

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 14, 2011

v

ANTHONY VICTOR CUNTURSO,

Defendant-Appellant.

No. 296606
Genesee Circuit Court
LC No. 09-025186-FH

Before: FORT HOOD, P.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

Defendant appeals the judgment of sentence resulting from his plea of guilty to vulnerable adult abuse, second degree, MCL 750.145n(2). Defendant was sentenced to serve 32 to 48 months in prison. Defendant's minimum sentence is a departure from the recommended minimum pursuant to the legislative sentencing guidelines. Defendant appeals by delayed leave granted, and we affirm.

The victim in this case is defendant's mother. She is diabetic and was dependent on her son for care. Defendant had rented out a room to his mother at a rate of \$450 per month in a home that he owned. In late April 2009, when officers and medical personnel entered the victim's residence, they found living conditions so extreme that the court was left "near speechless." The conditions consisted of raw sewage in the basement, an inoperable toilet filled with urine and feces, no running water, a lack of consistent heat, and cockroach feces so abundant that an emergency responder who had training as an exterminator commented that it was beyond his experience. The couch on which the victim slept was covered in feces and urine, and the victim was found to be dehydrated and suffering from a urinary tract infection. The smell in the home was so pervasive that officers were gagging and had to walk outside to get some air. Investigators had tried to make contact with the victim in January of 2008 and November of 2008, but the victim never came to the door. On April 14, 2009, a registered nurse was denied access to the home by defendant who represented that the victim was able to take care of herself. At the plea proceeding, defendant admitted that he had not been meeting his mother's dietary needs.

Defendant's only issue on appeal is that the circuit court erred in departing from the sentencing guidelines in imposing sentence. Under the guidelines, a trial court is generally required to impose a minimum sentence in accordance with the appropriate sentence range.

MCL 769.34(2); *People v Lucey*, 287 Mich App 267, 269-270; 787 NW2d 133 (2010). A court may depart from the range set forth in the guidelines if it states on the record substantial and compelling reasons for doing so. MCL 769.34(3); *Lucey*, 287 Mich App at 270.

Here, the sentencing guidelines established a minimum range from zero to nine months. Because the upper recommended minimum was less than 18 months, the trial court was required to impose an intermediate sanction¹ unless it stated on the record a substantial and compelling reason to sentence defendant to prison. MCL 769.34(4)(a); *People v Babcock*, 469 Mich 247, 256; 666 NW2d 231 (2003); *People v Stauffer*, 465 Mich 633, 635-636; 640 NW2d 869 (2002). “[A] substantial and compelling reason must be construed to mean an objective and verifiable reason that keenly or irresistibly grabs our attention; is of considerable worth in deciding the length of a sentence; and exists only in exceptional cases.” *Babcock*, 469 Mich at 257-258 (citation and internal quotation marks omitted).

The trial court emphasized several factors when departing, including the victim’s dependency on defendant to care for her, defendant’s attempts to conceal the victim’s condition from others, the “horrifying” condition of the victim’s residence, and evidence showing that defendant had not addressed either the victim’s physical and medical condition or the condition of the home over a period of time. There is no dispute that the reasons offered by the trial court were objective and verifiable.

The record before us shows, as the trial court found, that the circumstances of this crime are exceptional. Like the trial court, our attention is seized by these exceptional circumstances, and we are in agreement that the “horrifying” conditions in which the victim was living must significantly impact the sentence imposed. *Babcock*, 469 Mich at 269.

Defendant argues that the court erred because the factors that it relied on to depart had already been taken into consideration in offense variable (OV) 10, as well as the substantive crime itself. When the OVs take into account the factors cited to depart, a sentencing court is admonished not to “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); see also *People v Young*, 276 Mich App 446, 450-451; 740 NW2d 347 (2007).

The trial court referred to the victim’s dependence on defendant for care, presumably suggesting that defendant exploited her vulnerability as a basis for the sentencing departure. This offense behavior was, at least partially, accounted for in the guidelines under offense variable 10 (OV 10) (exploitation of a victim’s vulnerability), which was scored at ten points. MCL 777.40(1)(b). Section 40(1)(b) provides that ten points should be scored where “[t]he offender exploited a victim’s physical disability, mental disability, youth or agedness, or a

¹ An “intermediate sanction” is defined as “probation or any sanction, other than imprisonment in a state prison or state reformatory, that may lawfully be imposed.” MCL 769.31(b).

domestic relationship, or the offender abused his or her authority status.” “Vulnerability” is defined to “mean[] the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.” MCL 777.40(3)(c). “‘Abuse of authority status’ means a victim was exploited out of fear or deference to an authority figure, including, but not limited to, a parent, physician, or teacher.” MCL 777.40(3)(d).

The purpose of the statutory sentencing guidelines “is to ensure a degree of consistency in sentencing defendants with comparable histories who have committed comparable crimes, while also affording the sentencing court a degree of discretion to account for the specific circumstances of the case.” *People v Horn*, 279 Mich App 31, 42-43; 755 NW2d 212 (2008). The sentencing guidelines promote uniformity in criminal sentencing by undertaking to ensure “that offenders with similar offense and offender characteristics receive substantially similar sentences.” *People v Smith*, 482 Mich 292, 302; 754 NW2d 284 (2008). However, where particular circumstances exist that are too divergent from any notion of general, a court has discretion to depart from the recommended range. *Id.* The record in the case at hand establishes such circumstances.

While “commonplace repercussions of criminal activity do not support departures,” *id.*, the circumstances here cannot be described as “commonplace.” The court specifically found that the suggested guidelines did not “totally encompass and envision the horrifying conditions that were so manifested. And what is equally manifest is a defendant who chose to ignore those vivid, insalubrious conditions and required his mother to attempt to live through them.” Given the description of the crime found in the PSIR and repeated by the court, it was not error for the court to find that OV 10 did not adequately weigh the circumstances of the crime as the trial court described. The circumstances of this crime are exceptional, and divergence from the standard based on any notion of generality is appropriate.

For these same reasons, defendant’s argument that the extent of the departure was unsupported is also without merit. The minimum imposed was 23 months in excess of the longest recommended minimum. For a departure to be justified, the minimum sentence imposed must be proportionate to the defendant’s conduct and prior criminal history. *Smith*, 482 Mich at 299-300, citing *Babcock*, 469 Mich at 262-264. A court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been. *Smith*, 482 Mich at 304.

Here, the trial court described the circumstances as unusually extreme while emphasizing that these circumstances were concealed and longstanding. The court noted that “the conditions that have been mentioned . . . are not conditions that arise spontaneously or overnight,” and that defendant had turned away help for his mother when it was at the door of the home. The trial court also noted the relationship between defendant and the victim and that she was dependent on help both inside and outside the home. The court reiterated that the condition of the house was so bad that experienced officers were “physically gagging.” Not surprisingly, the court stated that even though the home was cold, that was “the least of our problems.” Under these extreme circumstances, we conclude that the departure was proportionate to the offense and the offender.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Michael J. Talbot

/s/ Christopher M. Murray