

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS R. BRUNAS,

Defendant-Appellant.

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UNPUBLISHED

January 25, 2005

No. 252926

Wayne Circuit Court

LC No. 00-007841-01

Before: Cavanagh, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of voluntary manslaughter, MCL 750.321. Defendant was sentenced to ten to fifteen years' imprisonment. We affirm.

Defendant argues that the trial court erred in departing from the sentencing guidelines because the factors for departing were not objective and verifiable or substantial and compelling. This Court reviews the trial court's determination of the existence of a sentencing departure factor for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). The determination that the sentencing factor is objective and verifiable is reviewed de novo as a matter of law. *Id.* The determination that objective and verifiable factors constitute substantial and compelling reasons to depart from a mandated minimum sentence is reviewed for an abuse of discretion. *Id.* at 264-265. "An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside [the] principled range of outcomes." *Id.* at 269. A question of statutory interpretation is a question of law reviewed de novo. *People v Disimone*, 251 Mich App 605, 609; 650 NW2d 436 (2002).

The appropriate sentencing guidelines in Michigan for this crime, committed on June 23, 2001, are statutorily based:

Except as otherwise provided in this subsection or for a departure from the appropriate minimum sentence range provided for under subsection (3), the minimum sentence imposed by a court of this state for a felony enumerated in part 2 of chapter XVII committed on or after January 1, 1999 shall be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed. [MCL 769.34(2).]

There are instances where the court may depart from the sentencing guidelines range:

A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII 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); see also *People v Lowery*, 258 Mich App 167, 170; 673 NW2d 107 (2003).]

However, the court may not depart from the guidelines based on a factor that is already taken into account in the determination of the guidelines unless “the court finds from the facts contained in the court record, including the presentencing investigation report, that the characteristic has been given inadequate or disproportionate weight.” MCL 769.34(3)(b); see also *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001).

The trial court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is otherwise permitted. MCL 769.34(2); *Babcock, supra* at 272. A reason must be objective and verifiable to constitute a substantial and compelling reason for departing from a mandated sentence, and it must keenly or irresistibly hold the attention of the court. *Babcock, supra* at 257. A substantial and compelling reason “exist[s] only in exceptional cases.” *Id.* (internal citation and quotation omitted). According to the statutory sentencing guidelines, MCL 769.34(3), the trial court must state on the record the reasons for departure.

Defendant’s sentencing guidelines range was twelve to twenty-four months’ imprisonment. Defendant was originally sentenced to ten to fifteen years’ imprisonment. Defendant appealed, and this Court affirmed defendant’s conviction, but remanded the case for resentencing, indicating that although the trial court gave reasons on the record regarding why it was departing from the guidelines, it did not present analysis under *Babcock* concerning whether the factors were “substantial and compelling” or whether the factors were “objective and verifiable.” On November 20, 2003, defendant was resentenced. The trial court again sentenced defendant to ten to fifteen years’ imprisonment for the manslaughter conviction, stating the reasons for departure on the record and indicating why the court found them “substantial and compelling” and “objective and verifiable.” Defendant now appeals on the basis that the reasons listed by the trial court were not objective and verifiable or substantial and compelling.

The trial court listed the reasons in its written departure form as follows:

Non-charged assaults with Defendant’s motor vehicle

Wilfull [r]epeated wreckless [sic] use of the motor vehicle that needlessly killed the [d]eceased

No remorse/ cold remorse

[L]ethal weapon (car) used

Prior [d]riving infractions no effect on defendant’s driving pattern in this case which led to death of [d]eceased.

To be objective and verifiable, the departure factors must be actions or occurrences external to the intellect and must be able to be confirmed. *People v Abramski*, 257 Mich App 71,

74; 665 NW2d 501 (2003). A departure from the guidelines range must result in a sentence proportionate to the seriousness of the defendant's conduct and criminal history. *Babcock, supra* at 264.

In departing, the trial court stated that "the evidence was that the defendant was in this car with all these people standing in the street speeding toward them, backing up, back and forth, speeding toward them again, backing up again. That's the objective evidence." The court indicated that these were assaults with which defendant was never charged.

