

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TODOCIO ESQUEDA GUERRA,

Defendant-Appellant.

UNPUBLISHED

May 19, 2009

No. 283133

Jackson Circuit Court

LC No. 07-004100-FH

Before: K. F. Kelly, P.J., and Cavanagh and Beckering, JJ.

PER CURIAM.

Defendant was charged with first-degree home invasion, and pleaded guilty to second-degree home invasion, MCL 750.110a(3). He was sentenced to 36 to 180 months' imprisonment. He appeals his departure sentence by delayed leave granted. We affirm.

In this case, a minimum sentence of 12 to 24 months was recommended by the sentencing guidelines for this class C felony subject to a maximum sentence of 180 months' imprisonment. See MCL 750.110a(6); MCL 777.16f; MCL 777.64. At sentencing one of the two victims of this home invasion described the circumstances of the offense. The victim explained that, on the night of the crime, he was extremely stunned to find defendant—a stranger—in his house, in the middle of the night. A struggle ensued, and the victim was able to restrain defendant until the police arrived.

In requesting a departure from the sentencing guidelines, the prosecution noted that defendant had been in trouble with the law on two previous occasions. In 2002, in Lenawee County, defendant was charged with first-degree home invasion. He was deported back to Mexico, and the case was dismissed. In 2004, defendant returned illegally to the United States and was charged with another home invasion—in Hillsdale County. After he was released on bond, defendant failed to appear for his preliminary examination or other legal proceedings. While he was on abscond status, defendant committed this offense in Jackson County. Defendant's attorney argued against the departure sentence, stating "there's really no showing why [the guidelines] should be exceeded."

Before rendering its sentence, the court noted that (1) not only was defendant in the United States illegally, but he was repeatedly charged with committing crimes—particularly breaking into people’s homes—while in the United States, (2) defendant had already “caught some breaks” in that he was deported instead of tried after his first charge of home invasion in the first degree, (3) nevertheless, defendant returned to the United States and was charged with a second home invasion from which he absconded, and (4) while on abscond status, defendant was charged with yet a third home invasion—a crime in which the victim could have been justified in using deadly force.¹ After considering the seriousness of the circumstances surrounding the offense and the offender, the court held that there were substantial and compelling reasons to depart from the guidelines’ recommended minimum sentence. The departure evaluation report filed by the court summarized these reasons, and also stated:

3. I am persuaded that the Defendant should serve the sentence I have rendered and it is my intention that this sentence be sustained if an appellate court determines that any of my rationales for departure survive review.

This appeal followed.

Defendant first argues that he must be resentenced because the sentencing court failed to state a legally valid objective and verifiable reason in support of the departure sentence which was based on an impermissible factor—his illegal alien status. We disagree.

Under the sentencing guidelines statute, the trial court must ordinarily impose a minimum sentence within the calculated guidelines range. MCL 769.34(2); *People v Babcock*, 469 Mich 247, 255 n 7; 666 NW2d 231 (2003). However, the trial court may depart from the appropriate sentence range if it has a substantial and compelling reason. MCL 769.34(3). A substantial and compelling reason exists only in exceptional cases. It is an objective and verifiable reason that keenly or irresistibly grabs the court’s attention, and is of considerable worth in deciding the length of sentence. *Babcock, supra* at 257-258. The departure cannot, for example, be based on certain arbitrary factors like gender, race, ethnicity, alienage, or religion. MCL 769.34(3)(a). Generally, a departure cannot be based on an offense or offender characteristic already considered in determining the guidelines range. MCL 769.34(3)(b).

This Court reviews for clear error the sentencing court’s factual determination that a particular departure factor exists. *Babcock, supra* at 265. Whether that factor is objective and verifiable is reviewed de novo as a matter of law. *Id.* Whether the objective and verifiable factors constitute substantial and compelling reasons to depart from the recommended sentence range is reviewed for an abuse of discretion. *Id.* An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes. *Id.* at 269-270.

Here, defendant argues that the trial court’s departure sentence was impermissibly based on his illegal alien status. The trial court did reference the fact that defendant was in this country

¹ Under the castle doctrine, a person who is in his dwelling is permitted to use deadly force if reasonably necessary. See *People v Riddle*, 467 Mich 116, 142; 649 NW2d 30 (2002).

illegally at the time the offense was committed; however, defendant fails to put such references in their proper context. That defendant was an illegal alien was not a substantial and compelling factor relied upon by the trial court to support the sentence departure—it was merely a factual circumstance of the crime. As the court stated on the record during sentencing, a substantial and compelling factor that supported the sentence departure was the fact that defendant *repeatedly* came into this country illegally *and* committed crimes, particularly home invasions.

This was defendant’s third home invasion charge. The first charge of home invasion in Lenawee County, also in the first degree, resulted in defendant being deported back to Mexico instead of being tried for the crime. Despite “catching this break,” as the trial court noted, defendant returned to this country illegally and, in Hillsdale County, was again charged with home invasion. After being released on bond—affording defendant another “break”—defendant absconded, i.e., he failed to appear for the associated legal proceedings. Then, while on abscond status, defendant was charged with this crime in Jackson County, another first-degree home invasion. As the trial court noted, this home invasion was particularly dangerous and violent. There were two victims in the home that defendant invaded in the middle of the night. A struggle between one victim and defendant ensued. The victim could have been justified in using deadly force against defendant.

