

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOHN HODGES,

Defendant-Appellee.

UNPUBLISHED

September 13, 1996

No. 176383

LC No. 90-102887-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN HODGES,

Defendant-Appellant.

No. 176778

LC No. 90-102887-FH

Before: Cavanagh, P.J., and Marilyn Kelly and J.R. Johnson,* JJ.

PER CURIAM.

Defendant pleaded guilty of three counts of delivery of fifty grams or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). Defendant was sentenced to concurrent terms of ten to twenty years' imprisonment. Defendant and the prosecutor both appealed, and this Court remanded for resentencing. *People v Hodges*, unpublished opinion per curiam of the Court of Appeals, issued March 29, 1994 (Docket Nos. 155439, 155717). At a subsequent hearing, a different judge sentenced defendant to consecutive terms of four to twenty years' imprisonment on one count and three to twenty years' imprisonment on the other two counts. Both parties appeal as of right. We remand.

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

I

The prosecutor argues that the trial court erred in departing from the mandatory minimum when resentencing defendant as this Court had already determined that the sentences of ten to twenty years' imprisonment were proportionate under *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). We disagree. When this Court remanded this case for resentencing, the effect was to vacate the original sentence. Although a trial court, on remand, must strictly comply with the mandate of an appellate court, *People v Bellanca*, 43 Mich App 577, 579; 204 NW2d 547 (1972), it may take any action that would otherwise be proper, so long as it is not inconsistent with the instructions of the appellate court, *People v Fisher*, 449 Mich 441, 446-447; 537 NW2d 577 (1995). Under the circumstances of this case, where the appellate court remanded for resentencing without directions to the trial court, the doctrine of the law of the case does not apply. *Id.* at 447. At resentencing, the trial court had discretion to impose whatever sentence it believed would be appropriate. See *People v Marshall*, 204 Mich App 584, 590-591; 517 NW2d 554 (1994).

II

The prosecutor also contends that the trial court erred in departing from the mandatory minimum sentence of ten years. The trial court may depart from mandatory minimum sentences only for substantial and compelling reasons. Moreover, the reasons for departure from a mandatory minimum sentence must be objective and verifiable. The trial court's determination that a particular factor does or does not exist is reviewed under the clearly erroneous standard. Should the trial court find that the factors qualify as substantial and compelling reasons to impose a sentence below the statutory minimum, that finding is then reviewed for an abuse of discretion. *People v Perry*, 216 Mich App 277, 280; 549 NW2d 42 (1996) When the reviewing court finds that both appropriate and inappropriate factors were considered, the case should be remanded for the sentencing court to determine whether it finds substantial and compelling reasons to deviate from the statutory minimum sentence solely on the basis of appropriate factors. *Id.* at 282.

In the present case, the trial court based its decision to depart from the mandatory minimum on (1) the effect of defendant's consecutive sentences, (2) defendant's age, (3) defendant's lack of a criminal record at the time of the crimes, (4) defendant's education and training, (5) defendant's dyslexia, (6) the fact that the police made an additional two buys from defendant although they could have arrested him after the first buy, (7) the fact that each buy was only seven grams above the minimum for the crime to which defendant pleaded, (8) defendant's cooperation with the police, (9) defendant's potential for rehabilitation, as shown by his work history, and (10) a letter from the officer in charge of the case stating that he believed that defendant had learned his lesson.

We conclude that the trial court considered both appropriate and inappropriate factors in determining that there were substantial and compelling reasons to depart from the mandatory minimum. The appropriate factors discussed by the trial court include defendant's age, defendant's lack of a criminal record at the time of the crimes, defendant's cooperation with the police, and defendant's work history. *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995). In addition, the trial court

appropriately gave consideration to the effect of defendant's consecutive sentences. *People v Jeff Davis*, 196 Mich App 597, 601; 493 NW2d 467 (1992).

The trial court also considered defendant's education and training and his dyslexia as a substantial and compelling reason for departure. According to the updated presentence report, defendant received his GED certificate and a certificate for a class in electronics theory I while he was incarcerated. However, while defendant's achievements in prison are commendable, we do not believe that defendant's prison accomplishments or his dyslexia "keenly" or "irresistibly" grab our attention as factors "of considerable worth" in deciding the length of a sentence. See *Fields, supra* at 67. Accordingly, we conclude that the trial court erred in considering these factors as substantial and compelling reasons justifying departure.

The trial court also considered the fact that the police made an additional two buys from defendant although they could have arrested him after the first buy. It is appropriate to depart from a minimum statutory sentence when a sentencing court finds that the government's actions, although not rising to the level of entrapment, purposefully escalated the crime. *Fields, supra* at 79. In the present case, defendant sold cocaine to undercover agents on March 2, 1990, August 23, 1990, and February 7, 1991. The record is silent as to why the police did not arrest him until after the third sale. The gaps between the three buys may simply indicate that the police were trying to discover defendant's source or any accomplices that he might have. Therefore, we find that the trial court clearly erred in assuming that the police purposefully delayed arresting defendant in order to increase the charges. Accordingly, this factor should not have been used to justify a downward departure.

The fact that each buy was only seven grams above the minimum for the crime to which defendant pleaded is not a substantial and compelling factor justifying a downward departure. *People v Krause*, 185 Mich App 353, 359; 460 NW2d 900 (1990). It was also improper for the trial court to consider the letter from the officer in charge of the case stating that he believed that defendant had learned his lesson. The officer's subjective evaluation of defendant's remorse is clearly not objective and verifiable. Cf. *Perry, supra* at 282-283.

Because we find that the trial court considered factors that were appropriate in conjunction with factors that were not, we remand to the trial court for a determination of whether the court still finds substantial and compelling reasons to deviate from the statutory minimum when limited to the appropriate factors. *Id.* at 282. If the trial court again finds that there are substantial and compelling reasons for departure, it should carefully consider the extent of the deviation it orders so as not to impose a disproportionately lenient sentence. *Id.* at 284.

III

On cross-appeal, defendant argues that the sentences imposed by the trial court violate the principle of proportionality. We disagree. The sentences imposed by the trial court are substantially lower than the statutory minimum sentences, which are presumptively proportionate. *Perry, supra* at 284; *People v Poppa*, 193 Mich App 184, 189; 483 NW2d 667 (1992). In view of the lengthy list of

factors considered by the trial court in fashioning defendant's sentences, the fact that the trial court did not specifically reference defendant's good prison record does not mean that his sentence is disproportionate.

Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Marilyn Kelly

/s/ J. Richardson Johnson