

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARKEE KIROME SMITH,

Defendant-Appellant.

UNPUBLISHED

December 28, 2021

No. 351930

Genesee Circuit Court

LC No. 18-043034-FH

Before: K. F. KELLY, P.J., and JANSEN and RICK, JJ.

PER CURIAM.

Defendant pleaded guilty to operating a motor vehicle while intoxicated (OWI) causing death, MCL 257.625(4)(a).¹ The trial court departed from the minimum sentence guidelines range of 36 to 71 months and imposed a sentence of 10 to 15 years’ imprisonment. On remand from our Supreme Court, defendant appeals as on leave granted,² challenging the upward departure. We remand for the trial court to further articulate its reasons for the departure sentence or to resentencing defendant.

I. FACTS

This case arises out of an automobile accident in April 2017. Defendant, who was driving while intoxicated, failed to stop at a stop sign and crashed into another vehicle. Defendant testified that the night before the accident, he went out to a bar and had several shots and beers. The morning of the accident, defendant drove his children to school while he was still intoxicated. As he was leaving the school, defendant believed he was being followed by unknown individuals.

¹ Four additional charges—manslaughter with a motor vehicle, MCL 750.321, reckless driving causing death, MCL 257.626(4), failure to stop at the scene of accident resulting in death, MCL 257.617(3), and failure to stop at the scene of a personal injury accident, MCL 257.617a—were dismissed as a result of plea negotiations.

² *People v Smith*, 506 Mich 964 (2020).

Defendant testified that these individuals tried to open his passenger door when he was at a stop sign, which caused him to panic and accelerate down the street. At approximately 8:30 a.m., defendant approached the intersection in which the accident at issue occurred. Defendant testified that he did not see the stop sign at this intersection because a tree covered the stop sign. Defendant believed he was driving approximately 20 to 25 miles per hour. He failed to stop at the stop sign and hit the other vehicle. The four-year-old victim was a passenger in the other vehicle, which was driven by the victim's grandmother. The victim died as a result of his injuries.

After defendant hit the other vehicle, he jumped out of his car. Defendant fled the scene. He did not stop to help or look to see who was in the car he hit. Defendant called the police from his uncle's house and also flagged down an officer who was driving by. After the accident, defendant's blood alcohol level was 0.203.

Before defendant's guilty plea, defense counsel filed a petition requesting that defendant undergo a forensic evaluation to determine whether he was competent to stand trial.³ The trial court found that defendant was competent to stand trial. At defendant's sentencing hearing, the parties agreed that there were no errors in the presentence investigation report (PSIR) and that the applicable minimum sentencing guidelines range was 36 to 71 months' imprisonment. In relevant part, the trial court assessed 2 points for prior record variable (PRV) 5, 50 points for offense variable (OV) 3, 15 points for OV 5, and 20 points for OV 18. As indicated, the trial court departed upwardly from the guidelines range and sentenced defendant to serve 10 to 15 years' imprisonment. During the sentencing hearing, the victim's mother and grandmother addressed the trial court. The victim's grandmother discussed not only her grief, but also her traumatic memories of being in the car "watching my grandson dying in the backseat," and being unable to help. Defendant read a letter in which he apologized for his wrongdoing in causing the accident, asserting that he "took full responsibility" for his actions.

II. ANALYSIS

On appeal, defendant argues that the trial court abused its discretion by departing upwardly from the guidelines range because the trial court did not articulate an adequate justification for the imposition of the maximum possible sentence. We agree.

Although the sentencing guidelines are no longer mandatory, trial courts must consult the guidelines and take them into account during sentencing. *People v Lockridge*, 498 Mich 358, 391; 870 NW2d 502 (2015). "[T]he standard of review to be applied by appellate courts reviewing a sentence for reasonableness on appeal is abuse of discretion." *People v Steanhouse*, 500 Mich 453, 471; 902 NW2d 327 (2017). "A sentencing judge's exercise of discretion must be based on accurate information." *People v Bennett*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 350649); slip op at 13 (cleaned up). A trial court abuses its discretion when it violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). *Steanhouse*, 500 Mich at 477. The principle of proportionality "requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and

³ Two competency evaluations were conducted because the first competency evaluation was not fully completed.

the offender.” *Id.* at 460 (cleaned up). A trial court’s findings of fact at sentencing are reviewed for clear error. *People v Odom*, 327 Mich App 297, 303; 933 NW2d 719 (2019). “Clear error exists if the reviewing court is left with a definite and firm conviction that the trial court made a mistake.” *Id.* at 304 (cleaned up).