Because many witnesses testified to defendant's actions and they were able to be confirmed, the first two factors for departure, non-charged assaults with defendant's motor vehicle and willful, repeated, reckless use of the motor vehicle that needlessly killed David Sulkowski, were not clearly erroneous and were objective and verifiable. *Abramski, supra* at 74. Also, the nature of defendant's actions with the automobile in a crowd of people gave a substantial and compelling reason for departure. Defendant recklessly drove into a crowd of people numerous times until he hit David Sulkowski. Those are facts that keenly hold the attention of a court.

Next, the trial court indicated that the fact that defendant's vehicle was used as a lethal weapon was not taken into account in the guidelines. If an automobile is used in the furtherance of accomplishing an assault and capable of inflicting serious injury, it may be considered a weapon. *People v Sheets*, 138 Mich App 794, 799; 360 NW2d 301 (1984). It was not clearly erroneous for the court to find that the vehicle in this case was used as a weapon. Nor was it erroneous for the court to conclude that the guidelines would have been higher if a gun or knife were used and to conclude that a car "can be as lethal as a gun." The nature of the vehicle used in this case is an objective and verifiable reason for departure that keenly holds the attention of a court.

The trial court also looked to defendant's past driving record to depart from the guidelines. It was not clearly erroneous for the court to find that defendant had prior driving infractions and that those infractions did not impact defendant by causing him to improve his driving. Defendant's record indicated that he had traffic violations for disobeying a stop sign, careless driving, and open intoxicants as a passenger in a vehicle. These factors were not taken into account in the sentencing guidelines and are objective and verifiable through his driving record. Defendant's past traffic transgressions and disregard for traffic laws keenly hold the attention of a court.

The trial court also indicated that it had "never seen an ounce of . . . remorse, which gives me another reason to depart . . . ." The court then tempered this comment by noting that defendant's good adjustment to prison exhibited some remorse. A trial court's assessment of a defendant's remorse is not objective and verifiable and, therefore, cannot constitute a substantial and compelling reason for departure. See *People v Daniel*, 462 Mich 1, 7-8; 609 NW2d 557 (2000). A "trial court's impressions are by definition subjective." *People v Babcock (Babcock I)*, 244 Mich App 64, 79; 624 NW2d 479 (2001), mod in part on other grounds by *People v Hegwood*, 465 Mich 432; 636 NW2d 127 (2001).

If a trial court articulates several reasons for departure, some that are allowable and some that are not, and this Court cannot determine if the sentence departure is sustainable without the

offending factors, remand for resentencing or rearticulation of the reasons for departure is appropriate. *People v Claypool*, 470 Mich 715, 727-728; 684 NW2d 278 (2004). Because we can determine that the trial court would have departed, and would have departed to the same degree, absent consideration of defendant's lack of remorse, we affirm the sentence.

As noted, the court tempered its finding of "no remorse." It stated, "I will take into some consideration the fact that the defendant has been doing some – doing well in prison as an indication of remorse, but still." This remark indicates that the court was equivocating to some extent with regard to the remorse issue and that it did not believe that defendant exhibited absolutely no remorse. This equivocation, combined with (1) the significant number of other departure factors and (2) the forceful manner in which the court discussed certain of the additional departure factors, convinces us that the court would have departed, and would have departed to the same degree, even disregarding the issue of remorse. For example, after discussing the issue of uncharged assaults, the court stated, "if that does not – if that doesn't show objective and verifiable factors that keenly and irresistibly grab[] the attention of decent human beings, I don't know what does." Also, after discussing how defendant had used his vehicle as a weapon, the court stated, "if the [c]ourt can't depart in a situation like this when can the Court depart? I mean, would two people [have] had to have lost there [sic] lives, three?" Our review of the record demonstrates to us that no error requiring resentencing occurred with regard to issue of remorse.

Moreover, given the exceptional circumstances in this case, the admittedly substantial departure from the guidelines range was warranted. Defendant repeatedly assaulted several individuals with his vehicle and essentially used his vehicle as a weapon. The unique and egregious facts of this case justified a significant departure. See, generally, *Babcock*, *supra* at 273 (the substantial and compelling reasons to depart from the guidelines must justify the particular departure).<sup>1</sup>

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Patrick M. Meter

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<sup>1</sup> We briefly note that we reject defendant's argument in his reply brief that *Blakely v Washington*, 542 US \_\_\_; 124 S Ct 2531; 159 L Ed 2d 403 (2004), applies to the sentencing in this case. The Michigan Supreme Court noted in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), that *Blakely* does not affect Michigan's sentencing system. We reject defendant's contention that *Blakely* applies under the unique facts of the present case.