

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD JOHNIGAN,

Defendant-Appellant.

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UNPUBLISHED

March 8, 2007

No. 267727

Wayne Circuit Court

LC Nos. 03-004486-01

03-004489-01

Before: Hoekstra, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Defendant appeals by right from his resentencing to life in prison for his conviction of felon in possession of a firearm, MCL 750.224f, as a fourth-habitual offender, MCL 769.12. We affirm.

Defendant is a murderer for hire. In 2003, he was tried for two contract murders in separate jury trials in Wayne County. In the first case, defendant was accused of murdering a drug informant. The jury found him guilty of first-degree, premeditated murder, MCL 750.316(1)(a), felon in possession, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to life in prison without the possibility of parole for the murder, with lesser sentences for the other offenses. In the instant case involving the death of Michael Moore, defendant was acquitted of first-degree murder and felony-firearm, but was found guilty of felon in possession. On August 19, 2003, he was sentenced as a habitual offender to life in prison for the possession offense. This sentence fell outside the guidelines.

Defendant's appeals were consolidated. A divided panel of this Court unanimously upheld defendant's convictions. *People v Johnigan*, 265 Mich App 463; 696 NW2d 724 (2005). However, the panel split regarding the proper resolution of defendant's challenge to the sentence in the instant case. Regarding the sentence guidelines departure, the majority held that because the trial court failed to articulate substantial and compelling reasons to depart from the sentencing guidelines, this Court was required to remand for resentencing. *Id.* at 467-470, 478 (Sawyer, J.), 478-479 (Schuette, P.J., concurring). Judge Sawyer agreed that the circumstances of defendant's offenses might justify a departure and noted that defendant was "deserving of enhanced criminal penalties" and would spend the rest of his life in prison on the basis of his murder convictions, but found that the trial court's failure to articulate reasons for departure, or

even acknowledge its sentence was a departure, prevented this Court from affirming the sentence. *Id.* at 477-478. Judge Schuette concurred, noting that defendant is a “hardened contract killer,” agreed with the remand so that the trial court could “simply state on the record the reasons (and many reasons exist) for a proper upward departure in sentencing defendant.” *Id.* at 478-479. Judge O’Connell, dissenting, found that the trial court had provided substantial and compelling reasons for the sentence departure, agreed with the trial court’s determination that defendant’s criminal history was not adequately addressed by the guidelines, and would hold that the sentence was proportionate. *Id.* at 481.

On remand, the trial court again sentenced defendant to life imprisonment. The trial court adopted its earlier reasons for departure, noted that Judge O’Connell found them adequate, and adopted portions of both the concurring and dissenting opinions as grounds for departure. The trial court observed that the guidelines “did not contemplate that kind of a lifestyle or choices that were made by the defendant,” and noted that it did not believe defendant was innocent of Moore’s murder, but stated that “that’s not a factor here I recognize.” The trial court also held that, while the fact that defendant was a fourth habitual offender allowed him to sentence defendant to a life sentence, defendant’s habitual status was not itself the reason for the life sentence.

On appeal, defendant argues that the trial court has again failed to articulate substantial and compelling reasons for departure. He argues that the trial court inappropriately used the fact that it believed defendant was guilty of killing Moore as a factor for departure. Defendant also argues that the trial court could not have determined that defendant was a contract killer because “there was no conviction for any of these other alleged acts.” Defendant asserts that he is entitled to be resentenced before a different judge because the trial court is obviously biased against him. We disagree.

In reviewing a departure from the guidelines range, we review the existence of a particular factor for clear error, the determination that the factor is objective and verifiable as a matter of law, the determination that the factors constituted substantial and compelling reasons for departure for an abuse of discretion, and the extent of the departure for an abuse of discretion. *People v Babcock*, 469 Mich 247, 256-257; 666 NW2d 231 (2003). In ascertaining whether the departure was proper, we must defer to the trial court’s direct knowledge of the facts and familiarity with the offender. *Id.* at 270.

A court may depart from the sentencing guidelines range if it has a substantial and compelling reason to do so, and states on the record the reasons for departure. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001). A court may not depart from a sentencing guidelines range based on an offense or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3); *Babcock*, *supra* at 258 n 12, 267-288. Factors meriting departure must be objective and verifiable, must keenly attract the court’s attention, and must be of considerable worth. *Id.* at 257-258. To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). In addition, we review a departure from the guidelines range to determine whether the sentence imposed is proportionate to the seriousness of the defendant’s conduct and his criminal history. *Babcock*, *supra* at 262 n 20, 264.

In the instant case, we hold that the trial court's reasons for departure are objective and verifiable, and substantial and compelling. While defendant maintains that the guidelines addressed his prior and concurrent offenses, we agree with the trial court that the guidelines were not adequate in this unique situation. None of the offense variables, including continuing pattern of criminal behavior (OV 13), MCL 777.43, are designed to score a career murderer.

As noted above, the trial court specifically held that it was not using its belief that defendant was guilty of killing Moore as a factor in resentencing. Contrary to defendant's arguments, the trial court was justified in determining, as did all of the members of the earlier panel of this Court, that defendant is a contract killer. Defendant ignores his other two murder convictions and the large quantity of evidence detailing his common plan to commit murder for hire. This evidence showed that defendant possessed the weapons that formed the basis for the instant conviction specifically to carry out those killings. Therefore, defendant's argument that the trial court improperly considered the circumstances surrounding Michael Moore's death, and that of defendant's other victims, is without merit. See *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998).

The record likewise amply supports the trial court's decision that defendant was incapable of rehabilitation. Defendant's criminal history is extensive. The Department of Corrections' report reveals that defendant has 21 active prison sentences. All but one involves the possession or use of a weapon.

We find these factors to be substantial and compelling; they keenly attract this Court's attention. *Babcock, supra* at 256-257. Given defendant's criminal history and the circumstances surrounding this offense, we find that the life sentence is proportionate to the crime and the offender. *Id.* at 264.

We also find that defendant is not entitled to resentencing before a different judge. A trial judge may be subject to disqualification if the "judge is personally biased or prejudiced for or against a party or attorney." MCR 2.003(B)(1); *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996). 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." *Id.* at 495-496. "Furthermore, the party who challenges a judge on the basis of bias or prejudice must overcome a heavy presumption of judicial impartiality." *Id.* at 497.

Here, defendant argues that the trial court's comments during the resentencing hearing are evidence of the trial court's bias. Defendant is mistaken. Hostile comments are ordinarily not supportive of finding bias. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). We have thoroughly reviewed the trial court's comments during resentencing. They show that the trial court was more aggrieved at this Court for having remanded the case considered to be an

inadequate basis than they show bias against defendant. Defendant has not established grounds for resentencing before a different judge.

We affirm.

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

/s/ Kurtis T. Wilder