

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

UNPUBLISHED
June 26, 2012

v

DAVID CHUCK CROFF,
Defendant-Appellee.

No. 302088
Ingham Circuit Court
LC No. 09-001367-FH

Before: BECKERING, P.J., and FTIZGERALD and STEPHENS, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court for consideration as on leave granted to plaintiff. Plaintiff argues that defendant David Chuck Croff's January 3, 2011, judgment of sentence was erroneous because the trial court neglected to obtain an updated presentence report; erred in scoring offense variable (OV) 14, MCL 777.44, at zero points instead of ten points; and improperly departed below the recommended sentence range. Because we agree that the trial court relied on improper reasons when departing below the sentencing guidelines and failed to explain the extent of its departure, we vacate the sentence imposed and remand for resentencing.

I

On April 27, 2010, defendant pleaded guilty to one count of delivery of a controlled substance—ecstasy, MCL 333.7401(2)(b)(i), and one count of delivery of a controlled substance—marijuana less than five kilograms, MCL 333.7401(2)(d)(iii). The trial court sentenced defendant on June 7, 2010, to six months in jail (with 19 days credit) and three years' probation. Plaintiff appealed, and on December 10, 2010, this Court vacated the sentence and remanded for resentencing. *People v Croff*, unpublished order of the Court of Appeals, entered December 10, 2010 (Docket No. 298733). On remand, the trial court imposed the same sentence in an order dated January 3, 2011. Plaintiff again appealed, and on June 15, 2011, this Court again vacated the judgment and remanded for sentencing within the C-II range of Class B felonies. *People v Croff*, unpublished order of the Court of Appeals, entered June 15, 2011 (Docket No. 302088). After this Court denied defendant's motion for reconsideration on August 3, 2011, *People v Croff*, unpublished order of the Court of Appeals, entered August 3, 2011 (Docket No. 302088), defendant appealed to our Supreme Court. In lieu of granting leave to appeal, the Supreme Court vacated this Court's order from June 15, 2011, and remanded to this

Court “for consideration as on leave granted.” *People v Croff*, 490 Mich 910; 805 NW2d 433 (2011). Therefore, the trial court’s judgment of sentence from January 3, 2011, is now before this Court on appeal.

II

Plaintiff first argues that the trial court should have adjourned the sentencing hearing to obtain an updated presentence investigative report (PSIR), notwithstanding plaintiff’s concession that there was no additional information to include in the report, because plaintiff did not waive its right to receive an updated PSIR. We disagree.

We review a court’s decision on a motion to adjourn sentencing for abuse of discretion. See *People v Dilling*, 222 Mich App 44, 53; 564 NW2d 56 (1997); see also MCL 771.14(6). The trial court is required to use a PSIR when sentencing a defendant, and a defendant cannot waive this requirement. MCL 771.14(1); *People v Hemphill*, 439 Mich 576, 579; 487 NW2d 152 (1992). Although the court is not required to create an updated PSIR whenever a defendant is resentenced, the PSIR used must be “reasonably updated” and contain “complete, accurate, and reliable” information. *People v Triplett*, 407 Mich 510, 515; 287 NW2d 165 (1980). A PSIR is not reasonably updated if (1) it is several years old, (2) it was prepared “in connection with unrelated offenses,” or (3) there was a significant intervening change of circumstances. *Hemphill*, 439 Mich at 580-581; see also *People v Anderson*, 107 Mich App 62, 67; 308 NW2d 662 (1981). A defendant or prosecutor may waive his right to receiving a reasonably updated PSIR so long as the prior PSIR is not “manifestly outdated.” *Hemphill*, 439 Mich at 582.

Under the facts of this case, the trial court properly denied plaintiff’s request to adjourn sentencing in order to obtain an updated PSIR. The prior PSIR was created about six months before the current sentencing. The PSIR was prepared in connection with this current conviction, and there was not a significant change of circumstances that would have required the court to prepare an updated PSIR. In fact, plaintiff admitted that it had no additions or corrections to the existing PSIR. Accordingly, the prior PSIR was “reasonably updated” under the circumstances. While plaintiff claims that a party must still waive their rights under the circumstances, waiver is only necessary where the existing PSIR is not reasonably updated. As the prior PSIR was reasonably updated, the court properly denied plaintiff’s request.

III

Plaintiff next claims that the trial court improperly scored OV 14 at zero points because defendant was the clear leader in the drug-dealing operation. We disagree.

