

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JEFFREY LEE-DEVINE MARSH,

Defendant-Appellee.

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UNPUBLISHED

February 12, 2008

No. 274995

Ingham Circuit Court

LC No. 03-000715-FH

Before: Talbot, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Following a remand by this Court, the trial court resentenced defendant to 36 months to 20 years in prison for his violation of a former version of MCL 333.7401(2)(a)(iii), possession with intent to deliver 50 grams or more but less than 225 grams of cocaine. The sentence constituted a downward departure from a generally mandatory minimum sentence of ten years. Plaintiff appeals by leave granted the trial court's order denying its motion for resentencing. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff argues that the trial court abused its discretion by granting a seven-year downward departure from the generally mandatory minimum sentence, and thereby imposing a disproportionately lenient sentence.<sup>1</sup> We disagree.

The former MCL 333.7401(4) allowed a trial court to depart from the ten-year minimum sentence generally required for a violation of the former MCL 333.7401(2)(a)(iii) "if the court finds on the record that there are substantial and compelling reasons to do so." In the landmark case of *People v Fields*, 448 Mich 58; 528 NW2d 176 (1995), our Supreme Court considered the meaning of the requirement of the former MCL 333.7401(4) that such a downward departure only be for substantial and compelling reasons. The Court held that only objective and verifiable factors could be used to judge whether substantial and compelling reasons exist for a downward departure. *Id.* at 62. The Court further concluded that "the reasons justifying departure should

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<sup>1</sup> We note that plaintiff's brief on appeal is somewhat unclear as to whether plaintiff is primarily arguing that the trial court abused its discretion by granting a downward departure at all, or is only challenging the extent of the departure. We have analyzed this case as if plaintiff is primarily arguing that the trial court should not have granted a downward departure at all.

‘keenly’ or ‘irresistibly’ grab our attention, and we should recognize them as being ‘of considerable worth’ in deciding the length of a sentence.” *Id.* at 67. Accordingly, substantial and compelling reasons for a downward departure “exist only in exceptional cases.” *Id.* at 68.

We review the existence or nonexistence of a particular factor relied on by the trial court in finding substantial and compelling reasons for a downward departure for clear error. *Id.* at 77. A determination whether a factor is objective and verifiable is reviewed de novo. *Id.* at 77-78. A trial court’s determination that objective and verifiable factors constitute substantial and compelling reasons for a downward departure is reviewed for an abuse of discretion. *Id.* at 78.

In *People v Hellis*, 211 Mich App 634, 637; 536 NW2d 587 (1995),<sup>2</sup> the defendant was convicted of possession with intent to deliver 50 grams or more but less than 225 grams of cocaine in violation of the former MCL 333.7401(2)(a)(iii). The trial court departed downward and imposed a minimum prison sentence of four years. *Id.* at 638. The prosecution argued that this downward departure was disproportionately lenient where the generally mandatory minimum sentence was ten years. *Id.* at 650. However, this Court affirmed the sentence, stating:

In the present case, the trial court departed from the statutory minimum sentence primarily because of what it described as “the drastic change in [defendant’s] lifestyle” after his arrest. This “drastic change” included an eighteen-day inpatient drug treatment program, weekly outpatient sessions, extensive community service, and defendant’s apparent abstention from controlled substances. Because these findings by the trial court were objectively made and verified, we find no clear error in these factual findings. [*Fields, supra* at] 77.

After reviewing the factual findings of the sentencing court for clear error, as we have done, we must determine whether the lower court abused its discretion in imposing the sentence that it did. *Id.*, p 78. *Fields* explicitly authorizes consideration of postarrest factors such as defendant’s activities in the present case. *Id.*, p 77. While we would question to some extent the weight ascribed by the trial court to defendant’s ostensible transformation (defendant’s history of drug-related criminal activity dated back some fourteen years, his postreformation period some ten months), our review is not de novo. Accordingly, we decline to find an abuse of discretion where the trial court’s justifications were based on objective and verifiable factors and represented a legitimate exercise of its discretion. [*Hellis, supra* at 650-651.]

We conclude that the trial court did not abuse its discretion in undertaking a downward departure in the present case. Similar to the defendant in *Hellis, supra*, defendant in this case appeared to have abstained from controlled substances for a substantial length of time following

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<sup>2</sup> All citations to *Hellis, supra*, are either to the introductory portion of Judge O’Connell’s lead opinion, which sets forth the basic facts and trial court proceedings, or to Part III of the lead opinion, which addresses the sentencing issue instructive to the instant case. Judges Jansen and Holbrook concurred in Part III. *Hellis, supra* at 651 (Jansen, J.), 658 (Holbrook, J.). Thus, the relevant holdings in Part III constituted part of a majority opinion of this Court.

his arrest for the present offenses. Further, defendant's conduct in obtaining a GED and becoming a community college student before being sentenced to prison, and in leading an Alcoholics Anonymous (AA) group and receiving no misconduct tickets while in prison, are objective and verifiable factors that are indicative of a substantial or "drastic" change in lifestyle.

