

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellant,

UNPUBLISHED  
October 10, 2013

v

THOMAS STEWART MURDOCK,  
  
Defendant-Appellee.

No. 312595  
Alger Circuit Court  
LC No. 2011-001962-FC

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Before: RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

The prosecution appeals as of right following defendant's jury trial convictions of operating a motor vehicle while intoxicated (OUIL) causing death, MCL 257.625(4)(a), operating a motor vehicle while intoxicated, MCL 257.625(1), third offense (OWI-3d), MCL 257.625(9)(c), possession of marijuana, MCL 333.7403(2)(d), and operating a motor vehicle with a suspended license, second offense, MCL 257.904(3)(a).<sup>1</sup> The trial court sentenced defendant to 11 months for the OWI-3d conviction, 85 days for the possession of marijuana conviction, and 85 days for the operating a motor vehicle with a suspended license conviction, with all convictions concurrent to the trial court's sentence of 2 to 15 years' imprisonment for the OUIL causing death conviction. We vacate the trial court's sentence for the OUIL causing death conviction and remand to the trial court for resentencing.

**I. BASIC FACTS AND PROCEDURAL HISTORY**

On the date of the incident, defendant and his girlfriend, Lisa Hardwick, were sitting in defendant's truck, which was parked on his property. Defendant and Hardwick had consumed alcohol and marijuana earlier that day. After conversing and listening to music, Hardwick exited the vehicle and went inside their cabin. Defendant remained in the vehicle and listened to music.

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<sup>1</sup> Defendant was also charged with, and acquitted of, involuntary manslaughter, MCL 750.321.

After a short period of time, defendant backed up the vehicle so that Hardwick could mow the lawn beneath where it was parked. Defendant reversed the truck “fast” and backed-up in a wide arc. Defendant heard a thump, exited the vehicle to investigate, and found Hardwick gravely wounded on the ground. Defendant contended that he saw Hardwick enter the cabin, but never saw Hardwick exit the cabin or when he reversed the vehicle. A boat that was affixed to defendant’s truck was ejected into the driveway after Hardwick was struck.

Defendant could not find his cell phone to call the police. Instead, defendant drove a few miles to a nearby store and called for help. According to a witness at the store, there was a loud back-up beeper that was audible from defendant’s truck when he placed the vehicle in reverse. Defendant returned to the cabin and met police. According to Officer Thomas Nolan, defendant was distraught and repeated that he did not intend to strike Hardwick with his truck. Hardwick died as a result of her injuries.

Defendant had tetrahydrocannabinol (THC) in his system and his blood alcohol content (BAC) was .16. Hardwick’s BAC was .134 and her system was positive for THC, hydrocodone, and dihydrocodeine. A Michigan State Police crash reconstructionist testified that defendant’s vehicle ran over Hardwick when he reversed and it struck her a second time when he accelerated forward. However, defendant’s crash reconstructionist testified that defendant’s vehicle was equipped with a back-up alarm and that the collision was unavoidable because Hardwick was already on the ground when she was struck by the vehicle.

The jury found defendant guilty of the above-mentioned charges. The presentence investigation report concluded that defendant’s sentencing guidelines range was 43 to 86 months. However, the trial court reduced defendant’s offense variable (OV) level, concluding that OVs 12 and 17 were incorrectly scored. Defendant’s new sentencing guidelines range was 36 to 71 months. In departing downward from the sentencing guidelines range, the trial court stated:

In the matter of the People versus Thomas Stewart Murdock, the Court having heard the arguments and the statements of the parties, I can only say that what has already been said and probably more poignantly than I can say it is that there are no winners in this situation, there are only losers.

We have a circumstance where somebody will have to be removed from society for a period of time which is at the discretion of the Court, and we have a person who has lost a life that will not be able to enjoy any days that might have been expected going forward.

I have read all the letters. I would take some argument with the perception of the People in terms of what was attempting to be said as opposed to the direct and circumstantial arguments that may have been perceived in the letters. I think what the statements have really been about is that this was a tragic accident.

The question comes down to whether the accident could have been avoided, and that’s where the alcohol comes in, and that’s why the charge, I’m certain, that the jury found was alcohol causing death. There’s obviously a lot of

questions that remain in terms of what truly happened and actually happened, and I don't know that anybody has a true understanding of that.

But as [defense counsel] has pointed out and the law contemplates is that there has to be a deterrence, taking into also the consideration of the rehabilitation and the message that the public truly expects.

Personally, what the public will perceive after sentence of judgment is something the Court has absolutely no control over, none; and that's not really a concern of the Court. It's what does justice require in these particular circumstances.

I take what your words to have been conveyed here, Mr. Murdock, to be true in terms of what you want to do going forward, and only time will tell. Only time will tell. I'm sure there are people that don't believe or have difficulty believing that all of those words will bear fruit. And again only time will tell and that will rest with you in the future.

But under these circumstances, the Court cannot find in its discretion that a jail sentence alone would be appropriate. And that gets to the aspect of the priors, the argument having been made not only by the probation department and [the People] that there should be and should have been some educational learning curve here that you fail to appreciate. Of course, nobody fails to appreciate anything until there's a consequence. And obviously there was never the consequence before to suggest to you that alcohol might lead you down the path that it has here today.

