

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

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LUTETTUS PERRY,

Defendant-Appellee.

---

UNPUBLISHED

May 27, 2003

No. 239051

Oakland Circuit Court

LC No. 2001-176416-FH

Before: Whitbeck, C.J., and White and Donofrio, JJ.

PER CURIAM.

The prosecutor appeals by delayed leave granted from defendant Lutettus Perry's sentence of ten to forty-five years' imprisonment imposed for a conviction of possession with intent to deliver between 225 and 649 grams of heroin.<sup>1</sup> We vacate Perry's sentence and remand for resentencing.

I. Basic Facts And Procedural History

Perry was charged with this and other offenses for an incident that occurred in January of 2001. In August of 2001, Perry appeared before the trial court and pleaded guilty as charged. Because the controlled substance act imposed a mandatory determinate sentence of twenty to thirty years' imprisonment,<sup>2</sup> the statutory sentencing guidelines were inapplicable and the court was required to impose the mandatory sentence unless it found "substantial and compelling reasons" to depart from that sentence.<sup>3</sup>

According to the presentence information report, the probation department recommended a minimum sentence of ten years. However, according to the prosecutor's statement at sentencing, the probation department recommended a minimum sentence of twenty-three years. Perry argued for a downward departure from the mandatory minimum sentence, asserting that the trial court should consider his advanced age (64) and poor health (kidney disease requiring

---

<sup>1</sup> MCL 333.7401(2)(a)(ii).

<sup>2</sup> *Id.*

<sup>3</sup> MCL 333.7401(4); MCL 769.34(5).

dialysis three times a week). Perry also advocated that the trial court consider the federal sentencing guidelines.

The trial court agreed to a departure and imposed a minimum sentence of ten years, stating:

Well, it's true the Court should consider Defendant's age and health when pondering deviation. The Court must recognize that despite those factors, Defendant caused just as much harm in the community by decimating [sic] drugs as a younger person dealing in the same quantities. He was a major trafficker and accumulated tremendous wealth through his trade. While long ago Defendant was convicted and sentenced for . . . the same crime, and despite that he returned to the same illicit way of life and armed himself with five deadly weapons.

Now, for all those reasons, I should not deviate below the mandatory minimum of 23 years. However, to do so would be, that is to not deviate, would be to ignore the one obvious, verifiable, objective factor, namely that such a sentence would be a death sentence because Defendant would die in prison. That's a substantial and compelling reason to deviate. However, to give him what . . . he's asking for, which is somewhere in the range of five years, is just too much of a departure.

## II. Standard Of Review

"The determination regarding the existence, or nonexistence, of a particular reason or factor is reviewed on appeal under the clearly erroneous standard."<sup>4</sup> We review the trial court's determination whether a departure from the mandatory minimum sentence is justified by substantial and compelling reasons for an abuse of discretion.<sup>5</sup>

## III. Sentencing Standards

Because Perry's conviction carried a mandatory determinate sentence of twenty to thirty years' imprisonment,<sup>6</sup> the statutory sentencing guidelines were inapplicable and the court was required to impose the mandatory sentence unless it found "substantial and compelling reasons" to depart from that sentence.<sup>7</sup>

## IV. Departures From The Sentencing Standards

A trial court may depart from the statutory minimum term of imprisonment if it finds "substantial and compelling reasons to do so."<sup>8</sup> "[T]he Legislature intended 'substantial and

<sup>4</sup> *People v Perry*, 216 Mich App 277, 280; 549 NW2d 42 (1996).

<sup>5</sup> *People v Nunez*, 242 Mich App 610, 617; 619 NW2d 550 (2000).

<sup>6</sup> MCL 333.7401(2)(a)(ii).

<sup>7</sup> MCL 333.7401(4); MCL 769.34(5).

<sup>8</sup> MCL 333.7401(4).

compelling reasons’ to exist only in exceptional cases.”<sup>9</sup> “[O]nly 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 for certain drug offenses.”<sup>10</sup> Appropriate objective factors include, but are not limited to, “(1) whether there are mitigating circumstances surrounding the offense, (2) whether the defendant has a prior record, (3) the defendant’s age, (4) the defendant’s work history, and (5) factors that arise after the defendant’s arrest such as the defendant’s cooperation with law enforcement officials.”<sup>11</sup> It is not enough that the court simply identify objective and verifiable factors; it “must also specifically articulate the reasons why the factors it identifies and relies upon collectively provide ‘substantial and compelling’ reasons to except the case from the legislatively mandated sentencing regime.”<sup>12</sup>

## V. The Trial Court’s Rationale

Here, the trial court elected to depart downwards from the mandatory minimum sentence based on Perry’s age and poor health. Age is a specifically approved factor for consideration. Health is not, but the list of factors is not exclusive. Both factors are objective and verifiable. The trial court found that they constituted substantial and compelling reasons for a downward departure because Perry might die before he could complete the legislatively mandated sentence. We conclude that this was an abuse of discretion, for the following reasons.

First, “a defendant has a ‘reasonable prospect’ of living into his early nineties,”<sup>13</sup> and here there was no medical evidence indicating that Perry’s overall condition was such that he could not live to serve his sentence. Second, the factors for determining whether to depart from the mandatory minimum sentence are generally designed to determine a defendant’s rehabilitative potential.<sup>14</sup> According to the presentence report, Perry was a drug trafficker whose sole source of income appeared to be profit from drug sales. Given that Perry engaged in this activity despite a previous conviction and term of imprisonment for a controlled substance violation, his potential for rehabilitation was low, regardless of his age and health. Accordingly, we find that the trial court’s departure from the mandatory minimum sentence was not supported by substantial and compelling reasons.

We vacate Perry’s sentence and remand for resentencing. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Pat M. Donofrio

---

<sup>9</sup> *People v Fields*, 448 Mich 58, 68; 528 NW2d 176 (1995).

<sup>10</sup> *People v Daniel*, 462 Mich 1, 6; 609 NW2d 557 (2000).

<sup>11</sup> *People v Johnson (On Remand)*, 223 Mich App 170, 173; 566 NW2d 28 (1997).

<sup>12</sup> *Id.* at 173-174 (footnote omitted).

<sup>13</sup> *People v Martinez (After Remand)*, 210 Mich App 199, 203; 532 NW2d 863 (1995) (citation omitted).

<sup>14</sup> *Daniel, supra* at 7, n 8; *People v Downey*, 183 Mich App 405, 414; 454 NW2d 235 (1990).