

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW LEE BURR,

Defendant-Appellant.

UNPUBLISHED
February 24, 2005

No. 251329
Otsego Circuit Court
LC No. 00-002514-FC

Before: Fort Hood, P.J., and Griffin and Donofrio, JJ.

PER CURIAM.

Defendant appeals the sentence he received after entering a guilty plea to a charge of unarmed robbery, MCL 750.530. Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to 150 to 270 months' imprisonment for his unarmed robbery conviction, an upward departure from the sentencing guideline minimum sentence recommendation of thirty-six to eighty-eight months. We previously denied defendant's application for leave to appeal for lack of merit in the grounds presented. *People v Burr*, unpublished order of the Court of Appeals, entered October 17, 2001 (Docket No. 236478). By order of our Supreme Court, this case was remanded to us for consideration as on leave granted. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The sole issue on appeal is whether defendant's sentence was an improper departure from the guidelines requiring resentencing. In reviewing a departure from the guidelines range, whether a particular factor relevant to the imposition of a departure sentence exists is a factual determination subject to review for clear error. *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003). Whether that factor is objective and verifiable is a question of law reviewed de novo. *Id.* And whether that factor constitutes a substantial and compelling reason to depart from the guidelines range is reviewed for an abuse of discretion. *Id.* at 264-265.

A departure from the appropriate sentence range is only allowed if there is a "substantial and compelling reason" for doing so. *Babcock, supra* at 255, citing MCL 769.34(3). Only those factors which are "objective and verifiable" may be used to judge whether substantial and compelling reasons exist. *Id.* at 257. To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Here, the trial court rejected the sentencing guidelines recommendation based on the following findings:

These are the 5th and 6th felonies for a 22 year old D. All of his crimes are invasive or potentially so.

This was a robbery apparently armed of two senior citizens– he literally could have scared them to death.

If the D is out someone else will be victimized.

The guidelines are too low for these dynamics.

The first and second factors articulated by the trial judge address the defendant's extensive criminal history and the fact that the victims were senior citizens. While these factors were objective and verifiable, the third and fourth factors were not.

Where, as in this case, this Court finds some of the factors are substantial and compelling and others are not, this Court is free to affirm, if it concludes that the trial court would still have departed, and departed to the same degree in the absence of the impermissible factors. *Babcock, supra* at 260-261. See, also, *People v Solmonson*, 261 Mich App 657, 668-672; 683 NW2d 761 (2004).

After our review, we affirm defendant's sentence on the basis that substantial and compelling reasons were articulated for the guidelines departure and that it is clear that the same sentence would have been imposed by the trial judge, despite the articulation of additional factors that were not objective and verifiable. *Babcock, supra; Solmonson, supra*.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Richard Allen Griffin

I concur in result only.

/s/ Pat M. Donofrio