

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KEVIN WALTER ROWLAND,

Defendant-Appellee.

UNPUBLISHED

October 29, 2009

No. 287377

Wayne Circuit Court

LC No. 08-007101-01

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

PER CURIAM.

Defendant pleaded guilty to second-degree home invasion, MCL 750.110a(3), and was sentenced as an habitual offender, fourth offense, MCL 769.12, to three years' probation. The prosecutor appeals defendant's sentence by leave granted, asserting that the trial court departed from the sentencing guidelines range without substantial and compelling reasons for a departure. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant broke the door of a home and took approximately \$20 in change, a checkbook, and Vicodin, Darvoset, and Levoxothyrine. He then went to a motel and knocked on the door of a room. A man answered, and defendant walked in without permission. He would not leave, so the man called the police. The police discovered defendant in bed and intoxicated at the motel, and the items taken from the homeowner were recovered.

At sentencing, the court asked defense counsel to identify the substantial and compelling reasons for departing from the sentencing guidelines range, which the parties had previously calculated as 29 to 57 months. The court adopted the reasons that had been mentioned on the record. On appeal, the prosecution argues that the reasons provided by defense counsel and adopted by the court were not substantial and compelling, defendant's background showed that he was not a good candidate for leniency, and therefore, the departure was an abuse of discretion.

The court may depart from the guidelines if it "has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). Only objective factors that are verifiable provide substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *People v Smith*, 482 Mich 292, 299, 303; 754 NW2d 284 (2008); *People v Babcock*, 469 Mich 247, 258; 666 NW2d 231 (2003). Objective and verifiable factors are "actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed."

People v Abramski, 257 Mich App 71, 74; 665 NW2d 501 (2003). A substantial and compelling reason to depart from the guidelines is a reason that “keenly or irresistibly grabs our attention” and is “of considerable worth in deciding the length of a sentence. . . .” *Babcock, supra* at 258. It “exists only in exceptional cases” *Id.* A departure is appropriate “if there are substantial and compelling reasons that lead the trial court to believe that a sentence within the guidelines range is not proportionate to the seriousness of the defendant's conduct and to the seriousness of his criminal history,” such that a departure would result in “a more proportionate criminal sentence than is available within the guidelines range.” *Id.* at 264. A trial court must justify the particular departure in the case. *Smith, supra* at 303-304.

This Court reviews the existence of a particular factor supporting a departure for clear error, the determination whether the factor is objective and verifiable de novo, and whether a reason is substantial and compelling for an abuse of discretion. *Babcock, supra* at 264-265. “An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes.” *Id.* at 274. If the reasons stated by the court are partially invalid, remand for resentencing or rearticulation is necessary unless the reviewing court can ascertain that the trial court would have departed to the same extent regardless of the invalid factors. *Id.* at 260-261. Complete analysis of whether the trial court articulated substantial and compelling reasons for the departure includes a proportionality review. *Smith, supra* at 305. “Such a review considers whether the sentence is proportionate to the seriousness of the defendant’s conduct and to the defendant in light of his criminal record. . . . [E]verything else being equal, the more egregious the offense and the more recidivist the criminal, the greater the punishment.” *Id.*, at 305 (citations and internal quotation marks omitted.) This Court reviews the extent of the departure for an abuse of discretion. *Id.* at 300.

Some of the factors argued by defense counsel and then adopted by the court do not constitute substantial and compelling factors. His employment history was not lengthy or particularly noteworthy. *People v Young*, 276 Mich App 446, 456-457; 740 NW2d 347 (2007). His age, 37 years old, is not a factor that keenly or irresistibly grabs one’s attention. *Id.* His expression of remorse may not be considered in undertaking a downward departure because “an appellate court cannot effectively or objectively review the sincerity of such an expression of remorse.” *People v Daniel*, 462 Mich 1, 11; 609 NW2d 557 (2000). However, other reasons identified by defense counsel and adopted by the court were objective and verifiable factors concerning his rehabilitative potential, including his family and community support, his mental health, and the circumstances of the offense. *Id.* at 7 n 8; *People v Harvey*, 203 Mich App 445, 448; 513 NW2d 185 (1994). Although the court adopted some reasons that were not valid, the trial court’s comments indicate that the court departed from the guidelines because it believed that probation with continued treatment gave defendant the best chance at rehabilitation. The court would have reached the same result without consideration of the invalid factors, and therefore, neither rearticulation nor resentencing is required. *Babcock, supra* at 260-261. With respect to whether the extent of the departure was an abuse of discretion, the prosecutor does not expressly argue that the sentence was disproportionately lenient but states that defendant’s record provided many reasons that the court should have sentenced him within the guidelines. Although defendant’s lengthy criminal record provides support for the prosecutor’s argument, we will defer to the trial court’s direct knowledge of the facts and familiarity with the offender. *Id.* at 270. We are not persuaded that the court’s determination that probation and treatment was a proportionate sentence was an abuse of discretion.

Affirmed.

/s/ Karen M. Fort Hood

/s/ David H. Sawyer

/s/ Pat M. Donofrio