

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SMITH BEACH ATWOOD,

Defendant-Appellee.

UNPUBLISHED

June 7, 2002

No. 232361

Washtenaw Circuit Court

LC No. 99-012337-FC

Before: Sawyer, P.J., and Murphy and Hoekstra, JJ.

PER CURIAM.

On appeal by leave granted, the prosecution challenges defendant's sentence of twelve to eighteen months' imprisonment, which the trial court imposed for defendant's plea-based conviction of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b). We vacate defendant's sentence and remand.

This case arises from defendant's fifteen-year-old adopted daughter's allegations that defendant had committed several acts of sexual conduct, including one act of digital penetration, with her. Defendant pleaded no contest to one count of CSC I and to six counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b). In a prior appeal, the prosecutor challenged defendant's initial sentence, imposed pursuant to a *Cobbs*¹ agreement, of a term of one day to one year and a day for the CSC I conviction, but did not challenge the trial court's sentence of five years' probation for the CSC II convictions. This Court held that the CSC I sentence was "disproportionately lenient and therefore invalid" and vacated that sentence and remanded for resentencing. *People v Atwood*, unpublished opinion per curiam of the Court of Appeals, issued October 27, 2000 (Docket No. 224315). On remand, after the trial court indicated that it was inclined to impose a term of twelve to eighteen months' imprisonment for the CSC I conviction, defendant affirmed his no contest plea, and the trial court imposed the stated sentence.

In the instant appeal, the prosecutor challenges the reasons on which the trial court relied in making a downward departure from the sentencing guidelines. Because the offense that

¹ *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

formed the basis for the CSC I conviction occurred after January 1, 1999, the legislative sentencing guidelines apply to defendant's sentence. MCL 769.34(2).

Under the legislative sentencing guidelines act, a court must, in most instances, impose a sentence in accordance with the recommended sentencing guidelines range. MCL 769.34(2); *People v Babcock*, 244 Mich App 64, 72; 624 NW2d 479 (2000) (*Babcock I*). A court may depart from the sentencing guidelines range if it has a substantial and compelling reason to do so and states on the record the reasons for departure. MCL 769.34(3); *Babcock I, supra*. Reasons for departure must be objective and verifiable. *Id.* at 75-76, quoting *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995). In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination subject to review for clear error, the determination that the factor is objective and verifiable is reviewed as a matter of law, and the determination whether the factors considered constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion. *People v Babcock*, __ Mich App __, __, n 3; __ NW2d __ (2002) (*Babcock II*); *Babcock I, supra*, citing *Fields, supra*. The *Fields* Court "instructed that when both appropriate and inappropriate factors are considered, the case should be remanded for the sentencing court to determine whether it finds substantial and compelling reasons to deviate from the statutory minimum sentence solely on the basis of appropriate factors." *People v Perry*, 216 Mich App 277, 282; 549 NW2d 42 (1996), citing *Fields, supra* at 80.

In this Court's prior decision, we agreed with the prosecution that the trial court imposed a disproportionately lenient sentence for the CSC I conviction, and thus we vacated the sentence and remanded for further proceedings. Unfortunately, we must again vacate the sentence imposed and remand for further proceedings. Although the trial court presented a lengthy explanation of its reasons for imposing the given sentence, it failed to limit its reasons to those that are objective and verifiable. *Fields, supra*; *Babcock I, supra*. The trial court did, in fact, state on the record objective and verifiable reasons for a downward departure from the sentencing guidelines range, all of which are appropriate here, including age, absence of previous criminal history, absence of a history of violence, an excellent work history, strong family support, immediate admission of responsibility and cooperation with the police, and a history of substantial work within the community and school system, see *Fields, supra* at 76-77, but it expressly stated that these reasons were "not the substance" of its departure. Instead, the trial court focused on the "best interest of the victim":

The substance upon which the [c]ourt was basing its departure on [in the prior sentencing] is the same thing that the [c]ourt is basing its departure on today for the most part and that is *the best interest of this victim*. [Emphasis supplied.]

In determining the best interest of the victim, the trial court relied on psychological reports and the victim's own statement. Regardless of the nature of the information on which the trial court relied, the best interest of the victim is not an objective and verifiable factor. Rather, the trial court's evaluation of the best interest of the victim involves a subjective determination of what the trial court thinks or believes would be best under the given circumstances. Thus, as a matter of law, the trial court erred in focusing on the best interest of the victim as the basis for a departure from the sentencing guidelines. *Babcock I, supra* at 75-76.

To the extent that the trial court may have relied to some degree on the previously stated objective and verifiable factors, the trial court failed to provide an explanation why it considered these factors.² While our Supreme Court has cited these factors as potentially substantial and compelling reasons for departure in *Fields, supra*, that case “does not authorize the mere listing of garden variety ‘factors,’ even objective and verifiable ones, as a means of complying with legislative intent. . . . [T]he sentencing court must also specifically articulate the reasons why the factors it identifies and relies upon collectively provide ‘substantial and compelling’ reasons to except this case from the legislatively mandated sentencing regime.” *People v Daniel*, 462 Mich 1, 8-9; 609 NW2d 557 (2000), quoting *People v Johnson (On Remand)*, 223 Mich App 170, 173-174; 566 NW2d 28 (1997).

Because the trial court principally relied on an inappropriate factor that was not objective or verifiable in conjunction with appropriate factors, *Perry, supra*, and failed to articulate why the appropriate factors cited constituted substantial and compelling reasons for departure in this case, *Daniel, supra*, we again vacate defendant’s CSC I sentence and remand for resentencing on the CSC I conviction only. MCL 769.34(11).³ However, we find no support in the record for the prosecutor’s argument that the case should be remanded to a different circuit, nor do we find it necessary for resentencing to be before a different judge. *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997); *People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986).⁴

Defendant’s sentence on the CSC I conviction is vacated. We remand for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Joel P. Hoekstra

² We note that the trial court did address some, but not most, of these factors in its comments at the first sentencing and at the resentencing incorporated those comments by reference.

³ We acknowledge that defendant has served the maximum term imposed on remand, and has been released from custody. However, a court has the authority to determine whether a sentence was invalid and to correct and invalid sentence, even after the defendant has been discharged from the invalid sentence. *People v Hill (After Remand)*, 202 Mich App 520, 523-524; 509 NW2d 856 (1993). Defendant is entitled to credit for all time served on the invalid sentence. *Id.* at 524; *People v Gregorczyk*, 178 Mich App 1, 4; 443 NW2d 816 (1989).

⁴ We reject defendant’s two arguments concerning alternative grounds for affirming the trial court’s sentences. First, we disagree that the law of the case limits this Court’s consideration in this appeal. “When a case is remanded from [this] Court because the entire sentence is invalid, every aspect of the sentence is before the judge de novo unless the remand order indicates otherwise.” *People v Williams (After Second Remand)*, 208 Mich App 60, 65; 526 NW2d 614 (1994). To the extent that defendant argues that this Court should not undertake a proportionality review of defendant’s sentence, we note that under *People v Hegwood*, 465 Mich 432, 437, n 10; 636 NW2d 127 (2001), “there can be varying degrees of substantial and compelling circumstances that must be considered in reviewing the extent of departure,” and “the principle of proportionality can be considered concerning the extent of a departure.” *Babcock II, supra* at ___.