prosecution recommended a term of 12 months in the county jail. The trial court instead sentenced defendant to 15-24 months in prison, without further elaboration. "[T]he trial judge must explain why the reasons for the departure that he articulated warranted a drastic departure . . ." *Smith*, 482 Mich at 309. Because the trial court did not provide substantial and compelling reasons for the sentencing departure on the record, nor did it explain why its stated reasons justified the extent of the departure, the trial court abused its discretion in sentencing defendant above the sentencing guidelines range. I would therefore remand for resentencing.

/s/ Deborah A. Servitto