A trial court may depart from the guidelines range when it determines that “the recommended range under the guidelines is disproportionate, in either direction, to the seriousness of the crime.” *Milbourn*, 435 Mich at 657. For example, a trial court may depart from the guidelines when the guidelines “do not adequately account for important factors legitimately considered at sentencing.” *Id.* Appropriate considerations under the “proportionality standard” include, but are not limited to:

(1) the seriousness of the offense; (2) factors that were inadequately considered by the guidelines; and (3) factors not considered by the guidelines, such as the relationship between the victim and the aggressor, the defendant’s misconduct while in custody, the defendant’s expressions of remorse, and the defendant’s potential for rehabilitation. [*People v Walden*, 319 Mich App 344, 352-353; 901 NW2d 142 (2017) (cleaned up).]

To determine whether the trial court’s stated reason was already considered by the sentencing guidelines, appellate courts must consider “whether the guidelines adequately took into account the conduct alleged to support the particular departure imposed.” *People v Steanhouse (On Remand)*, 322 Mich App 233, 240; 911 NW2d 253 (2017), vacated in part on other grounds 504 Mich 969 (2019).

The trial court must “justify the sentence imposed in order to facilitate appellate review.” *Lockridge*, 498 Mich at 392. In doing so, the trial court must explain “why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been.” *People v Dixon-Bey*, 321 Mich App 490, 525; 909 NW2d 458 (2017) (cleaned up). In determining proportionality, a trial court may consider its “familiarity with the facts and its experience in sentencing, [a] defendant’s extensive criminal history reflecting that past sentences of probation, jail, and prison had not deterred him, and the trial court’s legitimate concern for the protection of society” *People v Solmonson*, 261 Mich App 657, 671; 683 NW2d 761 (2004) (cleaned up). “However, reliance solely on a trial court’s familiarity with the facts of a case and its experience in sentencing cannot effectively combat unjustified disparity in sentencing because it construes sentencing review so narrowly as to avoid dealing with disparity altogether” *Dixon-Bey*, 321 Mich App at 530 (cleaned up). If a trial court’s reasons for departing from the sentencing guidelines are unclear, the appellate court “cannot substitute its own judgment about why the departure was justified.” *People v Smith*, 482 Mich 292, 304; 754 NW2d 284 (2008). “Nor may [the appellate court] speculate about conceivable reasons for departure that the trial court did not articulate or that cannot reasonably be inferred from what the trial court articulated.” *Id.* at 318.

In this case, the trial court stated the following reasons for departing from the applicable minimum sentencing guidelines range:

I have not looked forward to this day after having reviewed the file and the presentence report. I cannot imagine the hurt that this family has. I have a six year old grandson and I would go crazy if something like this happened to him.

When I read through the file and the presentence report, I came to the conclusion that the defendant during the course of his life has really only cared about himself and nobody else. The record shows that he is 27 years of age. He has eight children. There are five separate mothers of these children and there is not any evidence that I could find that the defendant has provided support for these children who range from ages from one to [ten] years.

The defendant tried initially to use his mental health issues as an excuse, but, according to the record, the doctors found otherwise. The defendant's blood level at the time it was tested after the accident was .203[,] which is more than two times the legal limit. As I said, when you read the presentence report, he lived his life caring only about himself.

I have decided, given the nature of the case and the background and circumstances that he brings into this courtroom, that I am not going to be bound by the sentencing guidelines.

The trial court identified some considerations that were not adequately contemplated by the guidelines. First, the unimaginable hurt inflicted on the family of such a young victim is a factor that is not contemplated by the guidelines. Although 50 points were assessed for OV 3 (physical injury), MCL 777.33(1)(b), because the victim's death resulted from the commission of a crime that involved the operation of a vehicle while defendant was intoxicated, no offense variable took into account that the victim was only four years old. The victim's tender age and the loss of so many years of life is a factor reflecting the seriousness of the offense that was not adequately taken into account by OV 3. Additionally, although 15 points were assessed for OV 5 (serious psychological injury to the victim's family), MCL 777.35(1)(a), this variable arguably did not adequately take into account the particular trauma suffered by the victim's grandmother, specifically, the devastating trauma arising from being trapped in the car and watching her grandson die, as she described to the court at sentencing.

