

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

HUGH ROBERT HEDEEN, JR.,

Defendant-Appellant.

UNPUBLISHED

June 6, 2006

No. 259798

St. Clair Circuit Court

LC No. 03-001361-FH

Before: Cavanagh, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

Defendant appeals, by leave granted, his sentence of 10 to 15 years imprisonment for third degree criminal sexual conduct. Because the trial court abused the principle of proportionality in sentencing defendant to a ten-year minimum sentence, we reverse and remand for resentencing.

On August 12, 2003 defendant pleaded guilty to one count of third-degree criminal sexual conduct (CSC III) (person between the ages of 13 and 15), MCL 750.520d(1)(a). On September 15, 2003, the trial court sentenced defendant to serve 10 to 15 years' imprisonment—an upward departure from the statutory sentencing guideline recommendation of 24 to 40 months. Defendant then moved for resentencing, which was denied by the court. Defendant thereafter filed a delayed application for leave to appeal, which was granted by this Court on February 11, 2005.

Defendant argues that the trial court erred in departing from the sentencing guidelines. In reviewing a departure from a sentencing guidelines range, we review the trial court's factual determination on the existence of a particular factor for clear error, the court's determination that the factor is objective and verifiable de novo as a matter of law, and the determination that the factor constituted substantial and compelling reasons for departure and the amount of the departure for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Id.* at 269. In ascertaining whether the departure was proper, this Court must defer to the trial court's direct knowledge of the facts and the familiarity of the offender. *Id.* at 270.

Under the sentencing guidelines act, MCL 769.31, *et seq.*, a trial court must impose a sentence within the guidelines range unless there is a "substantial and compelling" reason for the

departure stated on the record. MCL 769.34(3); *Babcock, supra* at 255-256. A reason is substantial and compelling when it meets the following criteria: (1) it is objective and verifiable; (2) it keenly and irresistibly grabs the attention of the court; (3) it is of considerable worth in deciding the length of a sentence; and (4) it is something that exists only in exceptional cases. *Babcock, supra* at 257-258. If a trial court finds that there are substantial and compelling reasons to believe that sentencing a defendant within the guidelines range would not be proportionate to the seriousness of the defendant's conduct and criminal history, then the trial court should depart from the guidelines. *Id.* at 264. "In departing from the guidelines range, the trial court must consider whether its sentence is proportionate to the seriousness of the defendant's conduct and his criminal history because, if it is not, the trial court's departure is necessarily not justified by a substantial and compelling reason." *Id.*

A departure cannot be based on "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." MCL 769.34(3)(a). Nor can it be based 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)(b).

Defendant first claims that he is entitled to resentencing because the trial court's sentence violated MCL 769.34(3)(b) by relying on factors, such as the on-going nature of the sexual relationship and the age difference between the parties, which had already been considered and scored within the statutory sentencing guidelines range. We disagree. The trial court specifically acknowledged it had no way to verify how many times defendant and the victim came together and thus did not depart based on the on-going sexual relationship. Further, while the trial court mentioned the age of the parties, it did not base its decision to depart on the age difference; rather, it was the fact that defendant impregnated the victim twice.

Defendant also argues that the trial court violated MCL 769.34(3)(a) by improperly basing its departure on its own religious beliefs against abortion. MCL 769.34(3)(a), however, prohibits a departure from the guidelines based on a *defendant's* religion, not the trial court's religion as argued here. Nevertheless, even if the statute can be read to prohibit a departure based on the trial judge's religious beliefs, there is no evidence here that the trial judge based his decision to depart on his religious or personal beliefs against abortion. Not only did the trial judge make no reference to religion at sentencing, that the trial judge referenced the 15-year old victim being twice impregnated and twice undergoing abortions does not establish he held any specific beliefs as to abortion itself.

The trial court departed because it concluded that defendant's behavior in this case was both "aberrant" and "abhorrent." The trial court noted that the crime affected the victim greatly and that her behavior has changed dramatically. The court also referred to the fact that defendant, a 32-year-old man, impregnated his 15-year-old victim not once, but two times, for which she underwent two abortions.

