

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAWRENCE JAMES STANKO,

Defendant-Appellant.

UNPUBLISHED

May 19, 2005

No. 254779

Oakland Circuit Court

LC No. 01-177228-FH

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from a sentence of 2½ to 15 years' imprisonment for a jury trial conviction of operating a motor vehicle under the influence of intoxicating liquor causing death (OUIL causing death), MCL 257.625(4). We affirm.

I. Facts and Procedure

On April 26, 2000, defendant was involved in an automobile accident that caused the death of a person in another vehicle. Defendant was convicted of OUIL causing death, and the trial court sentenced defendant to 2½ to 15 years' imprisonment for the conviction. Defendant appealed as of right his sentence, arguing that the trial court erred in scoring offense variable 3 (OV 3), MCL 777.33 (physical injury to victim), and offense variable 6 (OV 6), MCL 777.36 (intent to kill or injure another individual). On appeal, this Court held that, because the victim did not survive the accident, the trial court erred in scoring defendant twenty-five points for OV 3 for the victim sustaining a life-threatening or permanent incapacitating injury. *People v Stanko*, unpublished opinion per curiam of the Court of Appeals, issued January 27, 2004 (Docket No. 242876), slip op at 2. This Court explained that the language of MCL 777.33 at the time defendant committed the offense did not permit the trial court to assess defendant points for OV 3, noting that the Legislature had since amended MCL 777.33 to permit an assessment of thirty-five points if death results from a drunk driving offense. *Stanko, supra* at 2.¹ This Court then concluded:

¹ This Court also held that, because there was no evidence that defendant committed the crime with malice, the trial court erred in scoring defendant twenty-five points for OV 6 for creating a
(continued...)

Had the guidelines been properly scored, defendant would have zero points for OV 3, ten points for either OV 6 or OV 17, and ten points for OV 18 (the scoring of which was not disputed). An offense variable score of twenty points places defendant in the A-II category for which the minimum sentence range is zero to seventeen months. MCL 777.64. Because the upper limit is less than eighteen months, the trial court was required to impose an intermediate sanction unless it found a substantial and compelling reason to sentence defendant to prison. MCL 769.34(4)(a).

Because the trial court erred in scoring the guidelines and consequently did not impose a sentence within the applicable guidelines range and did not state on the record a substantial and compelling reason for departing from the guidelines, a remand for resentencing is required. MCL 769.34(10). The trial court may consider our unpublished opinion in *People v Hauser*, unpublished opinion per curiam of the Court of Appeals, issued October 29, 2002 (Docket No. 239688). In *Hauser* this Court noted that the guidelines prior to October 1, 2000, did not consider the fact that the victim died under circumstances similar to the instant matter. Death of a victim not considered by the guidelines is a factor that is objective and verifiable such, that upon proper articulation by the trial court, may be considered to determine if a substantial and compelling reason for upward departure exists. See *Hauser, supra*. Because the trial court sentenced defendant within the guidelines as it had calculated them and the sentence imposed was a result of the improper scoring of the guidelines rather than any prejudice or improper attitude toward defendant, resentencing by a different judge is not required. *People v Hegwood*, 465 Mich 432, 440-441 n 17; 636 NW2d 127 (2001). [*Stanko, supra* at 3.]

On remand, the trial court resentenced defendant to the same sentence of 2½ to 15 years' imprisonment. In doing so, the court explained that it was departing upward from the guidelines range of zero to seventeen months' imprisonment because a victim died.

II. Analysis

Defendant argues that the trial court erred in determining that there were substantial and compelling reasons to depart upward from the sentencing guidelines. Defendant contends that the departure was based on facts already taken into account in determining the guidelines range. We disagree.

“ [T]he existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. The determination that a particular factor is objective and verifiable should be reviewed by the appellate court as a matter of law. A trial court's determination that the objective and verifiable

(...continued)

high risk of death or serious injury knowing that death or serious injury was the probable result of his actions. *Id.* at 2-3.

factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion.’ ” [*People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003), quoting *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000), quoting *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995).]

An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes. *Babcock, supra* at 269.

Where the upper limit of a guidelines range is eighteen months or less, the trial court is required to impose an intermediate sanction unless it states on the record that a substantial and compelling reason exists to sentence defendant to prison. MCL 769.34(4)(a). “A substantial and compelling reason must be ‘objective and verifiable’; must ‘“keenly” or “irresistibly” grab our attention’; and must be ‘of “considerable worth” in deciding the length of a sentence.’ ” *Babcock, supra* at 272, quoting *Fields, supra* at 62, 67.

