

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAWN M. ZORMEIER,

Defendant-Appellant.

UNPUBLISHED

July 9, 1996

No. 167370

LC No. 91-112243-FH

Before: Taylor, P.J., and Bandstra and J.R. Johnson,* JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver between 50 and 224 grams of cocaine. MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). Although this offense mandates a minimum term of ten years' imprisonment and a maximum term of twenty years' imprisonment, the sentencing court, finding substantial and compelling reasons to depart from the minimum sentence, sentenced defendant to two to twenty years in prison. MCL 333.7401(4); MSA 14.15(7401)(4). The prosecutor appeals as of right, arguing that this departure was not warranted by the facts in this case. While we find the prosecutor's arguments meritorious, we conclude that it would be unjust to re-incarcerate defendant at this time. Accordingly, we affirm.

At the outset, we express our displeasure with the fact that defendant had already been paroled by the time this appeal of her sentence length was submitted to us for a decision. To prevent such a situation from arising again, we urge prosecutors to file a motion for expedited review along with a claim of appeal whenever the length of a defendant's sentence is appealed and it appears the defendant may be paroled before the appeal is formally submitted to a panel of this Court for review and decision. Indeed, for the persuasive effect it may have, a copy of this opinion may be attached to the motion for expedited appeal.

Plaintiff argues that the trial court abused its discretion in departing from the statutory minimum sentence. We agree.

* Circuit judge, sitting on the Court of Appeals by assignment.

Pursuant to MCL 333.7401(4); MSA 14.15(7401)(4), a sentencing court may depart from the minimum term of imprisonment if it finds on the record that there are substantial and compelling reasons to do so. Only those factors that are "objective and verifiable" may be used to determine whether substantial and compelling reasons exist. *People v Fields*, 448 Mich 58, 62; 528 NW2d 176 (1995); *People v Hill*, 192 Mich App 102, 105; 480 NW2d 913 (1991). Factors to be considered by the sentencing court include, but are not limited to: mitigating circumstances surrounding the offense, the defendant's prior record, the defendant's age, the defendant's work history, and the defendant's cooperation with law enforcement officials. *Fields, supra* at 76-77.

The determination that a particular factor is objective and verifiable should be reviewed by [appellate courts] as a matter of law. A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion. [*Fields, supra*, at 77-78.]

This Court reviews factual determinations underlying the sentencing court's decision to depart from the mandatory minimum sentence for clear error. *Id.* at 77.

Applying these principles to the instant case, we conclude that the departure from the mandatory minimum was improper or, at the least, the extent of the departure was too great. *People v Perry*, 216 Mich App 277; ___ NW2d ___ (1996). For example, the court took into consideration defendant's role in the offense, which it considered to be minimal. The facts of this crime, as the jury found them to be, do not mitigate defendant's culpability in this offense. Accordingly, the sentencing court erred in determining that defendant's involvement in this offense was minimal. *Fields, supra*. The jury rejected defendant's claim that she was unaware of the contents of the security box. Rather, the jury accepted the police officer's testimony that defendant admitted owning the bag and the contents in the security box. Therefore, we conclude that the sentencing court abused its discretion in considering defendant's involvement in this crime a substantial and compelling reason to depart from the minimum sentence.

The sentencing court also considered defendant's past work history, which it described as "good." However, the record indicates that defendant was unemployed at the time of her arrest and, as the presentence investigation report indicates, "has only worked odd jobs of cleaning houses of short duration and little consequence." Accordingly, we conclude that the sentencing court erred in determining that defendant's employment history was "good," and abused its discretion in considering this a substantial and compelling reason to depart from the minimum sentence.

For these and other reasons, we would ordinarily remand this case for resentencing. However, by the time this matter was submitted for consideration by our Court, defendant had served her minimum two-year sentence and was released on parole. Accordingly, we remanded this matter to the trial court for a factual determination regarding defendant's conduct while in prison and during the period of her parole, to aid us in determining whether justice would be served by requiring that defendant be reincarcerated. See *People v Triplett*, 407 Mich 510, 515-516; 287 NW2d 165 (1980) (a defendant's

conduct following incarceration should be considered in resentencing).

We conclude that re-incarceration would be an unjust result. The factual record developed by the trial court upon remand clearly shows that defendant has taken significant steps toward her rehabilitation and that no good purpose would be served by further incarceration. While in prison for two years, defendant had no misconducts on her record, voluntarily participated in employment, and actively participated in available substance abuse counseling. Uncontested testimony from defendant's substance abuse counselor, parents, employer, and a coworker established that, since she has been paroled, defendant has reestablished a relationship with her parents and is living with them, has been working and is a valued employee, has avoided her former drug-using friends and only establishes new relationships with persons who do not use drugs, and participates in available substance abuse counseling. We conclude from this record that defendant has accepted responsibility for the drug abuse problems that resulted in her conviction and that she is making verifiable progress in addressing that problem and otherwise getting her life in order. Defendant will continue to be subject to parole restrictions and monitoring for a number of years and will be at risk of re-incarceration if she fails to continue along the positive path she has taken since she was released from prison.

In light of these facts, we conclude that no good purpose would be served by subjecting defendant to incarceration again at this point and that her parole supervision will adequately safeguard the community against any further criminal activity. It would be unjust to remand for imposition of a longer sentence at this point. MCR 7.216(A). Accordingly, we affirm.

/s/ Clifford W. Taylor

/s/ Richard A. Bandstra

/s/ J. Richardson Johnson