

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JEFFREY LEE-DEVINE MARSH,

Defendant-Appellee.

UNPUBLISHED

March 30, 2006

No. 259269

Ingham Circuit Court

LC No. 03-000715-FH

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Plaintiff appeals by delayed leave granted the sentence of three to ten years in prison imposed on defendant's plea-based conviction of possession with intent to deliver 50 grams or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii). We vacate defendant's sentence and remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded guilty to delivery of 50 grams or more but less than 225 grams of cocaine in return for dismissal of charges of possession with intent to deliver 225 grams or more but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii), second or subsequent offense, MCL 333.7413(2), and possession of a firearm during the commission of a felony, MCL 750.227b. On the date of the offense, October 17, 2002, the crime of delivery of 50 grams or more but less than 225 grams of cocaine carried a mandatory penalty of not less than ten or more than 20 years in prison.¹

At the time defendant was sentenced, MCL 333.7401(4) authorized the trial court to depart downward from the minimum term mandated by MCL 333.7401(2)(a)(iii) if the trial court found on the record that substantial and compelling reasons existed to do so. In return for defendant's plea, plaintiff agreed not to appeal a downward departure that did not exceed two years. At sentencing, the trial court found that substantial and compelling reasons existed to

¹ 2002 PA 665, effective March 1, 2003, amended MCL 333.7401 to establish an entirely new offense and sentencing scheme. The amended version of MCL 333.7401 applies only to offenses committed on or after March 1, 2003. *People v Thomas*, 260 Mich App 450, 458-459; 678 NW2d 631 (2004).

depart downward from the mandated ten-year minimum sentence. The trial court noted that defendant would be eligible for parole in five years,² and reasoned that in reality, it was departing downward from a five-year mandated minimum sentence. In addition, the trial court noted that defendant had completed 18 months of probation without committing new offenses, that he regularly tested negative for narcotics, that he was involved in therapy, that he was attending school, and that he had a supportive family. The trial court asserted that this drastic change in defendant's lifestyle warranted a downward departure from the mandated minimum term. The trial court sentenced defendant to three to 20 years in prison. The trial court granted plaintiff's motion for resentencing, but declined to change the sentence.

To constitute a substantial and compelling reason for departing from the guidelines, a reason must be objective and verifiable, must irresistibly attract the attention of the court, and must be of considerable worth in deciding the length of the sentence. To be objective and verifiable, the factors must be actions or occurrences external to the mind, and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The reason for the departure must be articulated by the trial court on the record. MCL 769.34(3). A substantial and compelling reason articulated by a trial court to merit a departure from the sentencing guidelines must justify the particular departure at issue. If the stated reasons are partially invalid and we cannot ascertain whether the trial court would have departed to the same extent regardless of the invalid factors, remand for resentencing or rearticulation is necessary. *People v Babcock*, 469 Mich 247, 257-261; 666 NW2d 231 (2003).

In determining whether a sufficient basis exists to depart from the guidelines, the trial court must ascertain whether the departure would result in a sentence more proportionate to the seriousness of the offense and the defendant's criminal history than would adherence to the guidelines range. In addition, in departing from the guidelines, the trial court must determine whether the particular departure is proportionate to the circumstances of the offense and the offender. *Id.* at 262-264; *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

We review the determination of the existence of a factor for departing from the guidelines for clear error, the determination that a factor is objective and verifiable for error, and the determination that objective and verifiable factors merited departure from the guidelines for an abuse of discretion. A trial court may depart from the guidelines for nondiscriminatory reasons based on an offense or offender characteristic which was already considered in calculating the guidelines range only if the trial court concludes that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Babcock, supra* at 265-269. In determining whether substantial and compelling reasons existed to merit departure from the sentencing guidelines, an appellate court must give appropriate deference to the trial court's sentencing determination. *Id.* at 270.

We vacate defendant's sentence and remand this case to the trial court for resentencing. The trial court cited the likelihood that defendant would be paroled in five years, defendant's

² See MCL 791.234(10).

family support, and defendant's drastic change in his lifestyle as reasons for departing downward from the mandated minimum term. Defendant's eligibility for parole after serving five years is objective and can be verified; however, the conclusion that he is likely to receive parole at that time is entirely speculative. Speculation cannot constitute an objective and verifiable reason for departing from the guidelines. *Abramski, supra*. Defendant's family support is an objective and verifiable factor that was appropriate for consideration by the trial court. *People v Dean*, 462 Mich 1, 7; 609 NW2d 557 (2000). A drastic change in lifestyle can constitute a substantial and compelling reason for departing from the guidelines. *People v Hellis*, 211 Mich App 634; 536 NW2d 587 (1995). The trial court seemed to base its decision to depart downward and sentence defendant to a minimum term of three years in large part on its assumption that defendant would be paroled in five years. The trial court based its decision to depart downward from the guidelines on both valid and invalid factors. From the record, we cannot ascertain whether the trial court would have departed to the same extent had it relied only on valid factors. Under the circumstances, resentencing is required. *Babcock, supra* at 260-261.

We vacate defendant's sentence and remand this matter for resentencing. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra