

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
September 11, 2014

v

LAVAGAS DRAIN,

Defendant-Appellant.

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No. 316565  
Wayne Circuit Court  
LC No. 10-005864-FH

Before: HOEKSTRA, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was originally sentenced as a fourth habitual offender, MCL 769.12, to life imprisonment for the carrying a concealed weapon and felon in possession of a firearm convictions, and two years' imprisonment for the felony-firearm conviction. In Docket No. 306118, defendant filed a delayed application for leave to appeal his sentence, and in lieu of granting leave to appeal, this Court vacated the judgment of sentence and remanded for resentencing. *People v Drain*, unpublished order of the Court of Appeals, entered April 13, 2012 (Docket No. 306118). On remand, defendant was resentenced, as a fourth habitual offender to 15 to 25 years' imprisonment for the carrying a concealed weapon and felon in possession of a firearm convictions, and to two years' imprisonment for the felony-firearm conviction. Defendant now appeals that sentence as of right. We remand for resentencing.

Defendant argues that he is entitled to resentencing because the trial court failed to sufficiently justify its sentences that departed from the sentencing guidelines range. Specifically, defendant contends that the trial court failed to address why his sentences of 15 to 25 years' imprisonment were justified and proportional in relation to the guidelines range of 9 to 46 months' imprisonment, and in comparison to "the guidelines of the same length as the departure sentence," as previously ordered by this Court. *People v Drain*, unpublished order of the Court of Appeals, entered April 13, 2012 (Docket No. 306118). Further, defendant argues that his prior record of convictions was already taken into account by the sentencing guidelines and the fourth habitual offender statute. Defendant also contends that his sentences constituted cruel and unusual punishment because his sentences are disproportional in relation to the sentencing

guidelines. Regarding defendant's assertion that the trial court failed to articulate a sufficient explanation for its departure sentences, we agree.

Where a sentence departs from the guidelines range, the existence of a particular sentencing factor is a factual determination reviewed for clear error. *People v Smith*, 482 Mich 292, 326; 754 NW2d 284 (2008). Clear error exists when the Court is left with a definite and firm conviction that an error took place. *People v Fawaz*, 299 Mich App 55, 60; 829 NW2d 259 (2012). The determination that a sentencing factor is objective and verifiable is reviewed de novo. *People v Anderson*, 298 Mich App 178, 184; 825 NW2d 678 (2012). The court's determination that the sentencing factors constituted substantial and compelling reasons for departure from the guidelines is reviewed for an abuse of discretion, "as is the amount of the departure." *Smith*, 482 Mich at 300. An abuse of discretion is present when the sentence assessed is not within the range of principled outcomes. *Id.* Throughout the inquiry, this Court must defer to the trial court's firsthand knowledge of the facts and the defendant. *People v Babcock*, 469 Mich 247, 270; 666 NW2d 231 (2003).

"It is well established that '[a] court may depart from the appropriate sentence range . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.' " *Anderson*, 298 Mich App at 183, quoting MCL 769.34(3). In order to be substantial and compelling, the reasons upon which the trial court relied must be objective and verifiable. *Smith*, 482 Mich at 299. The reasons for departure must "be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention." *Id.* The trial court may not base a departure from the guidelines on an " 'offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts . . . that the characteristic has been given inadequate or disproportionate weight.' " *Id.* at 300, quoting MCL 769.34(3)(b). Additionally, the trial court must justify, on the record, both the departure from the guidelines and extent of the departure. *Id.* at 313. Departure should only occur in the most exceptional cases. *Babcock*, 469 Mich at 257.

The trial court articulated two justifications for departing from the guidelines range of 9 to 46 months' imprisonment, and instead resentencing defendant 15 to 25 years' imprisonment: (1) the prior record variables and the fourth habitual offender statute were insufficient in the trial court's view to account for defendant's numerous prior convictions (including five felonies and nine misdemeanors); and (2) defendant had shown himself unable to correct his conduct despite his sentences for his many prior convictions. However, at the resentencing hearing, the trial court failed to address how sentences of 15 to 25 years' imprisonment were proportional in relation to the guidelines range of 9 to 46 months. In the order vacating defendant's original sentences and remanding to the trial court, this Court specifically instructed:

If, on resentencing, the trial court imposes a sentence that constitutes a departure, the trial court must explain why the reasons it articulated for the sentence justify the particular departure. The proportionality of a departure is appropriately justified by comparing it to the sentencing grid. The trial court should articulate why the reasons supporting a departure are similar to conduct that would result in a sentence within the guidelines of the same length as the departure sentence.

[*People v Drain*, unpublished order of the Court of Appeals, entered April 13, 2012 (Docket No. 306118) (citations omitted).]

Although the trial court noted that, under the fourth habitual offender statute, MCL 769.12(1)(b), it could sentence defendant to any term of years up to life imprisonment, it did not explain why defendant's sentence was proportional to defendant or the offense in comparison to "the guidelines of the same length as the departure sentence." Defendant's minimum sentence of 15 years was nearly four times as high as the upper end of the guidelines range. In sum, while the trial court provided reasons for the departure sentence, it failed on remand, despite specific instructions from this Court, to explain how the departure sentences of 15 to 25 years' imprisonment were proportional in relation to the guidelines range, by articulating how the conduct justifying the departure was similar to conduct that would result in a sentencing guidelines range of 15 to 25 years. Resentencing is warranted yet again.

Finally, in his prayer for relief, defendant requests remand to a different judge.

The general concern when deciding whether to remand to a different trial judge is whether the appearance of justice will be better served if another judge presides over the case. We may remand to a different judge if the original judge would have difficulty in putting aside previously expressed views or findings, if reassignment is advisable to preserve the appearance of justice, and if reassignment will not entail excessive waste or duplication. [*Bayati v Bayati*, 264 Mich App 595, 602-603; 691 NW2d 812 (2004).]

Defendant fails to develop any argument that the sentencing judge would be unable to rule fairly on remand. A defendant may not announce a position and leave it to this Court to "discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position . . . Failure to brief a question on appeal is tantamount to abandoning it." *People v Kevorkian*, 248 Mich App 373, 388-389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Therefore, defendant has abandoned his request for remand to a different judge.

Because this case requires remand to the trial court for resentencing, we need not decide whether defendant's sentences constitute cruel or unusual punishment.

Remanded for resentencing. We do not retain jurisdiction.

/s/ Joel P. Hoekstra  
/s/ Kurtis T. Wilder  
/s/ Karen M. Fort Hood