

Court of Appeals, State of Michigan

ORDER

People of MI v Kenneth Earl Starkey

Docket No. 322957

LC No. 04-009495-FH

Stephen L. Borrello
Presiding Judge

Peter D. O'Connell

Amy Ronayne Krause
Judges

The Court orders pursuant to MCR 7.205(E)(2) that in lieu of granting the delayed application for leave to appeal, defendant's sentence is VACATED, and this case is REMANDED to the Wayne Circuit Court for resentencing. The upper limit of defendant's sentencing guidelines range was less than 18 months, and the court was required to impose an intermediate sanction under MCL 769.34(4)(a) unless it provided a substantial and compelling reason to depart from the guidelines range and impose a prison term. *People v Stauffer*, 465 Mich 633, 635-636; 640 NW2d 869 (2002); *People v Lucey*, 287 Mich App 267, 270-271; 787 NW2d 133 (2010).

On remand, the court may impose an intermediate sanction under the guidelines, or impose a prison sentence if it finds a substantial and compelling reason to do so and states its reason on the record, along with its reason for the extent of the departure. MCL 769.34(4)(a); *People v Smith*, 482 Mich 292, 303, 313; 754 NW2d 284 (2008). We note that a probation violation is worthy of independent consideration when a trial court is considering an upward departure from the guidelines. *People v Schaafsma*, 267 Mich App 184, 186; 704 NW2d 115 (2005) ("Because the probation violation is objective and verifiable, the trial court in its discretion may conclude that the factor provides a substantial and compelling reason to depart from the sentencing guidelines.").

The motion to expedite the appeal is DENIED as moot.

We do not retain jurisdiction.

O'Connell, J., would deny the application for leave to appeal and deny the motion to expedite the appeal, and states further that while the learned trial judge did not use the magic words "substantial and compelling," he clearly stated objective and verifiable reasons for his departure sentence and the extent of his departure. Because it is clear the trial court will impose the same sentence on remand, I would deny leave in the present case.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

SEP 12 2014

Date


Chief Clerk