We conclude that the trial court articulated legally valid, substantial, and compelling reasons for departing from the sentencing guidelines range. The reasons set forth are objective and verifiable, keenly attract our attention, and are of considerable worth. The trial court’s offhand comment that defendant needed to spend time in an “American prison” appears merely to be an indignant response to defendant’s blatant disregard of the trust and generosity shown him by our citizens and legal system. We reject defendant’s claim that he was denied the right to an impartial sentencing judge. That the court made observations that may have reflected the attitudes of society is not sufficient to overcome the heavy presumption of judicial impartiality. See *Cain v Dep’t of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). The sentencing court identified and relied on permissible factors in sentencing defendant. As this Court stated in *People v Antoine*, 194 Mich App 189, 191; 486 NW2d 92 (1992):

Sentencing is the time for comments against felonious, antisocial behavior recounted and unraveled before the eyes of the sentencer. At that critical stage of the proceeding when penalty is levied, the law vindicated, and the grievance of society and the victim redressed, the language of punishment need not be tepid.

Defendant also argues that his departure sentence was not properly individualized as it was disproportionate to the seriousness of the offense and his criminal history. See *People v Smith*, 482 Mich 292, 304; 754 NW2d 284 (2008); *Babcock, supra* at 262-263. We disagree.

Before imposing sentence, the sentencing court acknowledged its responsibility to render an individualized sentence consistent with the goals of sentencing which include disciplining and reforming the offender, as well as protecting the community and deterring similar crimes. See *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972); *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999). The court appropriately considered that defendant was charged with home invasion in the first degree, a class B felony carrying a maximum

sentence of 240 months' imprisonment. See MCL 777.16f; MCL 750.110a(5); *People v Brzezinski (After Remand)*, 196 Mich App 253, 256; 492 NW2d 781 (1992). The court noted that defendant pleaded guilty to second-degree home invasion, but that this was the third time that defendant faced criminal charges for home invasion offenses. The first charge resulted in defendant being deported, instead of being tried on the charge. The second charge resulted in defendant being released on bond, from which he absconded. A sentencing court is permitted to consider such facts. See *People v Adams*, 430 Mich 679, 686; 425 NW2d 437 (1988); *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994). Further, the court noted that the victim may have been justified in using deadly force against defendant. See *People v Riddle*, 467 Mich 116, 142; 649 NW2d 30 (2002).

And, although on appeal defendant argues that the issue whether he was in this country illegally was never adjudicated, the sentencing court is also permitted to rely on the contents of the presentence report, which are presumptively accurate if unchallenged by the defendant. See *People v Ratkov (After Remand)*, 201 Mich App 123, 125-126; 505 NW2d 886 (1993). Here, the presentence report indicated that defendant was in the United States illegally and, in fact, defendant was described in the LEIN system as a "deported criminal/aggravated felon." Although given the opportunity, defendant never challenged these or any other factual assertions contained in the presentence report. Further, at the plea hearing defendant failed to contest the prosecution's claim that defendant was not in this country legally and, in fact, defendant indicated that he wanted to be deported again. Nevertheless, it is clear from the record that the sentencing court did not impose the departure sentence because of defendant's alienage.

In rendering its sentence, the court held that, considering the substantial and compelling reasons to depart, a sentence within the guidelines range would not be proportionate; thus, departure was appropriate. We agree that the sentence actually imposed is more appropriate to the offense and this defendant than a sentence within the guidelines range would have been. We reject defendant's claim that the sentencing court improperly considered his bond status which was contemplated by PRV 6, MCL 769.34(3)(b), because the fact that defendant failed to appear for his preliminary examination in Hillsdale County was not accounted for in the scoring of the guidelines. See MCL 777.56(1)(c). We also disagree that defendant's due process rights were violated when the trial court failed to give him notice that it intended to depart from the sentencing guidelines range. "In a criminal case, due process generally requires reasonable notice of the charge and an opportunity to be heard." *People v McGee*, 258 Mich App 683, 699-700; 672 NW2d 191 (2003). Defendant was provided with notice of sentencing and an opportunity to be heard during the sentencing hearing.

In conclusion, the sentencing court complied reasonably with its obligations under the guidelines to further the legislative goal of sentencing uniformity. See *Smith, supra* at 319. The reasons articulated by the court as the basis for departure are objective and verifiable, and the court did not abuse its discretion by finding that they amounted to substantial and compelling reasons to depart from the sentencing guidelines range. Further, the extent of the departure is proportionate to the seriousness of the circumstances surrounding this offense and this offender. See *Babcock, supra* at 264. Defendant is not entitled to resentencing.

Next, defendant argues that the trial court violated his equal protection and due process rights, as well as the federal preemption doctrine and federal supremacy clause, when it considered defendant's alienage as a basis for the sentencing departure. Because we conclude that defendant's alienage was not a basis for the sentencing departure, none of these issues have merit.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Mark J. Cavanagh

/s/ Jane M. Beckering