

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BERNARD DORSEY,

Defendant-Appellant.

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UNPUBLISHED

March 28, 2000

No. 208447

Oakland Circuit Court

LC No. 94-132064-FH

Before: Wilder, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his sentence of twenty to thirty years in prison for his plea-based conviction of possession with intent to deliver 225 grams or more but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded guilty and was sentenced to ten to thirty years in prison. The ten-year term represented a downward departure from the statutorily mandated minimum term of twenty years. The trial court cited defendant's lack of a prior record, his military service, his acceptance of responsibility for his actions, and his assistance of law enforcement efforts to apprehend his source as substantial and compelling reasons for departing below the mandated minimum term. The people appealed, and in *People v Dorsey*, unpublished opinion per curiam of the Court of Appeals, issued December 13, 1996 (Docket No. 178108), another panel of this Court remanded for further proceedings, finding that not all of the factors cited by the trial court as substantial and compelling reasons for departing downward from the minimum term, specifically defendant's expression of remorse, were objective and verifiable. The *Dorsey* Court remanded this case with instructions that the trial court determine whether substantial and compelling reasons still existed to depart downward when only appropriate factors were considered.

On remand, the trial court found that no substantial and compelling reasons existed to depart below the mandated minimum term. The court sentenced defendant to twenty to thirty years in prison, with credit for 1,213 days.

On appeal, defendant argues that he was entitled to be resentenced by the judge who took his plea and imposed the original sentence. We disagree. A defendant who pleads guilty is entitled to be sentenced by the same judge who accepted the plea, provided that that judge is reasonably available. *People v Humble*, 146 Mich App 198, 200; 379 NW2d 422 (1985); MCR 2.630. Here, the original judge was simply not available for the reason that he was no longer appointed to the bench as a visiting judge. Thus, at the time of resentencing, the original judge lacked the authority to sit as a circuit judge. *People v Auker (After Remand)*, 132 Mich App 394, 399; 347 NW2d 466 (1984), rev'd in part on other grounds 419 Mich 918 (1984).

A court may depart from a mandatory minimum term if it finds on the record that substantial and compelling reasons exist to do so. MCL 333.7401(4); MSA 14.15(7401)(4). A trial court should start with the presumption that the mandatory minimum term is appropriate. *People v Downey*, 183 Mich App 405, 413; 454 NW2d 235 (1990). A determination that departure is warranted must be based on objective and verifiable factors. *People v Fields*, 448 Mich 58, 68; 528 NW2d 176 (1995). Appropriate factors for consideration include facts that mitigate the defendant's culpability, the defendant's prior record, age, and work history, and the defendant's post-arrest cooperation. *Id.*, 76-77. The existence or nonexistence of a factor is a factual determination that is reviewed for clear error. The determination that a factor is objective and verifiable is reviewed as a question of law. The determination that factors constitute substantial and compelling reasons to depart downward from a minimum term is reviewed for an abuse of discretion. *Id.*, 77-78.

Defendant argues that even disregarding his expressed remorse, substantial and compelling reasons existed to depart below the mandated minimum term for his offense. We disagree. Defendant's lack of a prior record is an appropriate factor for consideration; nevertheless, given that defendant acknowledged that he engaged in multiple narcotics transactions, his lack of a prior record is insufficient to warrant downward departure. *People v Pearson*, 185 Mich App 773, 779; 462 NW2d 839 (1990). Defendant's military service may be considered work history; however, he held no employment for several years prior to his original sentencing. His military service, while admirable, does not warrant downward departure. Finally, while defendant's post-arrest cooperation with law enforcement officials is an appropriate factor for consideration, we conclude that it does not, in and of itself, warrant downward departure in this case. The trial court's imposition of the statutorily mandated minimum term did not constitute an abuse of discretion.

Affirmed.

/s/ Kurtis T. Wilder  
/s/ David H. Sawyer  
/s/ Jane E. Markey