

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EUGENE ELLIS QUERRY,

Defendant-Appellant.

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UNPUBLISHED  
February 28, 2006

No. 257038  
Hillsdale Circuit Court  
LC No. 02-269659-FH

Before: Cooper, P.J., and Jansen and Markey, JJ.

MEMORANDUM.

Defendant appeals by delayed leave granted the sentence that the trial court imposed following his plea of guilty of a probation violation. In 2002, defendant pled guilty of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(ii), and was sentenced to a nine-month jail term and placed on probation for 60 months. Following the probation violation, he was sentenced to 56 to 84 months in prison on his original conviction. We vacate defendant's sentence and remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the trial court erred when it failed to sentence him within the sentencing guidelines for his original offense, or, in the alternative, that the court failed to provide substantial and compelling reasons for a guidelines departure. Defendant is correct. In *People v Hendrick*, 261 Mich App 673, 676-679; 683 NW2d 218 (2004), aff'd in part and rev'd in part 472 Mich 555; 697 NW2d 511 (2005), this Court held that, for certain felonies committed after January 1, 1999, the legislative sentencing guidelines apply to sentences imposed after a probation violation. *Id.* at 675.

Our Supreme Court affirmed, noting that "the language of MCL 769.34(2) is clear and lists no exceptions." *People v Hendrick*, 472 Mich 555, 560; 697 NW2d 511 (2005). This Court has also held that *Hendrick, supra*, 261 Mich App 673, applies retroactively to defendants who committed crimes after January 1, 1999, but who were sentenced for a probation violation before May 2004, when this Court issued its decision in *Hendrick, supra*. *People v Parker*, 267 Mich App 319, 323-328; 704 NW2d 734 (2005).

In the instant case, the trial court provided various reasons for its sentencing decision, including the large amount of marijuana involved, defendant's failure to benefit from drug treatment, his continued use of marijuana while on probation, and the need to deter him from his

continued criminal behavior. These factors could arguably support a sentencing guidelines departure. The trial court could properly take into account defendant's actions during the period of probation in deciding whether there was a substantial and compelling reason to depart. *Hendrick, supra* at 562-563. However, the trial court failed to recognize that the legislative sentencing guidelines applied during resentencing. In addition, the trial court did not appear to consider whether its stated reasons would constitute proper departure factors, or whether they justified the extent of the departure. *People v Babcock*, 469 Mich 247, 257-259; 666 NW2d 231 (2003).

Accordingly, we vacate defendant's sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Jessica R. Cooper

/s/ Kathleen Jansen

/s/ Jane E. Markey