

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JIMMY MASS, a/k/a KOOL AID,

Defendant-Appellee.

UNPUBLISHED

April 14, 1998

No. 203651

Monroe Circuit Court

LC No. 96-027539 FH

Before: Michael J. Kelly, P.J., and Fitzgerald and M.G. Harrison*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivery of more than 225 but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), and conspiracy to commit that offense, MCL 750.157a; MSA 28.354(1). After hearing and considering arguments regarding the propriety of a departure sentence under MCL 333.7401(4); MSA 14.15(7401)(4), the trial court found substantial and compelling factors and imposed departure sentences of ten to twenty years' imprisonment on each count, to be served consecutively under MCL 333.7401(3); MSA 14.15(7401)(3). *People v Denio*, 454 Mich 691; 564 NW2d 13 (1997). The prosecutor moved for reconsideration, which motion was denied by a successor to the trial judge, who retired. This appeal as of right then ensued. We reverse. This case is being decided without oral argument pursuant to MCR 7.214(E).

In imposing a departure sentence, the trial court remarked that defendant's role in the offense was "much less significant ... than is normally done in these cases." Defendant had assisted the "prime mover" by meeting an undercover police officer, the purchaser of the drugs, at a prearranged location, and leading the officer to a substitute meeting place, where the transaction was consummated. That kind of limited role in the actual criminal transaction may serve as a properly objective and verifiable basis for imposing a departure sentence. *People v Fields*, 448 Mich 58, 76; 528 NW2d 176 (1995).

However, the "simple iteration of objective and verifiable factors alone is insufficient to meet the statutory standard: the sentencing court must also specifically articulate the reasons why the factors it

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

identifies and relies upon collectively provide ‘substantial and compelling’ reasons to except the case from the legislatively mandated sentencing regime.” *People v Johnson (On Remand)*, 223 Mich App 170, 173-174; 566 NW2d 28 (1997). This the trial court failed to do. Indeed, the record would seem to contraindicate placing great reliance on this single mitigating factor, because there are at least equally compelling aggravating factors extant. These offenses were committed while defendant was on parole from previous drug crimes, and they represent defendant’s third and fourth adult felony convictions. Departure sentences are intended to be the exception and not the rule; only exceptional cases justify a downward deviation from the legislatively mandated sentencing provisions. *Fields, supra*, 448 Mich at 68, 70 n 5.

Even if this single factor were, however, otherwise sufficient to justify a departure sentence, the trial court failed to articulate additional justification for the extent of the departure, since it is obligated to avoid imposing a lenient and hence disproportionate sentence. *People v Perry*, 216 Mich App 277, 284; 549 NW2d 42 (1996). The legislatively mandated sentence is presumed proportionate and valid. *People v DiVietri*, 206 Mich App 61, 63; 520 NW2d 643 (1994); *People v Johnson (On Remand)*, *supra*, 223 Mich App at 175.

The presentence report reflects that, before running afoul of the criminal justice system at age thirty-two, defendant had been steadily employed. Work history is one of the objective and verifiable factors recognized in *People v Fields, supra*, as a possible basis for a sentence departure. 448 Mich at 78-79. It is therefore conceivable that a departure sentence may be appropriately imposed. We presently hold only that the trial court’s finding of mitigating circumstances is not clearly erroneous, and its further holding that such mitigating circumstances constitute an objective and verifiable factor is not legally erroneous. However, the determination that a departure sentence was warranted was, given the supporting reasons advanced by the trial court, an abuse of discretion on this record, and resentencing is required.

Reversed and remanded for resentencing. We do not retain jurisdiction.

/s/ Michael J. Kelly

/s/ E. Thomas Fitzgerald

/s/ Michael G. Harrison