The court shall 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, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight. [MCL 769.34(3)(b).]

Here, the trial court departed upward from the guidelines range because defendant’s crime caused the death of a victim. As stated by this Court in defendant’s previous appeal, “the guidelines prior to October 1, 2000, did not consider the fact that the victim died” *Stanko, supra* at 3.² Thus, we reject defendant’s argument that death of a victim is a factor that was already taken into account in determining the appropriate sentence range. “Death of a victim not considered by the guidelines is a factor that is objective and verifiable such[] that[,] upon proper articulation by the trial court, may be considered to determine if a substantial and compelling reason for upward departure exists.” *Id.* We conclude that because defendant’s crime caused a victim’s death, the guidelines did not account for a victim’s death as a result of the crime, and death is an objective and verifiable factor that keenly grabs the attention and is of considerable worth in deciding the length of the sentence, the trial court did not abuse its discretion in

² In October 2000, the Legislature amended MCL 777.33, to provide for the scoring of thirty-five points for OV 3 if death results from the commission of the offense and the elements of the crime involve operation of a vehicle under the influence or while impaired causing death. In October 2003, the Legislature further amended MCL 777.33 to provide for the scoring of fifty points for OV 3 if death results from the commission of an offense that involved operating a motor vehicle while under the influence of or visibly impaired by the use of alcohol, while having an unlawful blood, breath, or urine alcohol content, or while having an unlawful controlled substance in the body. Thus, if defendant had committed the offense on or after October 1, 2000, he would have been scored thirty-five points for OV 3 (or fifty points if he had committed the offense on or after October 1, 2003). This would have changed his guidelines range to nineteen to thirty-eight months’ imprisonment.

determining that this factor constitutes a substantial and compelling reason to depart upward from the guidelines.

Next, defendant argues that he is entitled to resentencing for a second time because the trial court did not obtain an updated presentence report before resentencing him. “[A] sentence that is outside the appropriate guidelines sentence range, for whatever reason, is appealable regardless of whether the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand.” *People v Kimble*, 470 Mich 305, 310; 684 NW2d 669 (2004), citing MCL 769.34(10). However, because defendant did not raise this precise issue at resentencing, in a motion for resentencing, or a motion for remand, it was not properly preserved for appeal. Therefore, this unpreserved issue is reviewed for plain error affecting defendant’s substantial rights. *Kimble, supra* at 312.

When a defendant is to be resentenced for a felony conviction, the sentencing court must utilize a reasonably updated presentence report in imposing the sentence. *People v Triplett*, 407 Mich 510, 511, 515; 287 NW2d 165 (1980). A completely new report is not required; a supplemental report updating the previous report is sufficient. *People v Martinez (After Remand)*, 210 Mich App 199, 202; 532 NW2d 863 (1995). A defendant or the prosecutor may waive the right to a reasonably updated presentence report at resentencing unless the previous report is manifestly outdated. *People v Hemphill*, 439 Mich 576, 582; 487 NW2d 152 (1992).³

Here, the trial court relied on a presentence report from June 14, 2002, in resentencing defendant on March 10, 2004. The court did not obtain an updated report. Therefore, the trial court committed plain error. However, defendant has not shown that his substantial rights were adversely affected by this error. Defendant does not present any information that should have been contained in an updated presentence report that was not contained in the original report. Further, defendant does not argue how an updated presentence report would have changed his sentence. Therefore, defendant has not shown that the plain error affected his substantial rights.

Defendant also argues that the trial court’s scoring of his offense variables violated his right to a jury trial pursuant to *Blakely v Washington*, 542 US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, our Supreme Court noted in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), that *Blakely* is inapplicable to Michigan’s sentencing scheme. Further, the United States Supreme Court’s subsequent holding in *United States v Booker*, ___ US ___; 125 S Ct 738; 160 L Ed 2d 621 (2005), does not affect Michigan’s sentencing scheme.

³ Defendant did not affirmatively waive the right to a reasonably updated presentence report, but he forfeited the issue by failing to object to the use of the original report.

Booker dealt with the federal sentencing scheme, which is a determinate sentencing scheme like the one addressed in *Blakely*, and is different from Michigan's indeterminate sentencing scheme. Thus, defendant's argument must fail.⁴

Affirmed.

/s/ Henry William Saad
/s/ Brian K. Zahra
/s/ Bill Schuette

⁴ Because we conclude that resentencing is not required, we need not address defendant's argument that resentencing should be before a different judge.