

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT RICHARD READ JR.,

Defendant-Appellant.

UNPUBLISHED

May 10, 2011

No. 296540

Genesee Circuit Court

LC No. 09-025014-FH

Before: WILDER, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Defendant, Robert Read, Jr., pleaded nolo contendere to a charge of burning other real property.¹ The trial court sentenced Read to 40 to 120 months' imprisonment, and Read now appeals by leave granted. We remand this case for articulation of reasons justifying the extent of the sentencing departure imposed or, alternatively, resentencing.

I. FACTS

One night in May 2008, Robert Read and his wife, Kendi Read, left a bar and returned to the home that Kendi Read was renting in Flint. The couple started fighting shortly after they arrived. Robert Read became irate and Kendi Read left the home. Robert Read called Kendi Read many times on her cell phone, trying to convince her to come back to the house. Kendi Read testified that Robert Read did not threaten her person, but did threaten to destroy her things, stating that "he had lighter fluid if [she] didn't come back." Three minutes after his last phone call, Robert Read sent Kendi Read a picture-text message, showing her bed on fire. After receiving the picture-text message, Kendi Read returned to the house. When she arrived, the right corner to approximately one-half of the back of the house was on fire. Kendi Read had her cell phone in hand, preparing to call 911, when Robert Read came and smashed her phone stating, "You're not going to tell them I did this." After Robert Read's sister, Shatia Brown, who lived next door to Kendi Read's home, intervened, Robert Read left.

¹ MCL 750.73.

Brown testified that before Kendi Read returned home, Robert Read came next door and told Brown that Kendi Read's house was on fire and to call 911. Brown also testified that Robert Read said he tried to put the fire out with a fire extinguisher and stated repeatedly that it was an accident.

City of Flint Police Sergeant David Bigelow went to Kendi Read's home to investigate the fire. Bigelow testified that the fire started in the bedroom and that there was a fire extinguisher behind other items under the kitchen sink. He opined that the fire extinguisher had not been moved because, "if it had been moved, I think things would've been knocked over, especially in haste." He further stated that the fire was an "incendiary fire," meaning that it was an "intentionally set fire."

Earl Mills, the owner of Kendi Read's rental home, addressed the trial court at sentencing. Mills stated that Robert Read was not a tenant. He claimed that because the home was destroyed, he incurred the loss of rental income for over a year, which he explained he needed to pay his bills and put food on his family's table. He stated that they also "had to pull one granddaughter out of college." He testified to rebuilding the house, noting that his time was used in personal labor, engaging with insurance companies, contractors, and electricians, and obtaining building permits and undergoing inspections. He also stated that he had to use \$26,000 of his own money to rebuild because the insurance company payout of \$56,693 covered only 60 percent of the damage. Mills emphasized that even while he was unable to rent the property out, he had to continue to pay property taxes, insurance, and for the reconstruction. Mills also indicated that Robert Read had not taken any actions to correct what he had done, stating that Robert Read has neither shown remorse nor tried to repay him for the damage.

The trial court asked Mills what he thought appropriate justice would be in this case, and Mills noted that it was his understanding that Robert Read's conviction carried a ten-year maximum penalty. The trial court confirmed that the maximum sentence was ten years, and then stated that it was in "total agreement . . . that a person who does this should . . . go to prison for a long time[.]" The trial court sympathized with Mills, stating, "If I could give him ten years, I think that still would not be enough for what he did here and what he's cost you." The trial court went on to explain, however, that it was bound to follow the law in the form of the sentencing guidelines. The trial court then explained that the guidelines recommended a minimum sentence between 0 to 9 months in this case. And the trial court added, "I don't have free rein here."

The trial court ordered Robert Read to pay Mills \$26,000 in restitution, subject to the condition that Mills provide verification of expenses paid. The trial court doubted, however, that Robert Read would pay restitution because he had yet to make any restitution payments to Mills in the year since the crime occurred.

In response to comments made by Robert Read, the trial court expressed regret that the system sometimes "coddle[s] people and we don't make them understand their responsibility[.]" The trial court stated that it was "extreme behavior" for Robert Read to take lighter fluid to ignite his wife's bed on fire and then to send her a picture-text message of her burning bed and house. Moreover, the trial court emphasized that Robert Read's actions were even more egregious because he was aware that his wife was a tenant and that he was burning down a house belonging to someone else. The trial court indicated that by sending the picture-text message, Robert Read

indicated he was not remorseful. The trial court added that Robert Read “burnt [his] wife and kids out of their home, the only place they had to live . . . basically put[ting] them on the streets[.]” The trial court speculated that Robert Read was probably more sorry that he was possibly being sentenced to prison than he was sorry about the crime committed. The trial court decided that the sentencing guidelines did not take into consideration the circumstances of this case.

