

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT E. LEMASTER,

Defendant-Appellant.

UNPUBLISHED

May 23, 1997

No. 184292

Oakland Circuit Court

LC No. 92-114328 FH

Before: Corrigan, C.J., and Young and M.J. Talbot*, JJ.

MEMORANDUM.

After remand for resentencing on charges of delivery of controlled substances in an amount of 50 or more but less than 225 grams, and of conspiracy to commit that offense, defendant received the statutorily prescribed sentence of 10 to 20 years imprisonment, to be served consecutively pursuant to §7401(3) of the Public Health Code, on each count. On this appeal of right, defendant contends the trial court erred at resentencing when it opined that, in light of this Court's order of remand, it had no discretion over the parameters of sentence. This case is being decided without oral argument pursuant to MCR 7.214(E).

This Court's decision on prior appeals of right by defendant, Docket No. 156031, and the prosecutor, Docket No. 155714, established that, as of the time of the original sentencing proceeding, substantial and compelling reasons for imposing a departure sentence, below the statutorily mandated minimum as to either count, were not established. This Court also held that consecutive sentencing was required. The law of the case doctrine applies with respect to those rulings both in this Court and the trial court. *Johnson v White*, 430 Mich 47, 53; 420 NW2d 87 (1988). However, the law of the case doctrine applies only where the facts remain materially the same. *Reeves v Cincinnati, Inc (After Remand)*, 208 Mich App 556, 559; 528 NW2d 787 (1995).

Here, defendant asked the trial court, at resentencing, to consider his behavior and accomplishments while incarcerated subsequent to the original sentencing. This information was

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

obviously unavailable at the original sentencing, and it is relevant and material to the defendant's request for a departure sentence. *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995). Consideration of this information would also facilitate the trial court's task in evaluating consecutive sentences. *People v Chambers*, 430 Mich 217, 229-230; 421 NW2d 903 (1988).

Accordingly, the failure of the trial court, at resentencing, to recognize that it possessed discretion to consider whether defendant had satisfactorily established, on the basis of additional information, grounds for a departure sentence, was an abuse of discretion. *People v Jackson*, 391 Mich 323, 332; 217 NW2d 22 (1974). Therefore, we again remand for resentencing *de novo*.

We do not retain jurisdiction.

/s/ Maura D. Corrigan
/s/ Robert P. Young, Jr.
/s/ Michael J. Talbot