The reasons for departure cited by the trial court satisfy the four-prong *Babcock* test. First, that the victim was twice impregnated and twice underwent abortions are objective and

verifiable facts. Second, these facts keenly grabbed the attention of the court, leading the court to state that the same were “outside of any box” he had ever dealt with. Third, the cited reasons are of considerable worth in deciding the length of defendant’s sentence, as they demonstrate defendant’s disregard for his prior behavior. Finally, the facts in this case only exist in exceptional cases. Arguably, it is not often a 32-year-old man impregnates a 15-year-old girl twice within a seven-month period, leading to two abortions. The trial court’s reason(s) for departure thus meet the criteria set forth in *Babcock*.

Such a finding does not, however, end this Court’s inquiry, because when 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 the 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 departure are to be assessed.” *Babcock, supra* at 262. Here, defendant has no prior felony convictions and his last misdemeanor conviction (trespass) occurred in 1991. Defendant’s prior record, then, serves as no indication that a threefold upward departure from the high end of the recommended minimum sentencing guidelines would be in order.

With respect to the seriousness of the offense, the trial court’s departure was based primarily upon defendant’s “aberrant” behavior of impregnating his 15-year-old victim twice, for which she underwent two abortions and because he was “not sure the guidelines take that into consideration.” While the trial court had a substantial and compelling reason to justify a departure, that reason does not support this *particular* departure. The presentence report indicates that the victim and defendant began dating in August of 2002 and that the victim became pregnant for the first time by defendant in September of 2002. The victim had an abortion and indicated to the presentence investigator that defendant was upset with her, as he did not believe in abortions. The presentence report also indicates that the victim was kicked out of her home by her mother’s boyfriend in approximately February of 2003 and went to live with defendant at that time, becoming pregnant a second time shortly thereafter.

“The Legislature has endeavored to provide the most severe punishments for those who commit the most serious crimes.” *People v Milbourn*, 435 Mich 630, 650; 461 NW2d 1 (1990). By sentencing defendant to the ten year minimum (the maximum allowed under the applicable statute) the court has left “no room for the principle of proportionality to operate on an offender convicted of [criminal sexual conduct] who has a previous record for this kind of offense or whose criminal behavior is more aggravated than in [defendant’s] case.” *Id.* at 668-669. Although defendant’s conduct certainly warrants imprisonment, he is not in the most severe class of offenders, and his behavior was not the most severe with respect to various acts of criminal sexual conduct this court has addressed (See e.g. *People v Brzezinski*, 196 Mich App 253, 256; 492 NW2d 781 (1992)). Accordingly, and keeping in mind that the trial court did not unequivocally find that the guidelines inadequately addressed the circumstances of this case, we find that the sentence imposed violates the principle of proportionality and remand to the trial court for resentencing.

Defendant next argues that the trial judge was not impartial because his departure from the sentencing guidelines was based on his religious beliefs against abortion. We disagree. Under MCR 2.003(B)(1), a judge may be subject to disqualification if he is “personally biased or

prejudiced for or against a party or attorney.” But disqualification is not warranted unless “the bias or prejudice is both personal and extrajudicial. Thus, the challenged bias must have its origin in events or sources of information gleaned outside the judicial proceeding.” *Cain v Dep’t of Corrections*, 451 Mich 470, 495-496; 548 NW2d 210 (1996). Further, the party challenging a judge on the basis of bias or prejudice must overcome a “heavy presumption of judicial impartiality.” *Id.* at 497. Here, defendant has proffered no evidence to overcome the heavy presumption of judicial impartiality. Again, the trial judge made no mention of his religious or personal beliefs about abortion at sentencing. Therefore, we conclude that this argument is meritless.

Finally, we reject defendant’s assertion that his sentence violates the rule of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Under controlling Michigan authority, *Blakely* does not apply to sentences imposed in Michigan. *People v Wilson*, 265 Mich App 386, 399; 695 NW2d 351 (2005). While defendant argues that our Supreme Court’s discussion in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004) that *Blakely* is not applicable to Michigan’s sentencing system is dicta that should not be followed by this Court, we rejected this argument in *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 780 (2004), lv gtd 472 Mich 881, 693 NW2d 823 (2005).

Reversed and remanded for resentencing. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Deborah A. Servitto