

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DION D. GILBERT,

Defendant-Appellant.

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UNPUBLISHED

August 9, 2002

No. 232677

Wayne Circuit Court

LC No. 00-007567

Before: Talbot, P.J., and Cooper and D. P. Ryan\*, JJ.

PER CURIAM.

A trial court convicted defendant of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and sentenced him to five to twenty years' imprisonment. Defendant appeals as of right. We remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that he is entitled to resentencing because the trial court failed to articulate its reasons for imposing a minimum term that exceeded the guidelines. We agree and remand this matter for resentencing. The sentencing guidelines require the trial court to impose a minimum sentence in accordance with the calculated guidelines range. MCL 769.34(2). However, a trial court may depart from the recommended sentencing range if it has a substantial and compelling reason and states this reason on the record. MCL 769.34(3); *People v Babcock*, 244 Mich App 64, 72; 624 NW2d 479 (2000). To constitute a substantial and compelling reason for departing from the guidelines, the reason must be objective and verifiable, and must irresistibly hold the attention of the court. *Babcock, supra* at 75. A court may not base a departure on an offense or offender characteristic already considered by the guidelines, unless it concludes that the guidelines provided inadequate or disproportionate weight to that factor, given the facts of the case. MCL 769.34(3)(b); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001).

The existence of a particular factor is a factual determination for the trial court and is reviewed for clear error on appeal. *Babcock, supra* at 75-76. "[O]nce this Court determines as a matter of law that the trial court's stated factor for departure was objective and verifiable, our review is limited to whether the trial court abused its discretion in concluding that the factor constituted a substantial and compelling reason to depart." *Id.* at 78. In addition, the substantial

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

and compelling factors relied upon by the trial court must justify the particular departure at issue. *People v Hegwood*, 465 Mich 432, 437, n 10; 636 NW2d 127 (2001).

In the instant case, the applicable statutory sentencing guidelines recommended a minimum term range of zero to seventeen months' imprisonment. The trial court sentenced defendant to sixty months to twenty years in prison, to be served concurrently with another sentence imposed during the same hearing, and consecutive to a sentence defendant was serving when he committed the offense.

Despite the fact that this minimum term clearly exceeded the guidelines, the trial court failed to state its reasons for the departure. Plaintiff's assertion that the trial court intended its remarks concerning sentencing in the other matter, regarding defendant's parole status and possession of a gun, to apply to the instant case as well is not supported by the record. The trial court made no reference to its earlier remarks when imposing sentence in the instant case.

Even assuming *arguendo* that plaintiff is correct, defendant's parole status was considered in the calculation of the guidelines. MCL 777.56. The trial court did not indicate that defendant's status was given inadequate weight in the calculation of the guidelines. *Armstrong, supra*. Further, the trial court cited no circumstances of the instant case that it deemed to be substantial and compelling reasons for exceeding the guidelines. Defendant is entitled to resentencing.

Remanded for resentencing. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Jessica R. Cooper

/s/ Daniel P. Ryan