

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

BERNARD SANTOS a/k/a SANTOS BERNARD,

Defendant-Appellee.

UNPUBLISHED

December 30, 1997

No. 198404

Oakland Circuit Court

LC No. 94-134557-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BERNARD SANTOS a/k/a SANTOS BERNARD,

Defendant-Appellant.

No. 198986

Oakland Circuit Court

LC No. 94-134557-FH

Before: Michael J. Kelly, P.J., and Cavanagh and N.L. Lambros*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of conspiracy to deliver more than 50 but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), MCL 750.157a; MSA 28.354(1), and delivery of more than 50 but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). He was sentenced to two consecutive terms of five to twenty years' imprisonment. In Docket No. 198404, the prosecution appeals as of right from the sentence imposed by the trial court, on the basis that it erroneously made a downward departure from the statutorily mandated minimum sentence. In Docket No. 198986, defendant appeals as of right from

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

his convictions, on the basis that he received an unfair trial due to prosecutorial misconduct and the trial court abused its discretion in admitting evidence that he failed to contest the civil forfeiture of his car. We affirm.

First, the prosecution argues that the trial court erred in departing below the statutory minimum sentence of ten years for each of defendant's convictions because there were no substantial and compelling reasons to justify the departure. A trial court has the authority to depart from the mandatory ten-year minimum sentence upon a finding of substantial and compelling reasons. MCL 333.7401(4); MSA 14.15(7401)(4). *People v Perry*, 216 Mich App 277, 279-280; 549 NW2d 42 (1996). The substantial and compelling reasons must be objective and verifiable. *Id.* at 280. The determination regarding the existence, or nonexistence, of a particular reason or factor is reviewed under the clearly erroneous standard. *Id.* Once the existence of a factor has been established, the court must determine whether the factor is objective and verifiable, and that finding of the trial court is reviewed de novo. *Id.* Should the trial court find that the factor qualifies as a substantial and compelling reason to impose a sentence below the statutory minimum, that finding is then reviewed for an abuse of discretion. *Id.*

Furthermore, sentencing courts should consider the following factors in determining whether a case presents substantial and compelling reasons to depart below the mandatory minimum: (1) whether there are mitigating circumstances surrounding the offense; (2) whether the defendant has a prior record; (3) the defendant's age; and (4) the defendant's work history. *Id.* at 281. A finding of substantial and compelling circumstances should not be seen as a threshold meant to be impossible to reach but that, nevertheless, such a finding should be the exception and not the rule, and that such reasons only exists in exceptional cases. *Id.* at 281-282. When both appropriate and inappropriate factors are 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.

The factors noted by the court for its departure from the statutory minimum were that: (1) defendant was forty-two years old, (2) he had no prior criminal record, (3) he had a good work history, (4) he was a family man, and (5) he had rehabilitative potential. First, we believe that the trial court's determination that the above factors existed was not clearly erroneous because there was evidence introduced to establish defendant's age, his criminal record, his work history and his family situation. Next, the first four factors were objective and verifiable. Defendant testified that he was forty-one years old at the time of trial, he had lived in Pontiac with his family since 1973 and worked for General Motors for twenty consecutive years. We also believe that the trial court did not abuse its discretion in determining that these four factors qualified as substantial and compelling reasons to depart below the statutory minimum sentence. Although courts often cite the young age of a defendant as a reason to deviate from a minimum sentence, a person who has advanced to middle age with a clean slate and a solid career may also present a compelling case for deviation, as someone with a proven capacity to live within the bounds society has set. *People v Fields*, 448 Mich 58, 78; 528 NW2d 176, reh den 448 Mich 1224 (1995). While the prosecution argues that defendant was a drug dealer who simply had not been caught before, there is no evidence in the record indicating that defendant previously sold narcotics. Given that defendant was over forty, had no prior criminal record, was gainfully employed

for twenty years and supported and had the support of his wife and two children (see letters in lower court file from defendant's family to sentencing court), the trial court did not abuse its discretion in concluding that there were substantial and compelling reasons to sentence defendant below the statutory minimum.