In addressing Robert Read and explaining the deviation from the guidelines, the trial court stated in relevant part the following:

The guidelines are zero to nine months, but I’ll be honest with you, I don’t think they take into account the situation here. I don’t think they take into account the losses that the victim has suffered in terms of—of having to rebuild a home that you burned down. I don’t think it takes into account that you texted the picture of the house while it was burning, which is an indication to me that . . . you really were lacking any remorse or really understanding of what it is that you were doing. I don’t think it takes into consideration the . . . problems that you created for the victim in terms of having to rebuild this house, having to pay taxes on a house that they can’t receive any income from during that time. It doesn’t take into consideration, in my opinion, your brazen disregard for what you were doing to your wife by sending her this picture and letting her see . . . her home burn down.

I just don’t think the guidelines take into consideration the amount of pain that you’ve caused both victims in this case by this action. I think those objective are factors that I think the Court . . . can look at, the amount of damage that was involved here, not only the \$56,000 that the insurance company was out of, but also the amount of money that the victim has been out of as a result of all of this.

So even though you have no prior felonies, only three prior misdemeanors, and no juvenile record, I think, because of . . . the act that you committed here, I really do think it justifies prison time in my mind.

* * *

I don’t think the guidelines take into account the—the circumstances here; and even taking into consideration Mr. Read’s prior record, I think it’s—that he deserves to be incarcerated for what he did here. . . . [T]his offense carries up to ten years in prison. I am gonna deviate from the guidelines of zero to nine. I do find that there’s substantial and compelling reasons to do so as I’ve already indicated here on the record.

. . . I also would indicate that I—I don’t believe that Mr. Read, given at least what I’ve seen in his past record, is gonna make restitution to the victim in this case. I think even up to now, as the victim has indicated, it’s been about a year since this offense has occurred; and he hasn’t tendered one dime at all in restitution at all to the victim in this particular case. So, again, I just don’t think

the guidelines take that into consideration. I think they're woefully inadequate in this particular case, given the circumstances.

And so I am gonna sentence him above the guideline range because of what he did here. He deserves to be punished for this; it's just that simple.

The trial court therefore imposed a sentence of 40 to 120 months in prison.

Robert Read moved for resentencing, conceding that the trial court properly found substantial and compelling reasons on the record to depart from the guidelines range. However, Robert Read argued, his minimum sentence of 40 months was so far off the recommended 0 to 9 month minimum sentence grid that his sentence was disproportionate under *People v Smith*,² and the trial court did not provide adequate explanation for the extent of the deviation.

Addressing Robert Read's motion for resentencing, the trial court reiterated its reasons for departing from the sentencing guidelines. On the issue of proportionality, the trial court stated as follows:

I did consider the proportionality. I may not have used the terms, but certainly I did take into consideration not only of the offense, which I thought was very heinous, the burning down of his own wife's home, but also he knew the landlord. I mean, . . . burning down his home . . . and premises, where he . . . counted on to make a living, . . . to earn income. . . .

But, also, I thought the offender was, in this Court's opinion, . . . pretty dastardly in what he did; and I pointed that out, because he wanted his wife to see this—her own home burned down, where her and her child were living, is my understanding, may have been his child, too, from what I recall; and . . . the Court thought that that was pretty offensive. It showed a total lack of remorse. So I do think I took into consideration his background and I think the sentence was not only proportionate to not only the offense that was involved but also the offender that was involved, someone who I thought was a very violent person given the way and nature in which he committed this offense; and so I do think that I complied with the requirements of People v Smith and I do think it was appropriate to sentence [Robert Read] to serve forty on the minimum, a hundred and twenty on the maximum.

And, to be honest with you, I still don't think the victims got justice in this case, because they never received the money back for this structure

So I think that the sentence was proportionate. I think that the offense was dastardly; and so I'm denying the motion at this time.

² *People v Smith*, 482 Mich 292; 754 NW2d 284 (2008).

On appeal, Robert Read challenges the proportionality of the sentence imposed.

II. PROPORTIONALITY OF SENTENCING DEPARTURE

A. STANDARD OF REVIEW

On appeal, this Court reviews a trial court's reasons given for a departure for clear error.³ This Court reviews de novo the trial court's conclusion that a reason is objective and verifiable.⁴ And this Court reviews for an abuse of discretion whether the trial court's reasons are substantial and compelling enough to justify the departure, as is the amount of the departure.⁵ "A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes."⁶

B. LEGAL STANDARDS

Under MCL 769.34(3), "[a] court may depart from the appropriate sentencing range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." "The court shall not base a departure 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."⁷ The trial court's reasons must be objective and verifiable, must keenly or irresistibly attract the court's attention, and must be of considerable worth.⁸

However, in addition to articulating the reasons for departing from the guidelines, the trial court must justify "the *particular* departure made," in terms of looking at the proportionality of the sentence imposed.⁹ "In determining whether a sufficient basis exists to justify a departure, the principle of proportionality . . . defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed."¹⁰ There must be a clear connection between the substantial and compelling reasons for departure and the extent of

³ *Id.* at 300.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ MCL 769.34(3)(b).

⁸ *Smith*, 482 Mich at 299.

⁹ *Id.* at 303 (emphasis in original); see also *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001).

