

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY DESHON MARTIN,

Defendant-Appellant.

UNPUBLISHED

September 21, 2010

No. 292945

Wayne Circuit Court

LC No. 08-017527-FC

Before: MURPHY, C.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of voluntary manslaughter, MCL 750.321, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to consecutive prison terms of 10 to 15 years for the manslaughter conviction and two years for the felony-firearm conviction. He appeals as of right, arguing that the trial court erred in departing from the sentencing guidelines range of 36 to 71 months without articulating substantial and compelling reasons for its departure, resulting in a disproportionate sentence. We vacate defendant's manslaughter sentence and remand for resentencing. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

"A court may depart from the appropriate sentence 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." MCL 769.34(3). Only objective factors that are verifiable provide substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008); *People v Babcock*, 469 Mich 247, 258; 666 NW2d 231 (2003). Objective and verifiable factors are "actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed." *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). This Court reviews a trial court's departure from the sentencing guidelines range by applying three standards. *Babcock*, 469 Mich at 264-265. The existence of a particular factor supporting a departure is reviewed for clear error, the determination whether the factor is objective and verifiable is reviewed de novo, and the determination whether a reason is substantial and compelling is reviewed for an abuse of discretion. *Id.* This Court also reviews the extent of the departure and the proportionality of the sentence for an abuse of discretion. *Smith*, 482 Mich at 300; *People v Noble*, 238 Mich App 647; 608 NW2d 123 (1999).

In this case, the trial court explained its sentence for defendant's manslaughter conviction as follows:

I believe that the jury mistakenly rewarded Mr. Martin in this whole episode for being a bad aim. One shot took effect severing the spinal cord of the victim, who was running from the defendant. Defendant fired at him at least nine times, based on the recovered evidence in the case, that was admitted to the jury.

However, eight shots were winging they're [sic] way around that neighborhood, which was busy with pedestrian traffic and was busy with cars going by with drivers and passengers. We all had the opportunity to review the security tapes from the party store parking lot.

Mr. Martin ran after the man who was running away and shot him in the back. Killed him. Therefore, I will exceed the guidelines. On the charge of Voluntary Manslaughter, it's the sentence of the Court, Mr. Martin you be confined to this State's prison for a minimum period of 120 months, a maximum period of 180 months.

We disagree with defendant's argument that the trial court's statement expressing its belief that the jury "mistakenly rewarded" defendant for "being a bad aim" does not qualify as objective and verifiable. Viewed in context, the statement reflects the trial court's disagreement with the jury's verdict. The court provided objective and verifiable reasons for its disagreement, including that defendant pursued the victim, that defendant fired at least nine shots toward the victim, and that defendant shot the victim in the back while the victim was fleeing. "[W]here there is record support that a greater offense has been committed by a defendant, it may constitute an aggravating factor to be considered by the judge at sentencing without an admission of guilt by defendant." *People v Fleming*, 428 Mich 408, 418; 410 NW2d 266 (1987); see also *People v Shavers*, 448 Mich 389, 393; 531 NW2d 165 (1995). The trial court could properly consider those aggravating factors, which were objective and verifiable, to conclude that defendant was guilty of a greater offense and to justify a departure from the guidelines range.

The trial court's departure decision was also based on its observation that the number of shots fired in an area placed other people at risk. The trial court's reliance on this is problematic because the court relied on this same fact to justify its decision to score ten points for OV 9, which considers the number of victims. MCL 769.34 provides that a 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." Ten points may be scored for OV 9 when "[t]here were 2 to 9 victims who were placed in danger of physical injury or death." MCL 777.39(1)(c). Here, the trial court determined that a ten-point score was justified for OV 9 because

while one of the shots that defendant fired took effect on the victim. Six of them, eight of them were wondering [sic] around the neighborhood. And the place was very busy with traffic and pedestrian . . . [p]otential victims.

Because the number of persons placed in danger of injury or death was reflected in the scoring of OV 9 and the trial court did not find that the guidelines failed to adequately account for that factor, it was improper for the trial court to rely on it to justify its departure from the guidelines range.

Further, the trial court wholly failed to explain the extent of the departure as required by *Smith*, 482 Mich at 300. In *Smith*, the Supreme Court explained that a trial court must “explain why” the substantial and compelling reasons that were found to exist justify the particular departure imposed. *Id.* at 292. The Court rejected the view that “as long as the record supports a departure, any departure sentence should be upheld on appeal as long as it is reasonable.” *Id.* at 313. Rather, the Court instructed that “[w]hen fashioning a proportionate minimum sentence that exceeds the guidelines recommendation, a trial court must justify why it chose the particular degree of departure. The court must explain why the substantial and compelling reason or reasons articulated justify the minimum sentence imposed.” *Id.* at 318. In this case, as in *Smith*, the trial court did not “justify why it chose the particular degree of departure,” or “why the substantial and compelling reason or reasons articulated justify the minimum sentence imposed.”

Because the trial court improperly relied on a factor that was already accounted for in the scoring of the guidelines to justify its departure from the guidelines, and the court’s analysis does not comport with *Smith*, we vacate defendant’s manslaughter sentence and remand for resentencing. However, defendant has not demonstrated that resentencing before a different judge is warranted. *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997).

Vacated in part and remanded for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray