

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNEDY L. WADE,

Defendant-Appellant.

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UNPUBLISHED

December 19, 2000

No. 213430

Wayne Circuit Court

LC No. 94-009283

Before: Wilder, P.J., and Holbrook, Jr., and McDonald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of 225 or more but less than 650 grams of cocaine, MCL 333.7403(2)(a)(ii); MSA 14.15(7403)(2)(a)(ii), and sentenced to ten to twenty years in prison. Defendant appealed his conviction and the prosecutor filed a cross-appeal challenging defendant's sentence on the ground that the trial court abused its discretion in deviating from the twenty-year mandatory minimum sentence without substantial and compelling reasons for doing so. This Court affirmed defendant's conviction, reversed defendant's sentence and remanded for further proceedings in an unpublished, per curiam opinion. *People v Wade*, unpublished opinion per curiam of the Court of Appeals, issued February 27, 1998 (Docket No. 190318). Specifically, this Court held that the trial court "abused its discretion in finding that defendant's employment record and support of his children provided substantial and compelling reasons to depart from the mandatory minimum sentence of twenty years for defendant's conviction offense." *Id.* at slip op p 4. On remand, the trial court resentenced defendant to twenty to thirty years in prison for his conviction. Defendant appeals as of right. We affirm.

Defendant contends that the trial court abused its discretion in sentencing him to a minimum of twenty years in prison because he presented substantial and compelling reasons to deviate below the mandatory minimum sentence provided in the statute. We disagree.

MCL 333.7403(2)(a)(ii); MSA 14.15(7403)(2)(a)(ii) provides in pertinent part:

(2) A person who violates this section as to:

(a) A controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(iv), and:

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(ii) Which is in an amount of 225 grams or more, but less than 650 grams, of any mixture containing that substance is guilty of a felony and shall be imprisoned for not less than 20 years nor more than 30 years.

Notwithstanding this mandatory minimum sentence, MCL 333.7403(3); MSA 14.15(7403)(3), provides, in pertinent part:

The court may depart from the minimum term of imprisonment authorized under subsection (2)(a)(ii), (iii), or (iv) if the court finds on the record that there are substantial and compelling reasons to do so.

A defendant's sentence must "be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). A statutory minimum sentence imposed by the Legislature is presumed to be proportionate and valid. *People v Williams*, 189 Mich App 400, 404; 473 NW2d 727 (1991). A trial court may depart below a mandatory minimum sentence if there are substantial and compelling reasons to do so. Only objective factors that are capable of verification may be used to assess whether there are substantial and compelling reasons to deviate from the minimum term of years imposed by the Legislature. *People v Daniel*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 113647, issued 5/2/00), slip op p 5; *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995). Sentencing judges should deviate from mandatory minimum sentences only in exceptional cases. *Id.*

Examples of objective and verifiable factors that may be considered in deviating from a minimum sentence include the defendant's prior record, age, work history, cooperation with law enforcement, and other factors arising after the defendant's arrest. *Fields, supra* at 77. Emphasis should also be placed on any mitigating circumstances surrounding the offense. *Id.* at 76. However, subjective factors such as a defendant's remorse or his effort to "turn himself around" are not proper factors for the trial court's consideration in deviating from a mandatory minimum sentence. *Daniel, supra* at slip op pp 7-8; *People v Johnson (On Remand)*, 223 Mich App 170, 174; 566 NW2d 28 (1997).

At defendant's initial sentencing, the trial court found substantial and compelling reasons to depart from the mandatory minimum sentence, stating as follows:

The defendant here has a prior record, which certainly goes against him, and the prior record is for a similar offense. The only other factors that possibly could qualify would be his employment. And, there is some question even as to that. He's married and I suspect that that should have some affect on the sentencing as he has four children that he is responsible for supporting. He don't have – his record is not very strong, to be honest with you, for a deviation. He does not have a strong record for a deviation.

Yet, the Court will find that the employment, the marriage, and the children, four children that he is responsible for supporting gives the Court some discretion to deviate from that minimum of 20 years. And, for that reason and those reasons, the Court will sentence Mr. Wade to a term of ten years, ten to 30 years with the Michigan Correctional Department.

The prosecution appealed defendant's sentence and this Court reversed defendant's ten-year minimum sentence and remanded for resentencing, holding that the trial court had no substantial and compelling reasons to deviate downward from the mandatory twenty-year sentence required for his possession conviction. *People v Wade*, unpublished opinion per curiam of the Court of Appeals, issued February 27, 1998 (Docket No. 190318). This Court found that (1) defendant had a prior conviction for attempted possession, (2) he earned only \$100 per week, but lived in a spacious home and owned two cars, (3) he gave no support to one of his children and gave minimal support to his other children, (4) a significant amount of cocaine and marijuana were found in defendant's home, and (5) defendant made little or no effort to help police in spite of his promise to do so. *Id.* Based on these findings, this Court concluded that the trial court abused its discretion in deviating from the mandatory minimum sentence by ten years based merely on defendant's employment record and the support of his children because they did not constitute substantial and compelling reasons to do so. *Id.*

At resentencing, the trial court opined that this Court's findings that defendant's income was only \$100 per week and that defendant failed to support his children were erroneous. The trial court stated that, contrary to this Court's conclusion, defendant's income exceeded \$100 per week, citing both defendant's updated sentencing memorandum and "information that was known to the Court at the time of sentencing[.]" Further, the trial court stated that this Court erroneously concluded that defendant failed to support his children. The trial court noted, however, that despite its belief that defendant's original sentence of ten to thirty years in prison was "fair and just," it was bound by this Court's ruling. Accordingly, it imposed a twenty-year mandatory minimum sentence for defendant's conviction.

We conclude that defendant's sentencing challenge is barred by the law of the case doctrine which provides that "an appellate court's determination of law will not be differently decided on a subsequent appeal in the same case if the facts remain materially the same." *People v Hermiz*, 235 Mich 248, 254; 597 NW2d 218 (1999), lv granted. When a higher court remands the case to a lower court for further proceedings based on its findings, that court is generally "'without power' to take action inconsistent with the judgment of the appellate court." *People v Russell*, 149 Mich App 110, 114; 385 NW2d 613 (1985). The determination of an appellate court is binding on all lower courts. *Hermiz, supra* at 254. If a litigant believes that this Court erred, the right of redress generally rests in a higher tribunal. *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996); *Bennett v Bennett*, 197 Mich App 497, 502; 496 NW2d 353 (1992). Accordingly, we could not overrule the prior panel's finding that substantial and compelling reasons to deviate from the mandatory minimum sentence did not exist even if we considered it to be erroneous, which we do not.<sup>1</sup> The trial court did not abuse its discretion in

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<sup>1</sup> After reviewing the record, we do not find the prior panel's determination that substantial and compelling reasons to depart from the mandatory minimum sentence did not exist

following this Court's previous ruling and sentencing defendant to the mandatory twenty-year minimum sentence. See *Williams, supra* at 404. If defendant believes the prior panel's decision to be in error, his only option is an application for leave to our Supreme Court. See *Kozyra, supra* at 433.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Donald E. Holbrook, Jr.

/s/ Gary R. McDonald

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to be erroneous. Even if the prior panel's factual findings that defendant only earned \$100 per week and did not financially support his children were in error, we are not persuaded that defendant's employment and family obligations, alone, constitute substantial and compelling reasons for departure. Defendant's circumstances are simply not of an extraordinary nature that would justify a deviation from the sentence prescribed by the Legislature for this crime, particularly given defendant's prior criminal record, the fact that he was on probation for attempted possession of cocaine when the drugs were discovered in his home, the amount of cocaine, marijuana, and cash found in defendant's closet, and defendant's failure to assist the police after the raid, despite his expressed interest and ability to provide information regarding his knowledge of other drug activities.

Further, contrary to defendant's contention, we are not persuaded that the facts in this case have materially changed since defendant's initial sentencing. The only additional information presented to the trial court at defendant's resentencing was testimony from his oldest daughter that defendant "was always there for [her] . . . and his family" and testimony from defendant's brother that defendant earned more than \$100 per week. However, even assuming these facts to be true, this information does not amount to a material factual change sufficient to negate application of the law of the case doctrine. Rather, we agree with the prior panel's ruling that substantial and compelling reasons to deviate from the mandatory minimum sentence did not exist in this case.