¹⁰ *Smith*, 482 Mich at 299-300, quoting *People v Babcock*, 469 Mich 247, 262; 666 NW2d 231 (2003) (ellipsis added by *Smith*).

the departure.¹¹ Moreover, “the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation[.]”¹² The proportionality review looks at “whether the sentence is proportionate to the seriousness of the defendant’s conduct and to the defendant in light of his criminal record[.]”¹³

In *People v Smith*, the Michigan Supreme Court noted that while not required, reference to where a departure sentence falls on the appropriate sentencing grid can be useful in considering the question of proportionality, because the grid “provides objective factual guideposts that can assist sentencing courts” in this endeavor.¹⁴ *Smith* looked at the defendant’s prior record variable (PRV) and offense variable (OV) scores and where they placed him on the sentencing grid, and compared that to where on the grid the sentence actually imposed would fall.¹⁵ To move the defendant into the cells corresponding to the sentence imposed, *Smith* noted that “the judge would have had to assess 20 to 40 additional OV points and 30 to 45 additional PRV points.”¹⁶ The Court emphasized the difficulty in understanding what factors justified such a departure, particularly because the trial judge failed to explain why the departure was proportionate.¹⁷ The Court suggested that if a defendant’s sentence is in excess of the highest available sentencing on the grid for the defendant’s scored PRVs, then the departure might be disproportionate.¹⁸

C. APPLYING THE LEGAL STANDARDS

In this case, the trial court did not clearly err in finding the existence of particular factors for departure from the sentencing guidelines. Specifically, the trial court properly considered (1) the amount of monetary damage done to Mills and his property, and (2) the picture-text message Robert Read sent to his wife.

The trial court stated that it did not think the sentencing guidelines “take into account the losses that the victim has suffered in terms of . . . having to rebuild a home that [Robert Read] burned down.” The insurance company had reimbursed Mills \$56,693, but Mills indicated that he spent an additional \$26,000 out-of-pocket. Although the sentencing guidelines take into account the value of property that was damaged, lost, or destroyed during the crime,¹⁹ the value

¹¹ *Id.* at 304.

¹² *Id.*

¹³ *Id.* at 305, quoting *Babcock*, 469 Mich at 262.

¹⁴ *Id.* at 309.

¹⁵ *Id.* at 307.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 307-308.

¹⁹ MCL 777.46.

of the property here (in terms of the monies spent to rebuild) was four times greater than the highest specific dollar figure noted in the guidelines.²⁰ Moreover, these damage figures did not take into account Mills' lost rental income as a result of the damaged property. Therefore, the guidelines do not give proportionate weight to the financial damage Robert Read caused.

Also, the Supreme Court has observed that sentencing courts can consider "transactional conduct when deciding what sentence to impose within the appropriate guidelines range and whether to depart from the guidelines recommendation."²¹ Robert Read's conduct of texting pictures to his wife after setting the fire is an objective and verifiable factor that, as the trial court recognized, keenly attracted its attention. It is also not a factor considered in the OV calculation.

Therefore, the factors that the trial court cited certainly explain why it believed that prison time was justified. But the link to the *extent* of the prison time that the trial court imposed is unclear. In other words, although the trial court stated at the reconsideration motion hearing that it had considered the issue of proportionality, the trial court failed to clearly articulate the connection between the reasons for the departure and the extent of the departure.

Indeed, the sentencing in this case is somewhat like the sentencing in *Smith*, because the minimum sentence imposed does not fall within even the uppermost cell for someone at Robert Read's PRV or OV level.²² This suggests that Robert Read's sentence might be disproportionate.²³ And while Robert Read's imposed sentence is not "off the charts" as it was in *Smith*, the trial court's sentence was nonetheless over four times higher than the minimum term Robert Read could have received had the trial court sentenced him within the guidelines recommendation.

The trial court articulated substantial and compelling reasons to make an upward departure from the sentencing guidelines. But the trial court did not articulate a justification for the *particular* departure made or explain how it was more proportionate than the sentencing guidelines suggested minimum range of 0 to 9 months. That is, "[t]he trial judge articulated . . . appropriate reasons for departure, but failed to explain why those reasons justify the extent of the departure."²⁴ "[I]t is not readily apparent why such a substantial departure is warranted on the basis of those reasons."²⁵ Robert Read's crime is most certainly "dastardly" and "extreme," as the trial court described it, and we do not disagree with the trial court's conclusion that prison time is warranted; however, "we cannot discern why the trial judge selected a minimum sentence

²⁰ See MCL 777.46(1)(b) ("The property had a value of more than \$20,000 . . .").

²¹ *People v McGraw*, 484 Mich 120, 129-130; 771 NW2d 655 (2009).

²² MCL 777.65.

²³ *Smith*, 482 Mich at 308.

²⁴ *Id.* at 310.

²⁵ *Id.* at 310-311.

so far in excess of the recommended guidelines range.”²⁶ Therefore, “[w]e cannot uphold such an unsupported departure.”²⁷

We remand this case for articulation of reasons justifying the extent of the sentencing departure imposed or, alternatively, resentencing. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood

²⁶ *Id.* at 311.

²⁷ *Id.*