

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant/Cross-Appellee,

v

HARUTYUN DULGER,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED

January 31, 1997

No. 180874

Oakland Circuit Court

LC Nos. 92-11741; FH, 92-

117479; 92-117480

Before: Reilly, P.J., and Wahls and N.I. Holowka,* J.

PER CURIAM.

Defendant pleaded guilty as charged of three counts of delivery of more than fifty but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). Judge John N. O'Brien sentenced defendant to concurrent prison terms of ten to twenty years of imprisonment and suspended the sentence for two of the convictions. The prosecution and defendant appealed the sentences. This Court reversed, concluding that consecutive sentencing was required. *People v Dulger*, unpublished memorandum opinion of the Court of Appeals, issued 7/28/94 (Docket Nos. 158846, 159468). On remand, defendant was sentenced to three consecutive sentences of two years, four months to twenty years by Judge David P. Kerwin. The prosecutor appeals and defendant cross-appeals as of right. We affirm.

The prosecution contends that the sentencing court abused its discretion by deviating from the statutory minimum sentence of ten years for reasons that were neither substantial nor compelling. We disagree.

Defendant was thirty-one at the time of the original sentencing in 1992 and had no prior record. He was employed by Filtra-Systems since 1988. The president of the company wrote a letter in which he referred to defendant's willingness to work twelve to sixteen hours on Saturday and Sunday in order to meet delivery deadlines. According to the presentence investigation report (PSIR), defendant was

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

earning \$11.75 per hour, and his base pay without overtime was \$21,000 annually. Defendant also reported working a second job.

The drug sales for which defendant was convicted occurred on February 4th, 11th and 19th of 1992. According to the PSIR, on March 3, 1992, defendant advised the undercover officer that he could arrange for delivery of a kilogram of cocaine. However, defendant was arrested May 21, 1992, apparently without any arrangements for the large delivery having been made.

When defendant was resentenced on remand in September, 1994, the update to the PSIR indicated that while incarcerated at Jackson State Prison, defendant earned twelve hours of college credit through Jackson Community College, had received a 3.5 grade point average and was appointed to the Dean's list for the semester. He was transferred from the Jackson facility to the Macomb Regional Facility and received no misconduct charges there. He attended and completed a substance abuse program and softball and volleyball officiating classes at that facility as well. He served as vice chairman of the unit representatives committee and was a member of other committees.

Considering these circumstances as a whole, we conclude that the sentencing court did not abuse its discretion in concluding that there were substantial and compelling reasons for deviating from the ten-year statutory minimum when the court sentenced defendant for the delivery convictions in this case. *People v Fields*, 448 Mich 58 ; 528 NW2d 176 (1995).

The prosecutor also contends that the sentencing court improperly considered the consecutive nature of the sentences. The cumulative effect of consecutive sentences does not affect the analysis of the proportionality of each sentence. *People v Clark*, 207 Mich App 500, 502; 526 NW2d 357 (1994). Rather, each sentence must be viewed individually to determine whether it violates the principle of proportionality. *People v Landis*, 197 Mich App 217, 218-219; 494 NW2d 865 (1992). Inasmuch as the proportionality of a sentence must be evaluated without regard to its consecutive nature, the court should not consider the consecutive nature of the sentencing when determining whether there are substantial and compelling reasons for departing from the statutory minimum or in determining the extent of a deviation from the minimum. However, in this case, our review of Judge Kerwin's statements at sentencing does not clearly demonstrate that the court considered the consecutive nature of the sentences. Accordingly, the prosecution is not entitled to resentencing on this basis.

Defendant contends that the court erred by imposing consecutive sentences. We disagree. We reiterate the holding in this Court's earlier opinion in this case that consecutive sentencing was required, regardless of whether the offenses were committed as part of the same transaction or in different transactions. *People v Morris*, 450 Mich 316, 338; 537 NW2d 842 (1995).

Defendant also asserts that the prosecutor's decision to charge defendant with three separate counts of delivery for the series of sales that took place in a short period of time violates the separation of powers doctrine and his right to due process. Defendant admitted delivering cocaine to the undercover officer on three separate occasions. We fail to see how the prosecutor's charging of defendant with three separate counts for three separate offenses violates defendant's right to due

process. We are also not persuaded that the combination of statutory minimum sentences and mandatory consecutive sentencing places sentencing power in the hands of the police and prosecution in violation of the separation of powers doctrine.

Defendant also claims that the sentencing court erred when it failed to consider the results of psychological testing that purportedly indicated a very low probability of recidivism. The court stated that it would not use the report because “however verifiable it might be,” using the report “would put the prosecution at a disadvantage in terms of being able to cross-examine Dr. Abramsky on his methodology and his opinions” We need not determine whether and under what circumstances a court *may* consider a psychological report. Rather, the issue here is whether the court was *required* to consider the report before it determined defendant’s sentences. We conclude that the court was not required to consider the report and that its decision not to consider the report does not entitle defendant to resentencing.

Finally, we disagree with both the prosecutor’s and defendant’s contentions that the sentences, when viewed individually, *Landis, supra*, were disproportionate. We find no abuse of discretion.

Affirmed.

/s/ Maureen Pulte Reilly

/s/ Myron H. Wahls

/s/ Nick I. Holowka