

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

GERARDO MUNIZ,

Defendant-Appellee.

UNPUBLISHED

October 13, 2005

No. 255564

Saginaw Circuit Court

LC No. 02-022152-FH

Before: Talbot, P.J., and White and Wilder, JJ.

PER CURIAM.

Plaintiff appeals by delayed leave granted from the sentence of five to twenty years imposed on defendant's plea-based conviction of delivery of fifty grams or more but less than 225 grams of heroin, MCL 333.7401(2)(a)(iii). We vacate that sentence and remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with delivery of fifty grams or more but less than 225 grams of heroin (Count I), possession with intent to deliver less than fifty grams of heroin, MCL 333.7401(2)(a)(iv) (Count II), and conspiracy to deliver fifty grams or more but less than 225 grams of heroin, MCL 333.7401(2)(a)(iii) and MCL 750.157a (Count III). Plaintiff also charged defendant as a third habitual offender, MCL 769.11. The offenses occurred on August 27, 2002. Under the statutory sentencing scheme as it existed at the time of the offenses, defendant faced consecutive mandatory sentences of ten to twenty years for Count I, one to twenty years for Count II, and ten to twenty years for Count III. Defendant's status as a third habitual offender made his potential maximum sentence forty years for each offense.

2002 PA 665 and 2002 PA 670, effective March 1, 2003, amended MCL 333.7401 to establish an entirely new offense and sentencing scheme. The amendments eliminated mandatory minimum sentences for certain offenses, and made consecutive sentencing discretionary with the trial court. Currently, the offense of delivery of fifty grams or more but less than 450 grams of heroin is punishable by imprisonment for not more than twenty years or

by a fine of \$250,000, or both. MCL 333.7401(2)(a)(iii).¹ MCL 791.234(12) was amended by 2002 PA 670 to provide that an individual convicted of violating MCL 333.7401(2)(a)(iii) before the effective date of 2002 PA 665 (i.e., March 1, 2003) is eligible for parole after serving one-half of the minimum term imposed for that violation or five years, whichever is less.

Defendant pleaded guilty to possession of fifty grams or more but less than 225 grams of heroin and possession with intent to deliver less than fifty grams of heroin in return for the prosecutor's agreement to dismiss the conspiracy charge. The trial court declined to impose the minimum terms mandated by the version of MCL 333.7401 in effect at the time defendant committed the offenses, and sentenced him to concurrent terms of five to twenty years in prison. The trial court did not enhance defendant's sentences pursuant to MCL 769.11.

We vacate the sentence of five to twenty years imposed on defendant's conviction of delivery of fifty grams or more but less than 225 grams of heroin, and remand for resentencing in accordance with this opinion. The amended statutory and sentencing scheme in 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). The trial court was required to sentence defendant under the version of MCL 333.7401 in effect at the time defendant committed the offenses.² Furthermore, because consecutive sentences were required under the version of MCL 333.7401 in effect at the time defendant committed the offenses, MCL 333.7401(3), the trial court was required to impose consecutive rather than concurrent sentences in this case. *People v Doxey*, 263 Mich App 115, 122-123; 687 NW2d 360 (2004).

Vacated and remanded. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Helene N. White
/s/ Kurtis T. Wilder

¹ In *People v Muniz*, 259 Mich App 176, 178-180; 675 NW2d 597 (2003), another panel of this Court reversed the trial court's decision granting defendant's petition to be tried under the amended version of MCL 333.7401.

² Defendant is entitled to argue, as he did at the sentencing hearing, that substantial and compelling reasons exist to sentence him to a minimum term below that mandated by statute. MCL 333.7401(4).