

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELTON CHARLES JOYNER,

Defendant-Appellant.

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UNPUBLISHED

March 8, 2007

No. 273657

Bay Circuit Court

LC No. 06-010191-FH

Before: Servitto, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his sentence of 16 to 24 months in prison imposed on his plea-based conviction of domestic assault, third offense, MCL 750.81(4). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded guilty to domestic assault, third offense, in return for dismissal of other charges and plaintiff's agreement to not seek enhancement of defendant's sentence as a habitual offender. At sentencing, the parties agreed that the statutory sentencing guidelines recommended a minimum term range of zero to nine months. The guidelines accounted for defendant's prior felony conviction of domestic assault, third offense, and six of his 17 prior misdemeanor convictions. Because the upper limit of defendant's guidelines range was less than 18 months, the trial court was required to impose an intermediate sanction<sup>1</sup> unless it found on the record that substantial and compelling reasons existed to sentence defendant to prison. MCL 769.34(4)(a). The trial court found that defendant's extensive prior record, which included numerous misdemeanor convictions that were not accounted for in the guidelines, constituted a substantial and compelling reason for departing from the guidelines and sentenced defendant to prison. In addition, the trial court found that the lack of available funding to place defendant into an intensive alcohol treatment program constituted a substantial and compelling reason for departing from the guidelines. The trial court sentenced defendant to 16 to 24 months' imprisonment, with credit for 141 days.

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<sup>1</sup> An intermediate sanction can include a jail term that does not exceed the upper limit of the guidelines range or 12 months, whichever is less. MCL 769.34(4)(a). An intermediate sanction does not include a prison term. *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002).

To constitute a substantial and compelling reason for departing from the guidelines, a reason 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. The reason for the departure must be articulated by the trial court on the record. MCL 769.34(3). A departure from the guidelines cannot be affirmed on the basis of a reason that the appellate court perceives but the trial court did not articulate. A substantial and compelling reason articulated by a trial court to merit a departure from the sentencing guidelines must justify the particular departure at issue. If the stated reasons are partially invalid and the appellate court cannot ascertain whether the trial court would have departed to the same extent regardless of the invalid factors, remand for resentencing or rearticulation is necessary. *People v Babcock*, 469 Mich 247, 257-261; 666 NW2d 231 (2003).

In determining whether a sufficient basis exists to depart from the sentencing guidelines, the trial court must ascertain whether the departure would result in a sentence more proportionate to the seriousness of the offense and the defendant's criminal history than would adherence to the guidelines range. In addition, 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 determination of the existence of a factor for departing from the guidelines is reviewed for clear error, the determination that a factor is objective and verifiable is reviewed as a matter of law, and the determination that objective and verifiable factors merited departure from the guidelines range is reviewed for an abuse of discretion. A trial court may depart from the guidelines range for nondiscriminatory reasons based on an offense or offender characteristic that was already considered in calculating the guidelines range if the trial court concludes that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Babcock, supra* at 264-269. In determining whether substantial and compelling reasons existed to merit departure from the sentencing guidelines, we must give appropriate deference to the trial court's sentencing determination. *Id.* at 270.

Defendant argues that he is entitled to be resentenced because the trial court failed to state substantial and compelling reasons for departing from the guidelines and sentencing him to prison. We disagree.

Defendant's prior record consisted of one felony conviction and 17 misdemeanor convictions. The sentencing guidelines accounted for the felony conviction and six misdemeanor convictions. MCL 777.52; MCL 777.55. In reviewing defendant's prior record, the trial court noted that the misdemeanor convictions that were not accounted for in scoring the guidelines included those for disorderly conduct and open intoxicants in public, that defendant's record demonstrated a history of assaultive and alcohol-related offenses, and that defendant had violated probation and been discharged from a substance abuse treatment program. The trial court's finding that defendant had an extensive prior record that was not adequately accounted for in the guidelines was objective and verifiable, and the trial court did not abuse its discretion in determining that the nature and number of defendant's prior convictions had been given inadequate weight by the guidelines. MCL 769.34(3)(b).

We conclude that the trial court's decision to depart from the guidelines based on the fact that funding did not exist to place defendant in an alcohol treatment program was erroneous because the lack of funds for a treatment program was not a characteristic of defendant or of his offense. However, the trial court indicated that it would have departed from the guidelines based on defendant's prior record alone. Moreover, a fair reading of the trial court's remarks leads us to conclude that the trial court would have departed to the same extent had it not considered the lack of funds for an alcohol treatment program.

Affirmed.

/s/ Deborah A. Servitto

/s/ Michael J. Talbot

/s/ Bill Schuette