

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ANTHONY HALL,

Defendant-Appellant.

UNPUBLISHED

April 3, 2008

No. 277284

Oakland Circuit Court

LC No. 2004-200029-FC

Before: Kelly, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Following this Court's remand of this case for resentencing, the trial court sentenced defendant as a second habitual offender, MCL 769.10, to 60 to 90 in prison years for second-degree murder, MCL 750.317. The sentence constituted an upward departure from the sentencing range called for by the trial court's scoring of the sentencing guidelines on remand. Defendant appeals as of right. We affirm. This case is being decided without oral argument under MCR 7.214(E).

In reviewing a trial court's departure from the sentencing guidelines, the existence of a factor relied on for departure is reviewed for clear error, whether such a factor is objective and verifiable is reviewed de novo, and whether a reason for departure is substantial and compelling is reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003).

Defendant first argues in effect that the trial court improperly considered his prior record and parole status in deciding to depart from the sentencing guidelines because these factors were considered by the guidelines in prior record variable (PRV) 1 and PRV 6 and the trial court did not make a finding under MCL 769.34(3)(b) that these offender characteristics were given inadequate weight. We disagree.

Contrary to defendant's argument, the basis for the departure was not the factors accounted for by PRV 1 and PRV 6, but rather the fact that defendant's continuing pattern of criminal behavior could not be accounted for under offense variable (OV) 13. Prior Record Variable 1 is concerned simply with the number of a defendant's prior high severity felony convictions within the relevant time limit, see MCL 777.51, while PRV 6 provides for the scoring of ten points for the commission of the sentencing offense while the defendant is on parole, see MCL 777.56(1)(c). In contrast, OV 13 is concerned with a "continuing pattern of

criminal behavior.” MCL 777.43(1). Although the trial court referred to defendant having “recently been released from parole” [sic] at the time of the murder and to defendant having a past record including three felonies these remarks were not actually part of the trial court’s expressed rationale for departing from the guidelines. Rather, in its only remark specifically addressing its decision to undertake an upward departure from the sentencing guidelines, the trial court expressed its conclusion “a departure upward from the guidelines” was warranted “given the new status of the law in Michigan.” This remark can only reasonably be understood as a reference to this Court having remanded this case for resentencing because the trial court’s prior scoring of 25 points for OV 13 could not be sustained under *People v Francisco*, 474 Mich 82; 711 NW2d 44 (2006) (which was released during the pendency of defendant’s prior appeal to this Court). Specifically, this Court held that under *Francisco, supra*, 25 points could not be scored under OV 13 for defendant’s offenses that occurred ten years prior to the sentence offense. *People v Hall*, unpublished opinion per curiam of the Court of Appeals, issued February 13, 2007 (Docket No. 265458). Thus, rather than basing its departure on an offender characteristic already taken into account by the sentencing guidelines as claimed by defendant, the trial court actually based its departure on a factor *not* considered by the guidelines, specifically evidence of a continuing pattern of criminal behavior not accounted for by OV 13 because of the time restrictions of that offense variable.

Defendant also argues that the trial court improperly referred to defendant’s predatory conduct as a basis for departure although points were scored under OV 10 for predatory conduct. However, while the trial court did refer to defendant’s conduct as involving “predatory conduct,” as discussed above, that was not the expressed basis for departure.

Defendant further suggests that the trial court relied on the victim’s age, good grade point average, and lack of drugs and alcohol in her system as a basis for departure, but that the victim’s age was accounted for in the scoring of points for victim vulnerability in OV 10 and that considering the loss to society due to her other positive attributes as a basis for departure would involve an “attendant judgment that one victim’s life is of greater worth than another’s, which cannot have been [the trial judge’s] meaning.” As discussed above, this was not the trial court’s expressed basis for departure. Moreover, considered in context, the references to the victim’s personal characteristics were not actually part of the trial court’s expression of its rationale for sentencing defendant as it did. Rather, in context, the remarks amounted to an aside imploring teenagers and parents to be careful of the people with whom teenagers associate or are allowed to associate.

Finally, defendant argues that the extent of the departure was disproportionately severe, emphasizing that under the trial court’s sentence he would not be eligible for parole until age 96, rather than age 91 if he had been sentenced to the highest minimum sentence within the guidelines. We disagree.

With regard to the proportionality of his sentence, defendant asserts that, “[i]t appears that the trial court wants [defendant] to die in prison.” However, defendant’s sentence cannot reasonably be considered to amount to a life sentence in the sense of being a sentence that precludes any realistic possibility of defendant eventually being released on parole. Of course, as with any long minimum prison sentence that would keep a defendant imprisoned until an advanced age, there is a significant possibility that defendant could die of natural causes while imprisoned. However, even accepting defendant’s contention that he will not be eligible for

parole until age 96, it is common knowledge that many individuals live to be in their nineties and even to be age 100 or older. In any event, it is readily apparent that this case involves an egregious offense and an egregious offender. Defendant was convicted of strangling a girl to death within an extremely short time of being released on parole from a sentence for the kidnapping and molestation of a woman. As our Supreme Court has noted, “in any civilized society, punishment should be made to fit the crime and the criminal.” *Babcock, supra* at 262. Also, “[t]he premise of our system of criminal justice is that, everything else being equal, the more egregious the offense, and the more recidivist the criminal, the greater the punishment.” *Id.* at 263. Given the egregious nature of defendant’s conduct in this case and in the prior incident it is readily apparent that his sentence was not disproportionately severe.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Donald S. Owens
/s/ Bill Schuette