The second reason provided by the trial court was that the PSIR demonstrated that defendant "during the course of his life has really only cared about himself and nobody else." Without elaboration by the trial court, we are unable to contextualize the trial court's observation. To do so would be speculative, and we may not substitute our own judgment for that of the trial court. *Smith*, 482 Mich at 318. There are many facts, both contained in defendant's PSIR and in statements made by defendant and the members of the aggrieved family, that may support this conclusion. Nonetheless, the trial court, not this body, must articulate which of those facts form the basis of its conclusion. See *id.* at 304.

The trial court also noted that defendant's blood alcohol level was ".203[,] which is more than two times the legal limit." OV 18 is scored for crimes against a person if the offense involves the operation of a "vehicle, vessel, ORV, snowmobile, aircraft, or locomotive." MCL 777.22(1). Under MCL 777.48(1)(a), 20 points are properly assessed for OV 18, in relevant part, "when [the

offender's] bodily alcohol content was 0.20 grams or more per 100 milliliters of blood” Here, the trial court assessed 20 points for OV 18. If that scoring was inadequate, the trial court needed to articulate how and why. The sentencing transcript does not provide any insight upon which we can discern this apparent scoring inadequacy.

Furthermore, while the trial court identified three sentencing considerations that very well may justify an upward departure from the sentencing guidelines if elaborated upon, we conclude that the trial court's remaining justifications for the departure from the guidelines range do not constitute appropriate considerations in this case. First, the record does not support the trial court's assumption that defendant had failed to support his children. Moreover, the trial court did not articulate how or why defendant's child support payments, or lack thereof, were relevant to whether a departure sentence was proportional to the circumstances surrounding the offense or the offender. “[A]n appellate court cannot substitute its own judgment about why the departure was justified,” *Smith*, 482 Mich at 304, and cannot “speculate about conceivable reasons for departure that the trial court did not articulate or that cannot reasonably be inferred from what the trial court articulated,” *id.* at 318. Second, we agree with defendant, and the prosecution concedes, that the court improperly considered as a sentencing factor defense counsel's request that defendant undergo a forensic examination to determine whether he was competent to stand trial. Further, it is unclear how much weight the trial court afforded to each of its stated reasons, or how each reason factored into the trial court's conclusion that an upward departure sentence was warranted.

Additionally, the trial court did not adequately justify the extent of the particular departure in this case, which resulted in the imposition of the maximum minimum sentence permissible under the two-thirds rule articulated in *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972), and codified in MCL 769.34(2)(b) (“The court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence.”). Trial courts do not have to “sentence defendants with mathematical certainty” and do not need to use precise words to justify a particular departure. *Smith*, 482 Mich at 311. However, “[e]ven where some departure appears to be appropriate, the extent of the departure (rather than the fact of the departure itself) may embody a violation of the principle of proportionality.” *Milbourn*, 435 Mich at 660. In this case, the trial court failed to explain how its articulated reasons and the circumstances of the offense and the offender rendered the maximum possible sentence more proportional than another sentence would have been. See *Dixon-Bey*, 321 Mich App at 525.⁴

We remand for the trial court to either resentence defendant or to more adequately explain why the particular departure sentence imposed is more proportional than another sentence would have been. See *People v Steanhouse*, 504 Mich 969 (2019). We retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Michelle M. Rick

⁴ Defendant also argues that his sentence was disproportionate. However, we decline to address this issue because we conclude that the trial court failed to articulate sufficient reasoning for imposing the departure sentence and remand the case to readdress sentencing.

Court of Appeals, State of Michigan

ORDER

People of MI v Markee Kirome Smith

Docket No. 351930

LC No. 18-043034-FH

Kirsten Frank Kelly
Presiding Judge

Kathleen Jansen

Michelle M. Rick
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 56 days of the Clerk’s certification of this order, and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, this matter is remanded for the trial court to either resentence defendant or to more adequately explain why the particular departure sentence imposed is more proportional than another sentence would have been. The proceedings on remand are limited to this issue.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.

/s/ Kirsten Frank Kelly
Presiding Judge



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

December 28, 2021
Date

Jerome W. Zimmer Jr.
Chief Clerk