

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALAN RUSSELL SHOEMAKER,

Defendant-Appellant.

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UNPUBLISHED

October 22, 2009

No. 287646

Washtenaw Circuit Court

LC No. 08-000719-FH

Before: Fort Hood, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Pursuant to a plea agreement, defendant pleaded no contest to aggravated stalking, MCL 750.411i, in exchange for the dismissal of four counts of malicious use of telecommunications services, MCL 750.540e. He was sentenced to one to five years' imprisonment. He appeals his sentence by delayed leave granted. We affirm defendant's conviction but vacate his sentence and remand for resentencing. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's conviction arises from numerous telephone calls he made to his former girlfriend, during which he threatened to kill her and sexually assault and kill her 12-year-old daughter.

Defendant argues that resentencing is required because the trial court was under the mistaken impression that a prison sentence was within the sentencing guidelines.

Whether a prison sentence is within the guidelines range and whether resentencing is required when a court imposes a sentence under a mistaken belief that it is within the guidelines range are questions of law that we review de novo. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004) (issues that concern "the proper interpretation and application of the legislative sentencing guidelines . . . are legal questions that this Court reviews de novo").

As scored by the court, the sentencing guidelines range was zero to 17 months. Pursuant to MCL 769.34(4)(a), if the upper limit of the guidelines range 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 guidelines range "or 12 months, whichever is less." An intermediate sanction does not include a

prison sentence. MCL 769.31(b); *People v Harper*, 479 Mich 599, 617-618; 739 NW2d 523 (2007). Therefore, defendant's sentence of one to five years' imprisonment was an upward departure.

The trial court was unaware that the prison sentence it imposed was a departure from the sentencing guidelines. Before the court imposed the sentence, the court asked defense counsel, "This is a straddle cell is it not?" and defense counsel responded affirmatively. A straddle cell is where the lower limit of the range is 12 months or less and the upper limit exceeds 18 months. MCL 769.34(4)(c); *Harper, supra* at 617. When the range is in a straddle cell, the sentencing court may elect either to sentence the defendant to a prison term with the minimum portion of the indeterminate sentence within the guidelines range or to impose an intermediate sanction, absent a departure. *Id.* In the present case, the court sentenced defendant under the mistaken impression that the range of zero to 17 months was in "straddle cell," where a prison sentence was not a departure.

The prosecution agrees that the prison sentence was a departure from the sentencing guidelines but contends that resentencing is not required because the court stated substantial and compelling reasons for the departure. Immediately after the colloquy with defense counsel concerning the "straddle cell," the trial court stated:

Well Mr. Shoemaker, you have five prior misdemeanor convictions and they revolve around alcoholism and domestic violence. I am concerned about what you did and I am especially concerned about what you said you were going to do.

For you to make the threats that you did to, as the police heard, rape and murder [GW] and that you love to have sex with 12-year-olds, and that you were going to rape [GW] takes this case out of the normal stalking situation, drunk or not.

It is the sentence of this Court that you serve a minimum of 12 months and a maximum of 60 months in the Michigan Department of Corrections.

"Appellate courts are obliged to review the trial court's determination that a substantial and compelling reason exists for departure." *People v Smith*, 482 Mich 292, 304; 754 NW2d 284 (2008). The trial court did not make that determination in this case because the court was unaware that the sentence it was imposing was a departure from the guidelines. A reviewing court may not determine that a substantial and compelling reason for departure existed when that reason was not articulated by the trial court. *Id.*, citing *People v Babcock*, 469 Mich 247, 259; 666 NW2d 231 (2003). If the trial court's reason for making a particular departure is unclear, "an appellate court cannot substitute its own judgment about why a departure was justified." *Smith, supra* at 304. Similarly, when the trial court is unaware that the sentence is a departure from the guidelines, this Court may not determine that the reasons articulated by the court for imposing a sentence that it believed was within the sentencing guidelines qualify as substantial and compelling reasons for departure. Therefore, we decline the prosecution's invitation to affirm the sentence on that basis. Moreover, the trial court in this matter also failed to explain "why the sentence imposed is more proportionate than a sentence within the guidelines

recommendation would have been,” *id.*, inasmuch as the court was not aware that the sentence was not within the guidelines recommendation.

Because the trial court sentenced defendant under a mistaken belief about whether a prison sentence was within the guidelines recommendation, we vacate defendant’s sentence and remand for resentencing. *Id.* at 319. On remand, the trial court shall sentence defendant within the appropriate guidelines range or articulate on the record a substantial and compelling reason for departing from that range in accordance with *Babcock, supra*, and *Smith, supra*.

We affirm defendant’s conviction but vacate his sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Karen M. Fort Hood  
/s/ David H. Sawyer  
/s/ Pat M. Donofrio