

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 16, 2012

v

JEFFREY SCOTT RIGTERINK,

Defendant-Appellant.

No. 307568
Ottawa Circuit Court
LC No. 11-035450-FH

Before: FITZGERALD, P.J., and METER and BOONSTRA, JJ.

PER CURIAM.

Defendant pleaded guilty of arson of real property, MCL 750.73, as an habitual offender, second offense, MCL 769.10. The trial court sentenced defendant to a prison term of 95 to 180 months. Defendant appeals by leave granted the sentence imposed. We affirm.

Defendant argues that the trial court abused its discretion by departing from the recommended minimum sentence range under the legislative guidelines. We disagree.

On appeal, courts review the reasons given for a departure for clear error. The conclusion that a reason is objective and verifiable is reviewed as a matter of law. 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. A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes. [*People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008) (citations omitted).]

Under the legislative sentencing guidelines, defendant's recommended minimum sentence range as a second-offense offender was 10 to 28 months' imprisonment. MCL 777.65; MCL 777.21(3)(a). However, 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." MCL 769.34(3). In order to be substantial and compelling, the reasons on which the trial court relied "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 Horn*, 279 Mich App 31, 43 n 6; 755 NW2d 212 (2008). The reasons for departure must also "be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention." *Smith*, 482 Mich at 299.

However, “[t]he trial court may 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 . . . that the characteristic has been given inadequate or disproportionate weight.’” *Id.* at 300, quoting MCL 769.34(3)(b). Moreover, “the statutory guidelines require more than an articulation of reasons for a departure; they require justification for the *particular* departure made.” *Smith*, 482 Mich at 303 (emphasis in original). Thus, “the trial court . . . must justify *on the record* both the departure and the extent of the departure.” *Id.* at 313 (emphasis in original).

In this case, the trial court articulated three primary reasons for its upward departure. The trial court found that prior record variable (PRV) 2, MCL 777.52, did not adequately take into account the number of defendant’s prior low severity felony convictions, that the PRVs did not adequately account for defendant’s lengthy criminal history and recidivism, and that the offense variables (OV) did not adequately address the fact that defendant’s offense threatened public safety and vital infrastructure. The trial court based its reasons for departure on defendant’s criminal record and facts contained in the presentence investigation report (PSIR). A defendant’s criminal record is objective and verifiable, as is a trial court’s reason for departure where it relies on the PSIR or testimony on the record. *Horn*, 279 Mich App at 43 n 6; *People v Gonzalez*, 256 Mich App 212, 228-229; 663 NW2d 499 (2003). Defendant argues, however, that the legislative sentencing guidelines already took into account the trial court’s reasons for departure.

The trial court’s first basis for departure was its finding that PRV 2 did not adequately account for the fact that defendant had six prior low severity felony convictions. Under PRV 2, the trial court scores 30 points where the defendant “has 4 or more prior low severity felony convictions.” MCL 777.52(1)(a). Although the trial court assessed the maximum 30 point score for PRV 2, *id.*, the statute only requires four prior low severity felony convictions to obtain that score. We find that the trial court did not abuse its discretion by finding that the sentencing guidelines did not adequately account for defendant’s additional felony convictions and that this was a substantial and compelling reason to depart from the guidelines. *Smith*, 482 Mich at 300.

The trial court’s second basis for departure was its finding that the PRVs did not adequately account for defendant’s lengthy criminal history and recidivism. A “defendant’s prior criminal history and recidivist history” are factors that are “included in the scoring of the prior record variables and offense variables and, thus, [are] insufficient to support an upward departure absent a finding by the trial court that the factors were given inadequate weight when scored.” *People v Hendrick*, 472 Mich 555, 564 n 10; 697 NW2d 511 (2005), citing MCL 769.34(3)(b). In this case, the trial court stated that the PRVs did not adequately account for defendant’s multiple terms of incarceration and his history of recidivism, noting the length of defendant’s prison terms, his violation of parole and failure to comply with the Sex Offender Registration Act upon release from prison, and the close proximity of his subsequent offenses to his release. On the record before us, we find that the trial court did not abuse its discretion by finding that the sentencing guidelines did not give adequate weight to defendant’s criminal history and failure to rehabilitate and that this constituted a substantial and compelling reason to depart from the sentencing guidelines. *Horn*, 279 Mich App at 44-45 (stating that “repeated offenses and failures at rehabilitation” are objective and verifiable factors that “constitute an acceptable justification for an upward departure” from the sentencing guidelines).

Finally, the trial court found that the OVs did not adequately address the fact that defendant's offense threatened public safety and vital infrastructure. Defendant burned a trailer at a railroad yard in Holland, Michigan. According to the PSIR, the fire destroyed communications equipment that the rail transport company (CSX) and its employees relied on to safely conduct daily train operations and that the monetary damage "cannot account for the safety threat this intentional act caused to CSX employee's, emergency responders, and the Holland community." The PSIR further stated that the location of the fire was an area "critical for movement of Amtrak passenger trains, military trains, hazardous material shipments, local area switching, and numerous other interstate train traffic. This intentional act by [defendant] could have resulted in a far more serious incident, resulting in loss of life and or serious injury to CSX employees and local residents." Accordingly, we find that the trial court did not abuse its discretion by finding that defendant's disregard for public safety was a substantial and compelling reason to depart from the legislative sentencing guidelines. See *Smith*, 482 Mich at 299-300.

Moreover, the trial court sufficiently justified on the record the extent of its departure by referencing the sentencing guidelines and the sentencing grid. *Smith*, 482 Mich at 303, 306, 313. Although the trial court imposed a minimum sentence significantly greater than that provided by the sentencing guidelines, we find that it did not abuse its discretion by determining that its departure contributed to a more proportionate sentence than that calculated under the legislative guidelines. *Id.* at 300, 305; *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Mark T. Boonstra