

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KYLE JARRETT,

Defendant-Appellee.

UNPUBLISHED

March 13, 1998

No. 188476

Oakland Circuit Court

LC No. 88-087048-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KYLE S. JARRETT,

Defendant-Appellant.

No. 190209

Oakland Circuit Court

LC No. 88-087048-FH

Before: MacKenzie, P.J., and Holbrook, Jr. and Saad, JJ.

PER CURIAM.

In Docket No. 188476, the prosecutor appeals by leave granted from an order granting defendant's motion for relief from judgment. The order granted defendant's request for resentencing on the basis of recent case law "clarifying" the "substantial and compelling" language of MCL 333.7401(4); MSA 14.15(7401)(4). In Docket No. 190209, defendant appeals as of right from the trial court's decision on resentencing to impose the same ten- to thirty-year prison sentences that were imposed originally. We reverse the order granting defendant's motion for relief from judgment, vacate the September 25, 1995 judgment on resentencing, and reinstate defendant's original sentences pursuant to the October 20, 1988 judgment of sentence.

Defendant's postappeal motion for relief from judgment is reviewable in accordance with subchapter 6.500 of the Michigan Court Rules, addressing postappeal relief. MCR 6.501; *People v Kincade (On Remand)*, 206 Mich App 477, 482; 522 NW2d 880 (1994). Defendant's motion sought resentencing on the ground that a departure below the statutory ten-year minimum sentence, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii),¹ was warranted for substantial and compelling reasons. However, because this very issue had been decided against defendant in a previous appeal,² to be entitled to relief defendant was required to establish "that a retroactive change in the law has undermined the prior decision." MCR 6.508(D)(2).

Assuming, without deciding, that the decisions in *People v Downey*, 183 Mich App 405; 454 NW2d 235 (1990); *People v Krause*, 185 Mich App 353, 358-359; 460 NW2d 900 (1990); *People v Troncoso*, 187 Mich App 567, 577; 468 NW2d 287 (1991); *People v Windall Hill*, 192 Mich App 102; 480 NW2d 913 (1991); and *People v Fields*, 448 Mich 58; 528 NW2d 176 (1995) [hereafter the "subsequent decisions"] can be viewed as producing a retroactive change in the law with respect to the scope of departure permitted under § 7401(4), we conclude that the subsequent decisions do not undermine defendant's original sentences.

The primary import of the subsequent decisions was to clarify which factors may be considered in determining whether there are substantial and compelling reasons for departure under § 7401(4); read together the subsequent decisions lead to the holding that only objective and verifiable factors can be considered. See e.g., *Downey*, 183 Mich App at 415-417; *Krause*, 185 Mich App at 358-359; *Hill*, 192 Mich App at 105; *Fields*, 448 Mich at 68. The record here indicates that the original sentencing judge considered *all factors* that were presented to her for consideration, including factors that were subjective and incapable of verification. Because the subsequent decisions restricted the scope of factors that could be considered for purposes of § 7401(4), and because the original sentencing judge considered all factors that were presented by the defendant, the subsequent decisions cannot be viewed as undermining defendant's sentences in this respect.

A secondary purpose of the subsequent decisions was to provide guidance in determining whether a given factor or combination of factors constitutes a substantial and compelling basis for departure. In this regard, the decisions recognize that the Legislature, in choosing the words "substantial and compelling," intended departures to occur only in "exceptional" cases. See e.g., *Downey*, 183 Mich App at 416; *Krause*, 185 Mich App at 360; *Hill*, 192 Mich App at 118; and *Fields*, 448 Mich at 68. Here, the first sentencing judge correctly noted that grounds for departure under § 7401(4) must be both substantial and compelling. She further determined that all the grounds advanced by defendant constituted so-called "normal" sentencing issues and did not rise to the level of substantial and compelling. We find the first judge's analysis to be consistent with the subsequent appellate decisions on the subject and, accordingly, conclude that the subsequent decisions do not undermine defendant's original sentences.

We also reject defendant's claim, which the second judge apparently accepted, that an allegedly exemplary prison record supports defendant's request for relief in the form of resentencing. While a judge may consider an exemplary prison record at a properly convened resentencing, *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995), we find that defendant's prison record is

irrelevant for purposes of determining whether defendant is entitled to be resentenced in the first instance.

Because any alleged retroactive change in the law did not undermine defendant's original sentences here, defendant was not entitled to postappeal relief. MCR 6.508(D)(2). Accordingly, we reverse the order granting defendant's postappeal motion for relief from judgment (and thereby awarding defendant resentencing). Our resolution of this issue effectively renders moot defendant's appeal in Docket No. 190209. Because we conclude that the trial court was not authorized to proceed to resentencing, we vacate the trial court's September 25, 1995 judgment on resentencing and reinstate defendant's original sentences pursuant to the October 20, 1988 judgment of sentence.

Reversed in part and vacated in part.

/s/ Barbara B. MacKenzie
/s/ Donald L. Holbrook, Jr.
/s/ Henry William Saad

¹ After defendant committed the offenses in question, § 7401(2)(a)(ii) was amended to increase the statutory minimum sentence from ten to twenty years.

² *People v Jarrett*, unpublished opinion per curiam (C.A. No. 116003), issued 11/9/89.