Plaintiff argues that *Hellis, supra*, was wrongly decided.<sup>3</sup> Initially, plaintiff argues that *Hellis, supra*, was wrongly decided because law-abiding behavior is already accounted for by the sentencing guidelines. Plaintiff cites language from *People v Young*, 276 Mich App 446, 454-455; \_\_\_ NW2d \_\_\_ (2007), essentially indicating that a trial court's ability to depart from the sentencing guidelines based on a defendant's prior record or lack thereof is limited because a prior record is considered by sentencing guidelines variables. However, this argument related to the sentencing guidelines is misplaced because the issue raised by plaintiff does not involve downward departure from the sentencing guidelines, but rather from a generally mandatory minimum sentence for a drug-related crime under the former MCL 333.7401(2)(a)(iii). Unlike with the sentencing guidelines, no set of variables was associated with the former MCL 333.7401(2)(a)(iii) to guide a trial court's decision whether to depart from its generally mandatory minimum sentence. Accordingly, that a defendant's law abiding conduct might be accounted for in the variables of the sentencing guidelines is simply immaterial to whether that conduct is properly considered by a trial court in deciding whether to depart from a generally mandatory minimum sentence under the former MCL 333.7401(2)(a)(iii).

Plaintiff also argues, in cursory fashion, that *Hellis, supra*, conflicts with *People v Abramski*, 257 Mich App 71; 665 NW2d 501 (2003), and *People v Poppa*, 193 Mich App 184; 483 NW2d 667 (1992). We disagree. The only sentencing issue in *Abramski, supra*, involved this Court affirming an upward departure from the sentencing guidelines for fleeing and eluding a police officer. *Abramski, supra* at 73-75. This is clearly a distinct issue from the downward departure from the generally mandatory minimum sentence for a drug-related crime in *Hellis, supra*. There is no conflict between *Hellis, supra*, and *Abramski, supra*. In *Poppa, supra*, the trial court sentenced the defendant to the generally mandatory minimum sentence for a violation of the former MCL 333.7401(2)(a)(i) consisting of delivery of over 650 grams of cocaine. This Court declined to find an abuse of discretion in that regard. *Poppa, supra* at 189. *Poppa, supra*, involved a circumstance in which the trial court declined to depart from a generally mandatory minimum sentence, while *Hellis, supra*, involved a trial court's affirmative decision to undertake such a departure. Plaintiff has not established that *Hellis, supra*, was wrongly decided.

Plaintiff argues that defendant's behavior while on probation was not exceptional, citing United States Department of Justice data indicating that most drug offenders make all court appearances while on pretrial release and are not rearrested during that period, and similarly that most probationers successfully complete probation. However, the trial court did not rely only on defendant's successful completion of a term of probation without being rearrested for controlled substance offenses, but also relied on defendant's additional positive actions related to furthering

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<sup>3</sup> We note that we are required by MCR 7.215(J)(1) to follow the relevant holdings in *Hellis, supra*. Nevertheless, as we will explain, plaintiff has not presented a convincing argument that *Hellis, supra*, was wrongly decided.

his education, and positive conduct while in prison, including leading an AA group and remaining free of misconduct tickets. The *Fields* Court expressly held that post-arrest factors are properly considered in determining whether there are substantial and compelling reasons for a downward departure from a generally mandatory minimum sentence for a drug-related crime. *Fields, supra* at 77. Further, the Court approved of an earlier decision of this Court affirming such a departure based on the defendant's lack of a prior record and additional positive factors. *Id.* at 78. Accordingly, it is apparent that relevant case law allows consideration of a defendant's apparent law abiding conduct over a period of time, combined with other positive factors, as a basis for a downward departure from a generally mandatory minimum sentence for a drug-related crime regardless of the statistical data cited by plaintiff.

Plaintiff further argues that the trial court abused its discretion by reducing the generally mandatory ten-year minimum sentence by seven years to three years, resulting in a disproportionately lenient sentence. Plaintiff asserts that defendant's criminal record and prior probation violations did not warrant such a departure. However, this past history was largely associated with illicit drugs, and could reasonably be viewed, as it apparently was by the trial court, as reflecting that defendant's successful conduct while on probation and awaiting disposition of the present case constituted a "drastic change," *Hellis, supra* at 634, from defendant's prior lifestyle.

Indeed, in *Hellis, supra*, this Court affirmed a downward departure from the generally mandated ten-year minimum sentence for delivery of 50 grams or more but less than 225 grams of cocaine to a four-year minimum sentence. *Hellis, supra* at 650-651. Thus, the downward departure from ten years to three years in this case is only a modestly more substantial departure than that in *Hellis, supra*. Further, unlike in *Hellis, supra*, because this case involved a remand for resentencing, the trial court had the benefit of knowing of defendant's continued positive prison record. These additional positive factors reasonably supported the trial court departing to the degree of a three-year minimum sentence.

In *People v Babcock*, 469 Mich 247, 263; 666 NW2d 231 (2003), our Supreme Court stated, "The premise of our system of criminal justice is that, everything else being equal, the more egregious the offense, *and the more recidivist the criminal, the greater the punishment*" (emphasis added). It follows that where there are substantial indications a defendant is less likely to be recidivist, as in this case with the evidence of defendant's changed lifestyle and positive institutional record, this is properly considered as a substantial mitigating factor in sentencing. Accordingly, the trial court did not abuse its discretion by imposing a disproportionately lenient sentence.

Affirmed.

/s/ Michael J. Talbot  
/s/ Mark J. Cavanagh  
/s/ Brian K. Zahra