

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VINH HUU PHUNG,

Defendant-Appellant.

UNPUBLISHED

June 12, 2003

No. 239098

Iosco Circuit Court

LC No. 00-004017-FC

Before: Sawyer, P.J., and Meter and Schuette, JJ.

MEMORANDUM.

Defendant appeals as on leave granted after remand from the Supreme Court his plea-based conviction for safebreaking, MCL 750.531. Defendant was sentenced to 107 months to 25 years imprisonment. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant argues that the trial court considered improper factors in exceeding the sentencing guidelines range of forty-three to eighty-six months. When a sentence departs from the guidelines range, this Court's review is limited to determining whether the trial court had substantial and compelling reasons for the departure. MCL 769.34 (11); *People v Babcock*, 244 Mich App 64, 74; 624 NW2d 479 (2000). The reasons must be objective and verifiable, and should be recognized as of considerable worth in deciding the length of the sentence. *Id.*, 75. The existence of the particular factor is a factual determination, the determination whether the factor is objective and verifiable is a matter of law, and the determination whether the factors constitute a substantial and compelling reason to depart is reviewed for abuse of discretion. *Id.*, 75-76.

Trial courts are prohibited from basing departures on certain matters:

(a) The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.

(b) The court shall 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. [MCL 769.34(3).]

While defendant argues that the court considered his ethnicity in passing sentence, the comments focused on the victims and the fact that defendant specifically targeted them based on their ethnicity. The court noted that defendant was also a member of the same ethnic minority as the victims, but he did so to demonstrate that not all ethnic crimes are committed by persons whose ethnic backgrounds differ from their victims. We find that the departure was based on the victim's status, and not defendant's national origin.

Defendant also asserts that the fact that he preselected victims was considered in scoring OV 10 and cannot be the basis for a departure. OV 10 concerns the exploitation of a vulnerable victim, and defendant was scored fifteen points for his predatory conduct. Predatory conduct is defined as pre-offense conduct directed at a victim for the primary purpose of victimization. MCL 777.40(3)(a).

The trial court could determine that defendant's conduct was more serious than what is considered in OV 10. Defendant did not just pick out one vulnerable victim. He engaged in a pattern of criminal activity that targeted a specific ethnic group. Defendant went to a number of communities where he cased Chinese restaurants, found out where their owners lived, and then broke into the owners' houses while they were at work. The court noted on the record the matters that were taken into account in the guidelines scoring. The court could reasonably conclude that defendant's conduct was not given adequate weight by the scoring of OV 10.

Thus, we conclude the trial court articulated substantial and compelling reasons in departing from the sentencing guidelines.

Affirmed.

/s/ David H. Sawyer

/s/ Patrick M. Meter

/s/ Bill Schuette