We review “a trial court’s scoring decision under the sentencing guidelines to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score.” *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009) (citation and quotation marks omitted). The court’s scoring of a variable will be upheld if there is any evidence in the record to support the decision. *Id.*

“Offense variable 14 is the offender’s role.” MCL 777.44(1). OV 14 is scored at ten points when “[t]he offender was a leader in a multiple offender situation” but at zero points if “[t]he offender was not a leader in a multiple offender situation.” MCL 777.44(1)(a)-(b). A court considers the entire criminal transaction when scoring OV 14. MCL 777.44(2)(a).

On appeal, plaintiff cites evidence that plaintiff claims establishes that defendant was the leader of a drug-dealing operation involving defendant and Krysten Dunn: defendant’s codefendant and girlfriend. Specifically, plaintiff argues that the age disparity between Dunn and defendant (ages 20 and 28, respectively), the location of the drug sales, and defendant’s knowledge and history with drug trafficking clearly established that defendant was the leader. However, there is record evidence to support the trial court’s decision. For example, the trial court noted Dunn’s active participation in the drug sales, including her actual delivery to the officer in one of the transactions. Further, parity in the criminality is shown by the facts that Dunn and defendant were in a boyfriend/girlfriend relationship and sold drugs to feed their own drug habits. Accordingly, the trial court did not abuse its discretion in scoring OV 14 at zero points because there is some evidence in the record to support the trial court’s decision.

IV

Finally, plaintiff claims that the trial court erred when it substantially departed below the sentencing guidelines because the court failed to articulate valid substantial and compelling reasons for departing from the guidelines and issued a sentence clearly disproportionate to the facts and circumstances of the crime and defendant’s criminal record. We agree.

Although a sentence imposed within the sentencing range will be affirmed by this Court, a trial court must articulate substantial and compelling reasons on the record when departing from the guidelines if the court believes the sentencing range is “[dis]proportionate to the seriousness of the defendant’s conduct and to the defendant in light of his criminal record.” *People v Babcock*, 469 Mich 247, 255-256, 261-262; 666 NW2d 231 (2003); see also MCL 769.34(3). To deviate from the sentencing guidelines, the trial court must articulate substantial and compelling reasons that (1) are objective and verifiable, (2) keenly or irresistibly attract the court’s attention, and (3) are of considerable worth in deciding the terms of the sentence. *Babcock*, 469 Mich at 257. Substantial and compelling reasons justifying a departure “exist only in exceptional cases.” *Id.* (citation and quotation marks omitted). The court cannot base its departure on matters adequately contemplated in the scoring variables. MCL 769.34(3)(b); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The sentencing court must explain why its chosen sentence “is proportionate to the seriousness of the defendant’s conduct and his criminal history because, if it is not, the trial court’s departure is necessarily not justified by a substantial and compelling reason.” *Babcock*, 469 Mich at 264. If a reason is found to be invalid and this Court cannot determine from the record whether the trial court would have sentenced the defendant to the same extent absent the invalid reason, this Court will remand the sentence for reconsideration. *Id.* at 260-261.

[T]he existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. The determination that a particular factor is objective and verifiable should be reviewed by the appellate court as a matter of

law. A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion. [*Id.* at 264-265 (internal quotations marks and citations omitted).]

The trial court sentenced defendant below the guidelines (six months in jail instead of 24 to 40 months in prison) for three reasons: (1) defendant's closed head injury; (2) defendant's full compliance with probation; and (3) the sentence given to Dunn. The trial court's findings on the existence of these reasons were not clearly erroneous because they were established and undisputed in the record. Further, the parties agree that the reasons provided by the court were objective and verifiable. Nevertheless, none of the reasons articulated by the trial court are substantial and compelling.

First, defendant's closed head injury does not keenly or irresistibly attract this court's attention to justify a downward departure. See *id.* at 257. Defendant insists that his short-term memory loss, speech impediments, and Attention Deficit Disorder caused by his head injury "could have an impact on impulse control and decision making and also could be a precursor to drug use." (emphasis added.) While the extent of a defendant's culpability can be a substantial and compelling reason for a downward departure, *People v Bates*, 190 Mich App 281, 282; 475 NW2d 392 (1991), the trial court did not find at resentencing that the effects of defendant's head injury affected his culpability. And, as the manner in which defendant's argument is phrased indicates, the record before the trial court did not support a finding that defendant's head injury affected his culpability.¹ The closed head injury that defendant sustained ten years before sentencing is not an exceptional circumstance justifying a downward departure. See *Babcock*, 469 Mich at 257.