We also believe that the final factor relied on by the trial court, defendant's rehabilitative potential, was objective and verifiable. See *People v Shinholster*, 196 Mich App 531, 535; 493 NW2d 502 (1992). The court appeared to base its determination that defendant had rehabilitative potential on the facts that he was forty-two years old, with no previous criminal record, a long time job with General Motors and had a family. Moreover, the trial court did not abuse its discretion in finding that defendant's potential for rehabilitation was a substantial and compelling reason to depart below the statutory minimum sentence.

The prosecution also argues that the consecutive sentences of five to twenty years' imprisonment were disproportionate. The sentences imposed upon criminal defendants are reviewed for an abuse of discretion. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* We do not believe that the departure resulted in a disproportionately lenient sentence. *Perry, supra* at 280.

Although defendant provided four ounces of cocaine to Pachorek, there is no indication that he was previously involved in drug dealing or any other offense, we believe that the departures from the statutory minimum as discussed above, were proportionate to the offense and defendant's lack of criminal background. Accordingly, the trial court properly sentenced defendant to two consecutive terms of five years' imprisonment because there were substantial and compelling reasons for a downward departure from the statutory minimum, and the sentence was proportionate.

Next, defendant argues that a miscarriage of justice occurred because the prosecutor vouched for the credibility of informant, Michael Pachorek, by questioning prospective jurors, eliciting testimony that Pachorek agreed to testify truthfully and knew that he could be charged with perjury if he did not, and making remarks during closing argument that he believed Pachorek testified truthfully. Because defendant did not object to the alleged improper comments of the prosecutor, appellate review of improper prosecutorial remarks is precluded, unless failure to review the issue would result in a miscarriage of justice or if a cautionary instruction could not have cured the prejudicial effect. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den, sub nom *Michigan v Caruso*, 115 S Ct 923, 130 L Ed 2d 802 (1995). We find that the only improper comment made by the prosecutor was that made during voir dire. However, had defendant objected, a curative instruction could have eliminated any risk of prejudice. *Bahoda, supra* at 282-283. Accordingly, this Court's failure to fully review the alleged improper comments of the prosecutor will not create a miscarriage of justice.

Finally, defendant argues that the trial court abused its discretion in admitting evidence that defendant failed to contest the civil forfeiture of his car because that testimony was not admissible pursuant to MRE 801(d)(2)(B) and therefore, could not be used as an admission of guilt. A trial court's decision to admit evidence will not be reversed absent an abuse of discretion. *People v Coleman*, 210

Mich App 1, 4; 532 NW2d 885 (1995). To find an abuse of discretion, the result must have been so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Id.*

In the present case, there was no indication that defendant's failure to contest the forfeiture of his car demonstrated an adoption or belief in his guilt. Thus, the testimony was not admissible pursuant to MRE 801(d)(2)(B). However, the prosecutor did not argue that defendant's failure to contest the forfeiture was evidence of his guilt.¹ See *People v Greenwood*, 209 Mich App 470; 531 NW2d 771 (1995). Rather, it seems that the prosecutor questioned defendant regarding the status of his car in response to defense counsel's implication that the police improperly confiscated his car. Therefore, defendant does not appear to have been prejudiced by the trial court's admission of the evidence because there is no indication that the jury used the testimony to conclude that defendant was guilty of the crimes charged.² Accordingly, the trial court did not abuse its discretion in allowing the admission of evidence that defendant failed to contest the forfeiture of his car.

Affirmed.

/s/ Michael J. Kelly

/s/ Mark J. Cavanagh

/s/ Nicholas J. Lambros

¹ Defendant states in his appellate brief that "the trial court abused its discretion in allowing the prosecutor to impeach [defendant] with the failure to contest a civil forfeiture action arising out of the same incident, and then comment that such failure was an adoptive admission." However, defendant did not cite this alleged comment regarding the adoptive admission and we did not find such a comment in the prosecutor's closing argument.

² Defendant also cites the Georgia Court of Appeals case of *Croom v State*, 217 Ga App 596; 458 SE2d 679 (GA App, 1995), in support of his argument. However, that case was not dispositive on the present issue.