

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

UNPUBLISHED
January 2, 2014

V

CHARLES BRADEN PALMER,
Defendant-Appellee.

No. 311495
Wayne Circuit Court
LC No. 12-003781-FH

Before: M. J. KELLY, P.J., and CAVANAGH and SHAPIRO, JJ.

SHAPIRO, J. (*concurring*).

I concur with the majority's opinion but write separately to note my view that the need for remand arises primarily from the trial court's failure to clearly articulate its reasons for its departure from the applicable sentencing guidelines range and not from whether a proper basis for departure existed.

Defendant pleaded guilty to breaking and entering a building with intent to commit a larceny, MCL 750.110, and malicious destruction of a building less than \$200. MCL 750.380(5). The trial court sentenced defendant to three years probation, the first six months to be served in jail without the possibility of early release, followed immediately by six months in residential drug rehabilitation treatment in the Salvation Army and follow up drug and alcohol testing for the balance of the probationary period.

As an initial matter, the basis for the guidelines range referred to by the parties at defendant's sentencing hearing is unclear and may be incorrect. The presentence report calculated an applicable range of 10 to 23 months, placing defendant in a "straddle cell" which, if applicable, would provide for the sentence imposed and thus not constitute a departure. MCL 777.65. Neither the plea nor sentencing transcripts contain any reference to a basis for scoring the guidelines differently. The sentencing information report shows this scoring as well. However, at sentencing, both attorneys informed the court that the accurate range was 29 to 114 months. Such a range would require a score of between 25 and 34 offense variable (OV) points and the record does not set forth the basis for such a score.

Turning to the departure issue, I agree with the majority that the trial court failed to articulate its grounds for departure in a fashion clear enough to facilitate appellate review. I further note that had the court been clearer in this respect, remand would likely be unnecessary

given that, at various points in the sentencing hearing, reference was made to each of the following:

- defendant pleaded guilty to the charged crimes, not reduced offenses;
- none of defendant's prior crimes were assaultive;
- defendant's prior theft crimes, like the instant crime, all occurred during periods of active drug addiction;
- the most important factor in defendant's rehabilitation and the long-term protection of the community would be to assure that defendant received drug treatment;
- it was unlikely that adequate treatment would be available to defendant in prison (although, as my colleagues note, the trial court failed to provide reference to the data concerning the wait for residential drug treatment in prison, a program for which 224 prisoners were on the waiting list as of a 2012 report¹);
- the building burglarized was a warehouse, not a residence, and the crime occurred after closing, and;
- nothing was taken during the burglary.

Some of these offense and offender characteristics are considered within the guidelines and so in order to rely upon them as a basis to depart, the court must find that the guidelines "[give] inadequate or disproportionate weight" to those characteristics as applied to this case. MCL 769.34(3) (b); *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003). Further, although not discussed by the trial court, the record reflects that defendant's crime did not have a major effect on the victim's business and that the victim desired only that defendant serve time in jail, not prison.

Accordingly, I concur in the remand.

/s/ Douglas B. Shapiro

¹ See 2012 Report by Michigan Department of Corrections, Field Operations Administration, Office of Community Alternatives, Substance Abuse Services Section, p 2.