Second, defendant's compliance with probation in the present case also does not keenly or irresistibly attract this court's attention to justify a downward departure. See *id.* at 257. We recognize that a defendant's conduct while on probation may serve as a substantial and compelling reason for departure. See *People v Schaafsma*, 267 Mich App 184, 186; 704 NW2d 115 (2005) (holding that a probation violation is objective and verifiable and may provide a substantial and compelling reason for an upward departure); *People v Harvey*, 203 Mich App 445, 448-449; 513 NW2d 185 (1994) (including defendant's status as "an exemplary probationer" among substantial and compelling reasons for a downward departure). However, it is important to distinguish conduct that is expected from a defendant and, thus, should not keenly or irresistibly attract a court's attention, from conduct that is unexpected and, consequently, may keenly or irresistibly attract a court's attention. For example, a court's attention could be keenly attracted by probationary behavior so exemplary that the expectations for a probationer have been exceeded, *Harvey*, 203 Mich App at 448-449; probationary behavior that falls short of expectations, i.e., a violation of probation, *Schaafsma*, 267 Mich App at 186; or compliance with

¹ The record reveals that after his head injury, which occurred when he was eighteen years, old, defendant attended college for two years where he studied real estate. At the time the PSIR was prepared, defendant was employed in telephone sales making \$2,000 per month.

law enforcement officials after arrest to effectively fight drug-related crime when compliance is neither expected nor required, *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995). Unlike these examples, defendant's good behavior for the six months between the June 2010 sentencing and the December 2010 sentencing was expected of him and not particularly exceptional in light of its short duration and the fact that defendant was in jail serving his six-month sentence. See *Babcock*, 469 Mich at 257.

Third, Dunn's sentence under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq.*, of two years probation and 30 days in jail is not a substantial and compelling reason for departure. See *People v Clark*, 185 Mich App 127, 129-132; 460 NW2d 246 (1990) (explaining that the lesser sentence of a defendant's fellow participant in a crime is not a substantial and compelling reason for departure). "Michigan's Legislature has determined that the proper approach to sentencing is to favor individualized sentencing for every defendant." *People v Sabin (On Second Remand)*, 242 Mich App 656, 661; 620 NW2d 19 (2000); see also *People v Adams*, 430 Mich 679, 686; 425 NW2d 437 (1988) ("The Legislature has determined that the appropriate approach to sentencing is the individualization of a sentence to a given offender."). Therefore, in *Clark*, this Court held that the lesser sentence of a defendant's fellow participant in a crime is not a substantial and compelling reason for a departure in the defendant's sentence. *Clark*, 185 Mich App at 129-132. Although defendant and Dunn may have been equally at fault in the drug sales, they were not similarly situated. Dunn's age, unlike defendant's age, allowed Dunn to be sentenced under the HYTA. See MCL 762.11(1). Any legislative presumption about Dunn's rehabilitative potential reflected in the statutory scheme does not apply to defendant. See *People v Perkins*, 107 Mich App 440, 444; 309 NW2d 634 (1981) ("The age classification [in the HYTA] indicates a legislative belief that individuals in the 17 to 20 age bracket would be more amenable to the training and rehabilitation provided under the act."); see also *People v Khanani*, ___ Mich App ___, ___ NW2d ___ (2012), slip op at 2 ("The HYTA 'evidences a legislative desire that persons in this age group not be stigmatized with criminal records for unreflective and immature acts.'").

Accordingly, we conclude that the trial court abused its discretion when it determined that substantial and compelling reasons existed to depart from the statutory minimum sentence. As none of the reasons relied upon by the trial court to depart from the guidelines were substantial and compelling, we must vacate defendant's judgment of sentence and remand for resentencing.² See *Babcock*, 469 Mich at 260-261. If the sentencing court on remand departs from the statutory minimum guidelines range, it must state on the record substantial and compelling reasons to justify the departure. See *id.* at 258; see also MCL 769.34(3). Moreover, "[w]hen departing, the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been." *People v Smith*, 482

² We also conclude that the trial court failed to explain why its reasons for departure justified the extent of the departure; the court's failure to do is an additional reason why we must vacate the judgment of sentence and remand for resentencing. See *People v Smith*, 482 Mich 292, 310-311; 754 NW2d 284 (2008).

Mich 292, 304; 754 NW2d 284 (2008). And it must explain why its reasons for departure justified the extent of the departure. See *id.* at 310-311.

We vacate defendant's judgment of sentence and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ E. Thomas Fitzgerald
/s/ Cynthia Diane Stephens