

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK JON HOLMQUIST,

Defendant-Appellant.

UNPUBLISHED
November 25, 2003

No. 242578
Kent Circuit Court
LC No. 01-003773-FC

Before: Cooper, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his sentence of twenty months to ten years in prison imposed after his plea-based conviction of breaking and entering a building with intent to commit a larceny, MCL 750.110. We affirm.

Defendant pleaded guilty to breaking and entering a church with intent to commit a larceny in exchange for the prosecution's agreement to dismiss a charge of safe breaking, MCL 750.531, and to forego charging him with additional counts of breaking and entering. Defendant agreed to disclose the extent of his involvement in other church burglaries.

Sentencing took place on October 22, 2001. The statutory sentencing guidelines recommended a minimum term range of zero to seventeen months. The trial court concluded that the guidelines did not adequately account for the number of burglaries in which defendant admitted involvement or for the fact that defendant admitted that he stole approximately \$34,000 worth of merchandise during the burglaries. The trial court remarked that church burglaries represented a unique type of crime for which the guidelines did not adequately account. The trial court sentenced defendant to twenty months to ten years in prison, with the sentence to begin as of March 27, 2001, the date on which defendant was incarcerated for the conviction offense.

Under the statutory sentencing guidelines, if the upper limit of the recommended minimum sentence range is eighteen months or less, the trial court must impose an intermediate sanction unless it states on the record that a substantial and compelling reason exists to commit the defendant to the jurisdiction of the Department of Corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the guidelines range or twelve months, whichever is less. MCL 769.34(4)(a). An intermediate sanction does not include a prison term. MCL 769.31(b); *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002).

To constitute a substantial and compelling reason for departing from the guidelines, the reason must be objective and verifiable, and must irresistibly hold the attention of the court. *People v Babcock*, 244 Mich App 64, 75; 624 NW2d 479 (2000) (*Babcock I*). To be objective and verifiable, a reason must be external to the mind and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). We review the determination of the existence of a substantial and compelling reason for departure for clear error, the determination that the reason is objective and verifiable as a matter of law, and the determination that the reason constituted a substantial and compelling reason to depart from the guidelines for an abuse of discretion. *Babcock I, supra*, 75-76, modified by 469 Mich 247; 666 NW2d 231 (2003) (*Babcock III*). The extent of a departure from the guidelines is reviewable pursuant to the principle of proportionality set out in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). *People v Babcock*, 250 Mich App 463, 468-469; 648 NW2d 221 (2002) (*Babcock II*), rev'd on other grounds by *Babcock III*. The key test of the proportionality of a sentence is whether it reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). The trial court may depart from the guidelines for nondiscriminatory reasons where legitimate factors either were not considered by the guidelines, or were considered but were given inadequate or disproportionate weight. MCL 769.34(3)(b); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001).

We affirm defendant's sentence. The trial court did not err in finding that defendant's involvement in numerous church burglaries and his taking of \$34,000 worth of property during the course of those burglaries was objective and verifiable and was given inadequate weight by the guidelines. *Armstrong, supra*. Furthermore, and contrary to defendant's assertion, the trial court's remark that departure from the guidelines was warranted on the ground that church burglary was a unique type of crime that was not adequately addressed by the guidelines did not constitute unlawful discrimination in favor of religion in general and Christianity in particular. A fair reading of the trial court's remarks indicates that the trial court determined that defendant's practice of burglarizing public institutions as opposed to businesses was not adequately accounted for by the guidelines. The trial court did not err in so finding. *Id.* The trial court did not abuse its discretion by finding that substantial and compelling reasons existed for departing from the guidelines and imposing a prison term rather than an intermediate sanction. MCL 769.34(4)(a); *Babcock I, supra*; *Babcock III, supra*. The trial court adequately articulated its reasons for exceeding the guidelines. Defendant's sentence adequately reflects the seriousness of the matter, and thus is proportionate. *Houston, supra*; *Babcock III, supra*.

Defendant's assertion that the trial court erred by failing to grant him credit for time served prior to sentencing, as required by MCL 769.11b and MCR 6.425(D)(2)(d), is without merit. Sentencing took place on October 22, 2001, but the trial court ordered the sentence to begin on March 27, 2001, the date on which defendant was incarcerated for the conviction offense. The "credit" to which defendant asserts that he was entitled was built into the sentence.

Affirmed.

/s/ Jessica R. Cooper
/s/ Jane E. Markey
/s/ Patrick M. Meter