

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

RYAN CHRISTOPHER BEALS,

Defendant-Appellee.

UNPUBLISHED

January 28, 2010

No. 289413

Oakland Circuit Court

LC No. 2008-219992-FH

Before: Donofrio, P.J., and Meter and Murray, JJ.

PER CURIAM.

Defendant pleaded guilty to delivery of ecstasy, MCL 333.7401(2)(b)(i), two counts of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), two counts of delivery of 50 grams or more but less than 450 grams of cocaine, MCL 333.7401(2)(a)(iii), and one count of possession of less than 25 grams of a controlled substance, MCL 333.7403(2)(a)(v). Defendant was sentenced to concurrent prison terms of five years, six months to 20 years on all the delivery convictions, and to 32 to 48 months on the possession conviction. Plaintiff appeals by delayed leave granted, challenging the sentences imposed on the delivery convictions. We vacate those sentences and remand for resentencing on those convictions. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The sentencing guidelines range for defendant's convictions of delivery of 50 grams or more but less than 450 grams of cocaine conviction was 99 to 160 months. The trial court departed downward, sentencing defendant to terms of 66 months to 20 years. In doing so, the trial court noted that defendant had pleaded guilty, that defendant was a drug dealer but also an addict, that there were "some grounds to believe that [he] would go straight," and that defendant used the proceeds from drug sales to feed his own drug habit.

The prosecutor argues that the trial court's stated reasons for departing from the guidelines were not substantial and compelling. We agree.

Under MCL 769.34(3), a minimum sentence that departs from the sentencing guidelines recommendation requires a substantial and compelling reason articulated on the record. In interpreting this statutory requirement, the Court has concluded that the reasons relied on must be objective and verifiable. They must be of considerable worth in determining the length of the sentence and

should keenly or irresistibly grab the court's attention. Substantial and compelling reasons for departure exist only in exceptional cases. "In determining whether a sufficient basis exists to justify a departure, the principle of proportionality . . . defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed." For a departure to be justified, the minimum sentence imposed must be proportionate to the defendant's conduct and prior criminal history. [*People v Smith*, 482 Mich 292, 299-300; 754 NW2d 284 (2008) (footnotes omitted), quoting *People v Babcock*, 469 Mich 247, 257-258, 262-264; 666 NW2d 231 (2003).]

"The phrase 'objective and verifiable' has been defined to mean that the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed." *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

In *Smith*, 482 Mich at 300, citing *Babcock*, 469 Mich at 273-274, our Supreme Court set forth the standard of review for the above determinations:

On appeal, courts review the reasons given for a departure for clear error. The conclusion that a reason is objective and verifiable is reviewed as a matter of law. Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure. A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes. [Footnotes omitted.]

Preliminarily, defendant argues that the trial court also took sentence enhancement into account at sentencing. However, the trial court did not state this as a reason for departure. We note that a defendant's enhanced intent can be a basis for departure if it is established as a substantial and compelling reason under the terms of *Babcock*. See *People v Claypool*, 470 Mich 715, 726; 684 NW2d 278 (2004). We further note that the trial court alluded to defendant's strong family ties. While this could be a basis for departure, see *People v Harvey*, 203 Mich App 445, 448; 513 NW2d 185 (1994), it was not expressly stated as a reason for the departure.¹

Regarding the stated reasons for departure, we conclude that trafficking in drugs for the sole purpose of supporting a drug habit, as opposed to trafficking to enable more nefarious pursuits, is not a substantial and compelling reason for a downward departure. We acknowledge some evidence to support the proposition that defendant's primary purpose for selling drugs was to enable his own use. However, we note that this evidence is not capable of being verified. Moreover, we agree with the prosecutor that such a reason for drug trafficking would not be "exceptional." In fact, it would seem commonplace. As such, this is not a reason for departure

¹ We note that the letter from defendant's father provided significant evidence of strong family support, which if specifically relied upon by the trial court could provide some support for a deviation.

that would “keenly or irresistibly grab the court’s attention.” Similarly, the fact that defendant used drugs was simply not “exceptional.”

The second reason for the departure, the belief that defendant would likely “go straight,” is a subjective prediction. Moreover, as a future event, it is clearly not verifiable. This was not a valid reason for departure.

The fact that defendant pleaded guilty is objective and verifiable but it is by no means “exceptional.” In addition, there is nothing about a guilty plea that would “keenly or irresistibly grab the court’s attention.” Accordingly, the trial court abused its discretion in finding that this was a substantial and compelling reason for departure.

The *Babcock* Court stated:

MCL 769.34(11) clearly states that if “the court of appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, the court shall remand the matter to the sentencing judge or another trial court judge for resentencing” “Find” is defined as: “to discover or perceive after consideration” *Random House Webster's College Dictionary* (1991). Therefore, if, after consideration, the Court of Appeals discovers or perceives that the trial court did not have a substantial and compelling reason to justify its departure, the Court must remand the case for resentencing. [*Babcock*, 469 Mich at 266.]

The trial court’s articulated reasons did not constitute substantial and compelling reasons for departing from the guidelines when imposing sentence for defendant’s delivery convictions. We vacate those sentences and remand for resentencing on those convictions. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Patrick M. Meter
/s/ Christopher M. Murray