

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMAINE DANTRELL WALKER,

Defendant-Appellant.

UNPUBLISHED

March 16, 2006

No. 259042

St. Clair Circuit Court

LC No. 03-000428-FH

Before: Neff, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his sentence of 4 to 20 years in prison imposed on his plea-based conviction of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded guilty to possession with intent to deliver less than 50 grams of cocaine and resisting and obstructing a police officer, MCL 750.479, in exchange for dismissal of other charges. Defendant failed to appear for his scheduled sentencing, and a warrant was issued for his arrest. During the period in which he was at large, defendant was charged with five new controlled substances offenses.

Defendant was arrested, and subsequently appeared for sentencing. The statutory sentencing guidelines recommended a minimum term range of 5 to 23 months for the conviction of possession with intent to deliver less than 50 grams of cocaine. The trial court sentenced defendant to 4 to 20 years in prison for possession with intent to deliver less than 50 grams of cocaine, citing his failure to appear for sentencing and his arrest on five new charges as substantial and compelling reasons for exceeding the guidelines.

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. *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003). The reason for the departure must be articulated by the trial court on the record. *Id.*; MCL 769.34(3). A departure from the guidelines cannot be affirmed on the basis of a reason which the appellate court perceives but the trial court did not articulate. *Babcock, supra* at 273. 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. *Id.* 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. *Id.* at 260-261.

In determining whether a sufficient basis exists to justify a departure 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. *Id.* at 264. 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.*; *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

We review the determination of the existence of a factor for departing from the guidelines for clear error, the determination that a factor is objective and verifiable for error, and the determination that objective and verifiable factors merited departure from the guidelines range for an abuse of discretion. *Babcock, supra* at 273-274. A trial court may depart from the guidelines range for nondiscriminatory reasons based on an offense or offender characteristic which 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 274.

Defendant argues that he is entitled to resentencing on his conviction of possession with intent to deliver less than 50 grams of cocaine¹ before a different judge because the trial court failed to cite substantial and compelling reasons for departing from the guidelines. In addition, defendant argues that he is entitled to resentencing because in imposing sentence the trial court considered the five pending charges, notwithstanding the fact that his guilt of those charges was not proved beyond a reasonable doubt as required by *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

We affirm defendant's sentence for possession with intent to deliver less than 50 grams of cocaine. The trial court cited the fact that defendant was charged with five new felonies after he absconded, and the fact that he failed to appear for sentencing as originally scheduled, as substantial and compelling reasons for exceeding the guidelines. These reasons were objective and verifiable, and attracted the attention of the court in that they demonstrated that defendant had no respect for the justice system and would attempt at every opportunity to avoid cooperating with it. The scoring of Prior Record Variable 6, MCL 777.56, relation to criminal justice system, took into account that defendant was awaiting adjudication on one charge, but did not allow for consideration that he had five charges pending against him.² The scoring of Offense Variable 19, MCL 777.49, interference with administration of justice, accounted for his

¹ Defendant does not challenge his sentence of one to two years in prison for resisting and obstructing a police officer.

² Prior Record Variable 6 is scored at ten points if "[t]he offender is on parole, probation, or delayed sentence status or on bond awaiting adjudication or sentencing for a felony."

act of resisting arrest at the time of the original offense rather than his failure to appear for sentencing as originally scheduled.³ The reasons cited by the trial court for exceeding the guidelines were not taken into account by the guidelines in determining the recommended minimum sentence range. The trial court did not abuse its discretion by exceeding the guidelines and sentencing defendant to 4 to 20 years in prison for possession with intent to deliver less than 50 grams of cocaine.

Further, our Supreme Court has noted that *Blakely* does not apply to Michigan's indeterminate sentencing scheme, *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), and we are bound to follow *Claypool*. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd in part 472 Mich 881 (2005).⁴

We affirm.

/s/ Janet T. Neff
/s/ Henry William Saad
/s/ Richard A. Bandstra

³ Offense Variable 19 is scored at ten points if the defendant “interfered with or attempted to interfere with the administration of justice.”

⁴ Our Supreme Court granted leave in *Drohan* to consider whether *Blakely* and *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005) apply to Michigan's sentencing scheme; however, *Claypool* continues to control on this issue.