

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAGANDRY MONTE SMITH,

Defendant-Appellant.

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UNPUBLISHED

January 27, 2005

No. 250832

Genesee Circuit Court

LC No. 01-008840-FH

Before: Zahra, P.J., and Neff and Cooper, JJ.

MEMORANDUM.

Defendant appeals by delayed leave granted, challenging his sentence of two to five years' imprisonment imposed after he was found guilty of violating probation on his conviction of receiving or concealing stolen property valued at \$1,000 or more but less than \$20,000, MCL 750.535(3)(a). We remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded guilty to the receiving or concealing stolen property charge and was sentenced to five years' probation, with the first six months in jail and with early release for boot camp. Subsequently, after defendant was found guilty of violating probation, the trial court revoked his probation and sentenced him to two to five years in prison, with credit for 107 days.

The statutory sentencing guidelines apply to a sentence imposed after a probation violation. *People v Hendrick*, 261 Mich App 673, 679-680; 683 NW2d 218 (2004). A trial court may depart from the established guidelines range if it has a substantial and compelling reason to do so, and clearly articulates that reason on the record. MCL 769.34(3). A substantial and compelling reason for departing from the guidelines must be objective and verifiable, must irresistibly attract the attention of the court, and must be of considerable worth in deciding the length of the sentence. A departure from the guidelines cannot be affirmed on the basis of a reason which the appellate court perceives but the trial court failed to articulate. *People v Babcock*, 469 Mich 247, 257-261; 666 NW2d 231 (2003). In departing from the guidelines range, the trial court must determine whether the particular departure is proportionate to the circumstances of the offense and the offender. *Id.* at 262-264; *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

The statutory sentencing guidelines established a minimum term range of zero to six months;<sup>1</sup> thus, the trial court's sentence of two to five years in prison constituted an upward departure from the minimum guidelines range. The trial court erred by failing to sentence defendant within the guidelines or to articulate substantial and compelling reasons for exceeding the guidelines. *Babcock, supra*; *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002); *Hendrick, supra*.

Remanded for resentencing. We do not retain jurisdiction.<sup>2</sup>

/s/ Brian K. Zahra  
/s/ Janet T. Neff  
/s/ Jessica R. Cooper

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<sup>1</sup> Under the statutory sentencing guidelines, if the upper limit of the established 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).

<sup>2</sup> While defendant has served the minimum two-year term imposed by the trial court, he is still on parole. See the Department of Corrections' Offender Tracking Information Service. Therefore, the challenge to his minimum sentence is not moot; on resentencing it is possible that the trial court will sentence him to time served, thus affecting his parole status.