

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
July 15, 2014

v

CHARLES DAVID HEMMINGER,
Defendant-Appellant.

No. 314863
Jackson Circuit Court
LC No. 11-004078-FH

Before: MURRAY, P.J., and O'CONNELL and BORRELLO, JJ.

PER CURIAM.

Defendant appeals by leave granted his sentence for breaking and entering, MCL 750.110. We affirm.

This is the second appeal defendant has presented on this sentence. The trial court originally sentenced defendant to 5 to 10 years' imprisonment, to be served consecutively to an existing sentence. Defendant appealed, and this Court entered an order vacating the consecutive sentence and remanding the case to the trial court for resentencing. *People v Hemminger*, unpublished order of the Court of Appeals, issued June 19, 2012 (Docket No. 309749).

On remand, the trial court sentenced defendant to 4 to 10 years' imprisonment on the breaking and entering conviction, with credit for 327 days of time served, to be served concurrently with the prior sentence. The sentence is an upward departure from the minimum sentence range of 5 to 23 months under the sentencing guidelines. Defendant now appeals and contends that the trial court abused its discretion by exceeding the sentencing guidelines.

When a trial court departs from the sentencing guidelines, this Court "reviews for clear error whether a particular factor articulated by the trial court exists." *People v Anderson*, 298 Mich App 178, 184; 825 NW2d 678 (2012). We review de novo the trial court's determination that the factors at issue are objective and verifiable. *Id.* The trial court's ultimate determination that the factor constituted a substantial and compelling reason for a departure sentence is reviewed for an abuse of discretion. *Id.*

In this case, the trial court identified two factors as justification for its departure from the sentencing guidelines. First, the trial court noted that defendant committed the crime while he was on probation. Second, the court stated that defendant's conduct of engaging in breaking and entering on an almost nightly basis "shocked the conscience."

We find no clear error in the trial court's determination that these factors existed. The Presentence Investigation Report (PSIR) clearly indicated that defendant was on probation for larceny in a building and that he had admitted to 25 other incidents of breaking and entering during the same time period. Moreover, the record confirms that these factors are objective and verifiable: defendant had previously acknowledged that the contents of the PSIR were correct.

We further conclude that the trial court was within its discretion in determining that these factors were substantial and compelling reasons to depart from the sentencing guidelines. Defendant argues that the fact that he was on probation at the time he committed the present offense was not a substantial and compelling reason to depart from the guidelines because Prior Record Variable (PRV) 6 took into consideration defendant's probationary status. PRV 6 scores a defendant's relationship to the criminal justice system. MCL 777.56. Ten points are assessed under PRV 6 if the defendant is on probation at the time of the offense. MCL 777.56. At resentencing, defendant was assessed 10 points for PRV 6 because at the time he committed the offense in this case, he was on probation for his 2010 conviction for larceny in a building. MCL 777.56(1)(c). The fact that defendant was on probation at the time he committed the sentencing offense was clearly already accounted for in PRV 6, but the fact that he was on probation for the same type of crime and repeatedly committed that crime was not accounted for in the scoring of PRV 6. Therefore, PRV 6 gave inadequate weight to the factor articulated by the trial court.

In addition, defendant argues that the number of similar crimes that he admitted to was not a substantial and compelling reason to depart from the guidelines because PRV 2 took into consideration defendant's prior record, and Offense Variable (OV) 13 took into consideration his continuing pattern of criminal behavior. PRV 2 scores prior low severity felony criminal convictions. MCL 777.52. At resentencing, defendant was assessed 5 points for PRV 2 for his 2010 conviction for larceny in a building. MCL 777.52(1)(d). OV 13 scores a continuing pattern of criminal behavior, and in scoring OV 13, "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43.

At resentencing, defendant was assessed 10 points for OV 13 because the offense was part of a pattern of felonious criminal activity involving a combination of three or more crimes against a person or property. MCL 777.43(1)(d). Specifically, the Presentence Case Report noted that in addition to the sentencing offense, in 2010 defendant was convicted of larceny in a building, and in 2011 defendant was charged with two counts of breaking and entering a building with the intent to commit a larceny and two counts of conspiracy to commit breaking and entering in Hillsdale County. Therefore, as with defendant's probationary status, the fact that defendant had committed some similar crimes was already accounted for in PRV 2 and OV 13. Thus, pursuant to MCL 769.34(3)(b), the trial court could not properly base its decision to depart from the sentencing guidelines on this information unless the trial court found from the facts contained in the court record, including the PSIR, that this factor had been given inadequate or disproportionate weight.

However, PRV 2 only took into account defendant's single, previous conviction, and OV 13 only took into account 2 additional counts of breaking and entering and 2 counts of conspiracy to commit breaking and entering. In contrast, defendant admitted to committing 25 other, similar crimes, and this information was objective and verifiable because it was in the

PSIR, which defendant agreed was accurate. At resentencing, the trial court found that the fact that defendant had committed multiple similar crimes was given inadequate or disproportionate weight in the guidelines calculation. Specifically, when explaining its reason for the upward departure, the trial court observed that defendant had committed a “multiple crime spree,” which caused “major disruption” in multiple counties and that defendant admitted to breaking and entering buildings “almost on a nightly basis.” Because defendant admitted to breaking and entering 25 buildings (in addition to the restaurant involved in the present offense), and the sentencing guidelines only accounted for four of these crimes, the trial court did not abuse its discretion in determining that the fact that defendant committed multiple, similar crimes was given inadequate or disproportionate weight in the guidelines calculation and constituted a substantial and compelling reason for departure.

Defendant’s recommended minimum sentence range under the legislative guidelines was calculated for the crime of breaking and entering a building with an intent to commit larceny, a Class D felony. MCL 777.16f. Had defendant been convicted for the other break-ins that he admitted to, his PRV score would have been 50 points, which is Level E. MCL 777.65. In addition, if defendant had been convicted for the other break-ins that he admitted to, his OV score would have been 35 points, which is Level IV. MCL 777.65. The recommended minimum sentence range for a Class D felony with a PRV Level E and an OV Level IV is 29 to 57 months. MCL 777.65. Defendant’s minimum sentence of four years falls within this recommended guideline range. In other words, when defendant’s actual minimum sentence is compared against the sentencing grid, and the objective and verifiable information in his PSIR is taken into consideration, his actual minimal sentence is anchored in the sentencing guidelines. *People v Smith*, 482 Mich 292, 318; 754 NW2d 284 (2008).

In *Smith*, the Michigan Supreme Court recognized that “departures from the guidelines recommendation cannot be assessed with mathematical precision,” but a trial court “must comply *reasonably* with its obligations under the guidelines to further the legislative goal of sentencing uniformity.” *Smith*, 482 Mich at 319. In the present case, because defendant’s minimum sentence of four years was more appropriate to the offense than a sentence within the guidelines range would have been, the trial court did not abuse its discretion when it sentenced defendant to a minimum sentence of four years. *Smith*, 482 Mich at 318.

Lastly, defendant argues that the trial court erred in calculating the credit for his time served. We disagree. The time that defendant was jailed for his probation violation overlapped with the time he was in jail awaiting trial and sentencing on a separate offense, specifically the breaking and entering charge in this case. MCL 769.11b does not entitle defendant to credit for time served before sentencing if he was incarcerated for an offense other than that for which he is ultimately convicted. Defendant was not entitled to credit for the time he was incarcerated for a separate offense before he was sentenced in this case.

Affirmed.

/s/ Christopher M. Murray
/s/ Peter D. O’Connell
/s/ Stephen L. Borrello