

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES LAMONT ANDERSON,

Defendant-Appellant.

UNPUBLISHED

January 22, 2004

No. 241769

Huron Circuit Court

LC No. 02-004208-FH

Before: Hoekstra, P.J., and Sawyer and Gage, JJ.

PER CURIAM.

Defendant appeals as of right his sentence following his bench trial conviction of delivery of less than fifty grams of a schedule-two controlled substance, MCL 333.7401(2)(a)(iv), for which he was sentenced to three to twenty years' imprisonment. We affirm defendant's conviction but remand for resentencing.

Defendant first challenges the court's departure from the guidelines' recommended minimum sentence of ten to twenty-three months' imprisonment. Departure from the statutory sentencing guidelines is permitted if the sentencing court articulates on the record a substantial and compelling reason to depart. MCL 769.34(3). However, if the sentencing court did not have substantial and compelling reasons to depart, we must remand for resentencing. MCL 769.34(11).

In the instant case, the sentencing court proffered three reasons on the record for departing from the guidelines. Defendant argues that these reasons were not substantial and compelling. We agree in part and disagree in part.

First, the sentencing court reasoned that departure was appropriate because it had sentenced other individuals convicted of the same offense as defendant to longer minimum sentences. However, a factor to consider when determining if a proffered reason warrants departure is whether it is " 'of considerable worth.' " *People v Babcock*, 469 Mich 247, 258, 267, 269; 666 NW2d 231 (2003) (citation omitted). Because the Legislature intended that the statutory sentencing guidelines apply to defendant's sentence, MCL 769.34(2), and a clearly expressed statute must be enforced as written, *People v Libbett*, 251 Mich App 353, 365-366; 650 NW2d 407 (2002), the court could not justify a departure by referring to sentences imposed before enactment of the statutory sentencing guidelines. *Id.*

Second, the sentencing court reasoned that departure was appropriate because defendant had two previous felony convictions for delivery of less than fifty grams of cocaine. A sentencing court cannot depart if its reason for departure has already been considered by the guidelines, unless the court finds that the reason was given inadequate or disproportionate weight. MCL 769.34(3)(b). Here, defendant's previous convictions were considered by the guidelines through prior record variable one (PRV 1). MCL 777.13; MCL 777.51. However, defendant's inability to conform his conduct to the law was not considered by the sentencing guidelines when determining his minimum sentence. MCL 777.31-33; MCL 777.42-45; MCL 777.49; MCL 777.49a; MCL 777.51-.57. Thus, because the trial court reasonably concluded that this reason was given inadequate or disproportionate consideration by the sentencing guidelines, it was a valid reason for departure.

Third, and finally, the sentencing court reasoned that departure was appropriate because MCL 333.7413(2) might make the statutory sentencing guidelines inapplicable. Sentences for drug offenses are addressed by both the controlled substance act, MCL 333.7101 *et seq.*, and the statutory sentencing guidelines, MCL 777.1 *et seq.* *People v Izarraras-Placante*, 246 Mich App 490, 498; 633 NW2d 18 (2001). "Statutes that relate to the same subject or share a common purpose are 'in pari materia' [and] must be read as one law, even if they contain no reference to one another and were enacted on different dates." *Id.* A statutory construction that avoids conflict should control. *Id.* at 498.

The statutory sentencing guidelines provide that a sentencing court shall impose a minimum sentence outside the statutory guidelines range if another statute mandates a minimum sentence. MCL 769.34(2)(a). Nevertheless, MCL 333.7413(2) provides that a defendant convicted of a subsequent controlled substance violation *may* be imprisoned for twice the amount normally authorized. The statute's use of the word "may" indicates that it is discretionary. *People v Brown*, 249 Mich App 382, 386; 642 NW2d 382 (2002). Thus, because MCL 333.7413(2) is discretionary, and the statutory guidelines only authorize departure for *mandatory* sentences, this indicates that MCL 333.7413(2) does not mandate a departure from the statutory guidelines.

In addition, MCL 777.18 indicates that it applies to subsequent controlled substances violations, and MCL 777.21(4) provides for sentence calculation for an offense described in MCL 777.18, and does not mention enhancement for repeated convictions. In contrast, MCL 777.21(3), provides for enhancement of sentences for repeated convictions. Where a provision included in one part of a statute is omitted from another part, the omission is construed as intentional. *People v Rahilly*, 247 Mich App 108, 112; 635 NW2d 227 (2001). This indicates the Legislature's intent to preclude enhancement for subsequent violations under MCL 333.7413(2).

Because not all of the sentencing court's reasons for departure were substantial and compelling, and it is unclear whether the court would have departed to the same extent solely because of the substantial and compelling reason it did articulate, this case must be remanded to the sentencing court for "resentencing or rearticulation of its substantial and compelling reasons to justify its departure." *Babcock, supra* at 260-261.

Defendant also contends that he was deprived of effective assistance of counsel because his trial counsel failed to raise an entrapment defense. We disagree. Review of unpreserved

claims of ineffective assistance of counsel is limited to the errors “apparent on the record,” *People v Darden*, 230 Mich App 597, 604; 585 NW2d 27 (1998), and those errors are reviewed for plain error, *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

To establish ineffective assistance of counsel, “a defendant must show that [trial] counsel’s performance fell below an objective standard of reasonableness” and that he was prejudiced by trial counsel’s representation. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). However, there is a strong presumption that trial counsel’s assistance was trial strategy, which a defendant must overcome. *People v Avant*, 235 Mich App 499, 507-508; 597 NW2d 864 (1999). Here, counsel’s trial strategy was that defendant was innocent. This Court does not substitute its judgment for counsel’s judgment regarding trial strategy.” *People v Kevorkian*, 248 Mich App 373, 414; 636 NW2d 291 (2001). Although counsel’s trial strategy ultimately failed, it did not constitute ineffective assistance of counsel. *Id.* at 414-415. Further, an entrapment defense would have been unsuccessful because defendant was not entrapped; thus, defendant has failed to show ineffective assistance of counsel. *People v Maleski*, 220 Mich App 518, 523-524; 560 NW2d 71 (1996).

Affirmed, but remanded for resentencing. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Hilda R. Gage