

STATE OF MICHIGAN
JUDGE OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JACK NOVEL YOUHANA,

Defendant-Appellee.

UNPUBLISHED

December 6, 1996

No. 185143

LC Nos. 94-134996-FH;

94-134997-FH;

94-134998-FH;

94-134999-FH

Before: J.H. Gillis, P.J., and G.S. Allen and J.B. Sullivan, JJ.*

MEMORANDUM.

Defendant pleaded guilty in lower court case no. 94-134997-FH to 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), and habitual offender, second offense, MCL 769.10; MSA 28.1082, for which he was sentenced to four to twenty years' imprisonment. Defendant also pleaded guilty in each of the other three lower court cases to delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and habitual offender, second offense. He was sentenced to consecutive terms of one to twenty years' imprisonment in each of those cases. The prosecution appeals as of right. We remand for further proceedings. This case has been decided without oral argument pursuant to MCR 7.214(E)(1)(b).

The sentencing judge erred in failing to articulate any reasons on the record for departing from the mandatory minimum sentence of ten years in lower court case no. 94-134997-FH. MCL 333.7401(4); MSA 14.15(7401)(4). We do not agree with defendant's assertion that the record reflects that the sentencing judge adopted the defense position on the substantial and compelling reasons for departure. Contrast *People v Lawson*, 195 Mich App 76; 489 NW2d 147 (1992). At best, the record reflects that the sentencing judge adopted the defense recommendation of a four-year minimum

*Former Court of Appeals judges, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.

sentence. However, even if we agreed with defendant's assertion, we would remand for further proceedings because not all reasons proffered by defense counsel at sentencing were appropriate reasons for departure under the standard adopted in *People v Fields*, 448 Mich 58, 80; 528 NW2d 176 (1995). Under the circumstances, we conclude that the appropriate remedy is to remand to the sentencing judge for articulation of the reasons for the departure. If the judge, after applying the standards in *Fields, supra*, determines that those reasons are not substantial and compelling or the extent of departure is disproportionate, defendant shall be resentenced, subject to both his right to withdraw the plea under *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993), and the provisions of the enhancement statute underlying his conviction as an habitual offender. See *People v Perry*, 216 Mich App 277; 549 NW2d 42 (1996); *People v Sanders*, 193 Mich App 128 483 NW2d 439 (1992). See also *People v Primer*, 444 Mich 269; 506 NW2d 839 (1993).

We do not agree with the prosecution's argument that the habitual-offender sentences imposed in each of defendant's other three cases are disproportionately lenient. *People v Cervantes*, 448 Mich 620; 532 NW2d 831 (1995); *People v Gatewood (On Remand)*, 216 Mich App 559; ___ NW2d ___ (1996); *People v Marshall Warner*, 190 Mich App 734; 476 NW2d 660 (1991). We note, however, that the sentencing judge imposed sentences for the underlying offenses, and then vacated those sentences and imposed identical terms for the habitual offender convictions. We further note that the prosecution suggested minimum sentences of one year at the sentencing hearing before the sentencing judge imposed the sentences on the underlying offenses. However, because the sentencing judge failed to articulate any reasons for the sentences in these three cases, we remand to the judge for articulation of the reasons for these sentences. See *People v White*, 208 Mich App 126, 136; 527 NW2d 34 (1994).

If on remand, the sentencing judge is unavailable to articulate reasons for the sentences or the case is reassigned to another judge, defendant shall be resentenced in all four cases because, without the articulation, it cannot be determined whether the specific reasons relied upon by the sentencing judge for imposing the sentences were proper. MCR 7.216(A)(7); see MCR 6.440.

Remanded for proceedings consistent with this opinion. No further jurisdiction.

/s/ John H. Gillis

/s/ Glenn S. Allen, Jr.

/s/ Joseph B. Sullivan