STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v ROBERT VICTOR MICHIELUTTI, Defendant-Appellant.	FOR PUBLICATION May 3, 2005 9:20 a.m. No. 251706 Macomb Circuit Court LC No. 02-001008-FH Official Reported Version

Before: Murray, P.J., and Markey and O'Connell, JJ.

MURRAY, P.J. (*concurring in part and dissenting in part*).

In addressing the issue raised and decided below and now raised on appeal by defendant, the majority correctly concludes that the trial court erred in failing to address several of the objective and verifiable factors for a downward sentence departure presented to it by defendant. Those factors are defendant's age, lack of prior record, work history, and family support. See *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995). Therefore, I concur in the need to remand this case for resentencing so that the trial court can address those factors raised by defendant.

However, I part company with my colleagues in their sua sponte initiative to create new standards for use by trial courts when considering sentencing departures. With all due respect to the majority, there are significant procedural reasons why their discussion on this issue is premature.

As any casual reader of the Michigan Appeals Reports will recognize, we quite frequently inform parties that we will not address an issue not raised or decided by the trial court, on the basis that it is not properly preserved. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992); *People v Stacy*, 193 Mich App 19, 28; 484 NW2d 675 (1992). We are likewise disinclined to review issues that are actually raised by the parties, but not adequately briefed. See, e.g., *Steward v Panek*, 251 Mich App 546, 558; 652 NW2d 232 (2002). The general rationale supporting these prudent rules of appellate procedure is that it is best to decide issues with the benefit of briefing and argument. *Bradley v Saranac Bd of Ed*, 455 Mich 285, 302-303; 565 NW2d 650 (1997). Although we will, at times, decide a legal issue when the facts necessary to its resolution are properly before us, that is usually invoked when a party raises the issue to this Court as an alternative means to affirm. See *Spruytte v Owens*, 190 Mich App 127, 132; 475 NW2d 382 (1991).

Here, defendant did not argue to the trial court that a change in the law was a basis to support a downward departure, and he has not raised that issue before this Court. Thus, the majority has taken upon itself to raise an issue that has never been raised in either court[1] and that addresses an issue that has not been decided by any appellate court of this state. This is contrary to the policies of appellate procedure noted above, and it is imprudent to overlook those cases.

Additionally, because we have unanimously concluded that resentencing is required on the basis of the trial court's failure to consider all defendant's articulated objective and verifiable reasons for departure, *Fields*, *supra*, any further discussion is unnecessary to a decision, and therefore dicta. *Mitchell v Detroit*, 264 Mich App 37, 44; 689 NW2d 239 (2004). For these reasons, I would not discuss or decide the issue whether a change in law is a factor to be utilized by a trial court in departing from a sentencing guideline, as that decision is better left to a case in which the Court has benefited from full advocacy.[2]

No appellate court in this state has yet to hold that a change in the law—which is obviously objective and verifiable—can be considered in determining whether a defendant's sentence should deviate below (or above) the sentencing guidelines. I advocate against creating this questionable new rule of law in a case in which the issue was neither raised nor decided at any level.

/s/ Christopher M. Murray

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[1] Of course, there are limited circumstances under which a court must raise issues sua sponte, such as the issue of subject-matter jurisdiction. *In re Fraser Estate*, 288 Mich 392, 394; 285 NW 1 (1939).

[2] It is also quite possible that the majority has erred in its conclusion. We have unequivocally held that the amendments to MCL 333.7401 do not apply retroactively. *People v Thomas*, 260 Mich App 450, 458-459; 678 NW2d 631 (2004). Thus, in *Thomas*, the defendant, who was sentenced on April 24, 2002, could not benefit from the amended statute effective March 1, 2003. So too here. As the majority notes, *Thomas* is binding and precludes application of the amended statute to defendant, who was sentenced on September 9, 2002. Such a conclusion is also consistent with MCL 769.34(2), which provides generally that a defendant is to be sentenced under the law in effect on the date of his offense. *People v Dailey*, 469 Mich 1019 (2004).

The majority's direction to the trial court to consider this change of law if it determines that other factors point to a downward departure seems contrary to this law. If an amendment to a sentencing statute is not retroactive, how can a court be allowed to consider the amendment when sentencing? If the amendment is not retroactive, it does not apply to *any* circumstances occurring before its enactment date.