

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

RESHAWN L. GOVER,

Defendant-Appellee.

UNPUBLISHED

September 16, 1997

No. 188780

Oakland Circuit Court

LC No. 93-128119-FH

Before: Markey, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

On plea of guilty, defendant was convicted of both possession with intent to deliver more than 225 but less than 650 grams of cocaine, and of conspiracy to commit that offense. MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii); MCL 750.157a; MSA 28.354(1). Defendant was initially given a departure sentence of two to thirty years' imprisonment on each count, to be served consecutively. On the prosecution's motion for resentencing, by what was in effect a stipulation, and without addressing the minimum sentences at all, a substitute judge sentenced defendant to two to sixty years' imprisonment as a second drug offender on each count, to be served consecutively. The prosecution appeals by right, contending that the minimum sentences represent excessive leniency, although conceding that departure sentences under §7401(4) of the Public Health Code, being MCL 333.7401(4); MSA 14.15(7401)(4), are warranted on the facts.

Cooperation with law enforcement is one of the principal factors justifying a departure sentence. *People v Fields*, 448 Mich 58, 76; 528 NW2d 176 (1995). Departure sentences are conceded to be justified in this case by virtue of defendant's significant level of cooperation with law enforcement authorities in providing the crucial testimony necessary to convict the prime mover in the drug conspiracy, Ronnie Lee Williams. The original sentencing judge, who also presided at Williams' trial, noted that defendant's testimony was a key element in the prosecution of Williams. The judge noted that he had polled the jury after the verdict and the jurors likewise had found defendant's testimony both crucially important and truthful.

However, although a departure sentence was warranted, the issue presented is whether the actual sentences imposed, which are mandatorily consecutive, *People v Denio*, 454 Mich 691; 564 NW2d 13 (1997), are disproportionately lenient and thus constitute an abuse of the trial court's sentencing discretion. Here, the court notes that the amount of cocaine involved was 510 grams according to the presentence report. Defendant also has a prior conviction for a drug offense. Given the amount of cocaine involved and the degree of departure, which is to be juxtaposed against the legislative intent to use harsh sentences against drug dealers, this Court concludes that the two year minimum sentences are disproportionately low and constitute an abuse of discretion. *People v Catanzarite*, 211 Mich App 573, 585; 536 NW2d 570 (1995); *People v Perry*, 216 Mich App 277, 279-280; 549 NW2d 42 (1996).

On remand, the trial court should note that it has discretion, pursuant to MCL 769.9(3); MSA 28.1081(3), to fix both the minimum and maximum sentences. Assuming arguendo that defendant is subject to double punishment under §7413 of the Public Health Code, MCL 333.7413; MSA 14.15(7413), the trial court is not required to automatically double the statutory penalties, whether on the minimum or the maximum, and it may fix the maximum at any amount up to 60 years, the minimum at any term up to 40 years on each count. *People v Perry*, 201 Mich App 347; 505 NW2d 909 (1993); *People v Francisco Perez*, 417 Mich 1100.21 (1983) ("the statutory minimum and maximum sentences for major controlled substance offenses are not mandatory except insofar as they establish the outer limits within which a sentence must be fixed"). On remand, the court should look more closely at whether double punishment applies; the presentence report reflects only an Ohio conviction, which on its face would appear not to be a prior offense "under this article" as defined in §7413(2) of the Public Health Code, MCL 333.7413(2); MSA 14.15(7413(2); cf. §625(7)(g) of the Motor Vehicle Code, MCL 257.625(7)(g); MSA 9.2325(7)(g), which defines "prior conviction" as including a conviction under "a law of another state substantially corresponding to subsection (1)," etc. Whatever the status of defendant's Ohio conviction, he is a second drug offender for purposes of evaluating the proportionality of a departure sentence, but he may or may not be subject to double punishment on that account.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ Janet T. Neff

/s/ Michael R. Smolenski