

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
October 9, 2012

v

TYE ALAN TRIANTAFELO,
Defendant-Appellant.

No. 306782
Emmet Circuit Court
LC No. 11-003459-FH

Before: JANSEN, P.J., and FORT HOOD and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of attempted larceny in a building, MCL 750.360; MCL 750.92. He was sentenced as a fourth habitual offender, MCL 769.12, to serve 18 months to 15 years in prison. Defendant appeals by right. For the reasons set forth below, we vacate defendant's sentence and remand for resentencing.

Defendant's appeal focuses only on the sentence imposed by the trial court. As scored, the statutory sentencing guidelines recommended a minimum term of zero to 18 months (an intermediate sanction). Thus, the court's sentence of 18 months' to 15 years' imprisonment constitutes a departure. The court departed from the sentencing guidelines citing defendant's age, his extensive criminal history of theft and fraud, and that this pattern of criminal activity was not adequately considered by the sentencing variables. The trial court also stated that it would be incongruent to sentence defendant to serve time in jail following what would likely be a prison term for the parole violation.

On appeal, defendant argues that the trial court did not articulate substantial and compelling reasons for the sentencing departure. We agree. We review a trial court's determination that a substantial and compelling reason exists for a sentencing departure for an abuse of discretion. *People v Babcock*, 469 Mich 247, 269-270; 666 NW2d 231 (2003). Appellate review of the factors cited in support of the sentencing departure is for clear error. *People v Horn*, 279 Mich App 31, 43; 755 NW2d 212 (2008). Whether the factors are "objective and verifiable" is reviewed de novo. *Id.*

A trial court is required to sentence a defendant within the statutory sentencing guidelines unless there is at least one "substantial and compelling reason" for departure. *Babcock*, 469 Mich at 255; MCL 769.34(3). The reasons for departure must be "objective and verifiable." *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). That is, the reason for departure

must be “of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court’s attention.” *Id.* A sentencing departure cannot be based upon a fact included within the sentencing guidelines unless the fact “has been given inadequate or disproportionate weight.” *People v Kahley*, 277 Mich App 182, 187; 744 NW2d 194 (2007); see MCL 769.34(3)(b). In addition, a sentencing departure must be “proportionate” by “adequately account[ing] for the gravity of the offense and any relevant characteristics of the offender.” *Smith*, 482 Mich at 318. Finally, the trial court must justify the “particular degree of departure.” *Id.*

When the upper limit of the sentencing guidelines minimum range is 18 months or less, the trial court is required to sentence the defendant to an “intermediate sanction” unless there are substantial and compelling reasons to sentence the defendant to a term of incarceration. *People v Harper*, 479 Mich 599, 617-618; 739 NW2d 523 (2007); MCL 769.34(4)(a). Imposition of a prison, instead of a jail, sentence when the guidelines provide for an intermediate sanction is effectively treated and evaluated as an upward departure. See, e.g., *People v Muttscheler*, 481 Mich 372, 375; 750 NW2d 159 (2008); *People v Stauffer*, 465 Mich 633, 635-636; 640 NW2d 869 (2002).

MCL 769.34(4)(a) reads as follows:

If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in [MCL 777.1 *et seq.*] is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual 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 recommended minimum sentence range or 12 months, whichever is less.

The term “intermediate sanction” is defined in MCL 769.31(b) as “probation or any sanction, other than imprisonment in a state prison or state reformatory, that may lawfully be imposed.” A prison sentence is not an intermediate sanction. *Stauffer*, 465 Mich at 635.

While the trial court did note defendant’s age, crime, and refusal to testify, the court did not correlate those statements to reasons for departing from the guidelines. Rather, the court seems to have referenced these matters to provide context for its decision that departure was warranted because of defendant’s criminal history, which the court explicitly linked to its decision to depart. Additionally, the court cited as a reason to depart the requirement that it impose a sentence following any sentence imposed for the parole violation, and that it did not make sense to the court to impose what it characterized as a “local” sentence (presumably jail time) after a prison term. Plaintiff concedes that this second stated justification is not a substantial and compelling reason to depart. *People v Lucey*, 287 Mich App 267, 272-273; 787 NW2d 133 (2010).

“Under the sentencing guidelines, the recommendation for a defendant’s minimum sentence is determined in significant part by the defendant’s criminal history.” *People v Young*, 276 Mich App 446, 454; 740 NW2d 347 (2007). The sentencing guidelines require scoring of

the prior record variables on the basis of the defendant's felony, misdemeanor, and juvenile adjudication history. *Id.* In *Young*, this Court explained:

Because the sentencing guidelines make elaborate provision for a defendant's criminal record and base the recommended minimum sentence in part on those provisions, a trial court may not depart from the recommended minimum on the basis of a defendant's prior record unless the trial court first finds that the sentencing guidelines gave inadequate or disproportionate weight to the defendant's criminal history. . . . [*Id.*]

Indeed, offense variable (OV) 13 also incorporates a defendant's criminal history when it demonstrates a pattern of felonious criminal activity. MCL 777.43. OV 13 was scored at 5 points as a result of defendant's four low severity felony convictions. MCL 777.43(1)(f). However, because OV 13 limits scoring to prior felonies, it does not take into account the extent of defendant's property crimes, including false pretenses under \$200, conspiracy to possess credit card without consent, and possession of a stolen vehicle, a crime committed in another state. This pattern of criminal activity is consistent with the court's characterization of defendant's criminal history of "repetitive behavior in committing frauds and stealing from people." Although the court did not directly comment on defendant's likelihood of committing additional crimes of theft or fraud in the future, we infer that the reference to "repetitive behavior" encompasses a recognition of the likelihood of future repetition. This is itself a substantial and compelling reason for upward departure. See *People v Solmonson*, 261 Mich App 657, 671-672; 683 NW2d 761 (2004) (where the trial court concluded that past prison sentences had not deterred the defendant and a legitimate concern for public safety existed).

It is certainly possible that the trial court would have imposed the same sentence on the basis of the first cited reason alone, particularly given its preamble in which it reviewed defendant's criminal history. However, the court gave no indication that it would have considered this reason sufficient. Because of this uncertainty, resentencing is necessary.

Defendant also argues on appeal that his sentence is disproportionate. See *Babcock*, 469 Mich at 262. We decline to address this argument because we have already determined that defendant is entitled to be resentenced.

We vacate defendant's sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Karen M. Fort Hood
/s/ Douglas B. Shapiro