

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY LEE BROWN,

Defendant-Appellant.

UNPUBLISHED

December 28, 2004

No. 249863

Jackson Circuit Court

LC No. 03-000154-FH

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

PER CURIAM.

Defendant was convicted of operating under the influence of liquor (OUIL), MCL 257.625(8)(c) and for driving while license suspended (DWLS), MCL 257.301(1). Defendant appeals his sentence of 18 to 60 months for OUIL as an improper upward departure from the sentencing guidelines and as disproportionate. His concurrent sentence of 180 days in jail for DWLS is not an issue on appeal. We affirm.

I. FACTS

Officer William Grant Mills testified that on February 1, 2003 at about 2:10 a.m. he was standing outside his parked patrol car watching people leave Bumper's Bar. He heard a bang and observed a car pressed up against a parked car in front of it, right in front of the entrance to the bar. Mills approached defendant, who was alone in the car behind the wheel, then defendant pulled away in reverse from the car that was struck. Mills told defendant to stop driving and observed that defendant had glossy, bloodshot eyes and that he smelled strongly of intoxicants. Defendant's speech was slurred and he was unsteady on his feet after Mills asked defendant to step out of the vehicle. Defendant failed alphabet, counting and finger dexterity sobriety tests. Mills administered a breathalyzer test and defendant blew a blood alcohol content of .26. Defendant did not have a valid driver's license.

II. STANDARD OF REVIEW

We review de novo whether a particular sentencing factor is objective and verifiable. *Id.* at 265. Defendant's prior criminal record is objective and verifiable. It is essentially statistical information external to the mind of any particular judge. See, e.g., *People v Babcock*, 244 Mich App 64; 624 NW2d 479 (2000).

The trial court's determination that objective and verifiable factors in a particular case present substantial and compelling reasons to depart from the statutory sentencing guidelines is reviewed for an abuse of discretion. *Babcock, supra* at 265.

III. SENTENCING GUIDELINES

Defendant's guidelines scoring called for a minimum sentence of zero to 11 months. The trial court departed upward from these guidelines and sentenced defendant to 18 to 60 months for OUIL. The trial court stated:

[I]t's obvious that suspending your license or revoking your license hasn't worked because you drive anyway. You know, "if I get caught, I get caught, then I suffer the consequences." . . . You shouldn't have been behind the wheel at all You're a danger to yourself, you're a danger to others, more importantly. . . . Putting you on probation isn't going to make you stop driving. Nothing else has worked so far. The only thing that seems to work is you sit in jail.

According to the judge, "it's the Court's opinion that the guidelines do not adequately reflect that this is your fifth drunk driving conviction and seventh driving while license suspended conviction, neither of which is adequately reflected in the guidelines."

A trial court may depart from statutory sentencing guidelines if there is a "substantial and compelling reason" for it. MCL 769.34(3). According to the Michigan Supreme Court, a substantial and compelling reason "must be construed to mean an objective and verifiable reason that keenly or irresistibly grabs our attention; is of considerable worth in deciding the length of a sentence; and exists only in exceptional cases." *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003) (citation, quotations omitted).

In evaluating whether the trial court abused its discretion the appellate court must assess the proportionality of the sentence. "In determining whether a sufficient basis exists to justify a departure, the principle of proportionality – that is, whether the sentence is proportionate to the seriousness of defendant's conduct and to the defendant in light of his criminal record – defines the standard against which the allegedly substantial and compelling reasons in support of the departure are to be assessed." *Id.* at 262.

In light of defendant's prior criminal record, an upward departure of seven months was not disproportionate. The trial court emphasized the recidivist nature of defendant's record. MCL 769.34(3)(b) states:

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.

Indeed, while the guidelines designate points for prior misdemeanors that impact the statutory minimum sentence range, the guidelines do not delve deeper to consider whether the misdemeanors fit a pattern of recidivist behavior. It was not beyond the realm of reason for the

trial court to impose seven more months on a repeat offender with defendant's long and repetitive record of drunk driving and driving without a valid license.

Moreover, the guidelines also inadequately and disproportionately weighed defendant's number of prior misdemeanors. MCL 769.34(2)(b). Prior record variable 5 reaches a ceiling of twenty points after seven misdemeanors. MCL 777.55(a). Defendant had sixteen. That fact, coupled with the recidivist nature of defendant's criminal record, ensured that the trial court based its departure on separate considerations apart from factors already accounted for in the sentencing guidelines.

Affirmed.

/s/ Patrick M. Meter
/s/ Kurtis T. Wilder
/s/ Bill Schuette