But as has been pointed out, the Court did sit through the entire trial and is left, I think, with some of the same questions that the jury may have had, and in particular why they were unable to find you guilty of the other charge of involuntary manslaughter. There was no question in their mind or in the Court's mind that the charge that you were convicted of would most likely be the ultimate decision because the facts, as [the prosecutor] stated, were there. There was proof of alcohol, there was proof of driving.

Having said that, the Court also understands and would agree with some of the arguments of [defense counsel] that the guidelines are just that, they're not perfect by any means. And I think there is a certain amount of compounding. For example, the aspect of the drunk driving on a public highway, under the circumstances this Court finds would potentially be unnecessary. If you went for help, you were going to be charged; you were driving drunk on the highway. Does that factor in? Should that factor in? Well, the facts say obviously. But whether or not the Court finds that to be compelling to take into consideration is truly debatable.

I do find that there are, because of your history or lack of history, other than the alcohol-related offenses, which is why this Court is not going to sentence

you to a jail term, compelling reasons to depart from the minimum of 36 to a sentence of two years, which is set by this Court as the minimum, the maximum which is set by statute on the principal charge of operated—operating, Count 5, while intoxicated causing death. It will be the recommendation and sentence of this Court that because of the facts and the circumstances as laid out in this trial that there is reason to depart downward, but not to the degree that has been argued by the defense. Those 85 days of credit will be given to you as required.

So the sentence and judgment on operating while intoxicated causing death, the Court finds that there are compelling reasons given the circumstances surrounding the incident of the evening such that the testimony has been consistent in that Mr. Murdock was unaware, did not know, did not see the victim in this matter behind the vehicle, and the other circumstances involving why or whatever the condition might have been of the victim in this matter. So 24 months to 15 years with the credit for the five served -- 85 days served.

## II. DEPARTURE FROM THE SENTENCING GUIDELINES

The prosecution argues that the trial court erred in failing to articulate substantial and compelling reasons for its downward departure from the sentencing guidelines. We agree.

This Court reviews for clear error the trial court's determination of whether a particular factor for departure exists. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). The trial court's conclusion that a reason is objective and verifiable is reviewed as a matter of law. *Id.* "Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure." *Id.* "A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes." *Id.*

The Michigan Sentencing Guidelines require a trial court to impose a minimum sentence that falls within the sentencing guidelines range. MCL 769.34(2); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). "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); *Buehler*, 477 Mich at 24. In order to be substantial and compelling, the reasons must be "objective and verifiable." *Smith*, 482 Mich at 299. "To be objective and verifiable, a reason must be based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed." *People v Anderson*, 298 Mich App 178, 183; 825 NW2d 678 (2012), quoting *People v Horn*, 279 Mich App 31, 43 n 6; 755 NW2d 212 (2008). The reason or reasons given justifying the departure "must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention. Substantial and compelling reasons for departure exist only in exceptional cases." *Smith*, 482 Mich at 299. However, a departure "may not be based 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." *People v Harper*, 479 Mich 599, 617; 739 NW2d 523 (2008); MCL 769.34(3)(b). The trial court "must

justify on the record *both* the departure and the extent of the departure.” *Anderson*, 298 Mich App at 184 (emphasis added).

Here, the trial court failed to articulate substantial and compelling reasons for its downward departure from the sentencing guidelines. Specifically, the trial court’s conclusion that “the facts and the circumstances as laid out in this trial [] is reason to depart downward” was a generalized statement. In other words, it contained no specific substantial and compelling reasons for departure. The trial court also stated that it departed due to defendant’s “lack of [criminal] history, other than the alcohol-related offenses.” In this respect, the court erred because a defendant’s lack of criminal record, standing alone, is insufficient to qualify as a substantial and compelling reason to depart downward from the sentencing guidelines. *People v Portellos*, 298 Mich App 431, 455; 827 NW2d 725 (2012). We note that defendant had several prior convictions: (1) unlawfully carrying a weapon, marijuana, and drug paraphernalia in Chattanooga, Tennessee in 1990; (2) operating while impaired in 2001; (3) stealing a Christmas tree in 2002; (4) operating while intoxicated (second offense) in 2005; (5) driving with a suspended license in 2005; and (6) littering in 2007.

Additionally, the trial court also indicated its apparent belief that defendant could not see Hardwick when he reversed his truck and the potential of Hardwick’s culpability in the collision. However, we note that it appears from our review of the record that any culpability on the part of Hardwick is nonexistent. In addition, the trial court’s mere disagreement with the jury verdict, where the jury found defendant guilty of the sentencing offense beyond a reasonable doubt, is not an objective and verifiable reason for departure. See *People v Fleming*, 428 Mich 408, 418; 410 NW2d 266 (1987) (“[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.”) (emphasis added). Therefore, the trial court abused its discretion in finding that defendant’s prior criminal history and the “facts and circumstances” of the trial to be mitigating circumstances to justify a downward departure. See *Smith*, 482 Mich at 300.

Vacated and remanded for resentencing. We do not retain jurisdiction.

/s/ Michael J. Riordan

/s/ Jane E. Markey

/s/ Kirsten Frank Kelly