STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant/Cross-Appellee,

v

ROGER DUANE WARDLAW,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
June 30, 1998

No. 197568
Oakland Circuit Court
LC No. 95-138712-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant/Cross-Appellee,

v

CHRISTOPHER DAVID WARDLAW,

Defendant-Appellee/Cross-Appellant.

No. 197570
Oakland Circuit Court
LC No. 95-138711-FH

Before: Jansen, P.J., and Kelly and Markey, JJ.

PER CURIAM.

Over plaintiff's objection, the trial court accepted defendants' *Cobbs* pleas.[1] Defendant Roger Wardlaw pleaded guilty to one count of conspiracy to deliver 225 to 649 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii); MCL 750.157a; MSA 28.354(1), two counts of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), three counts of delivery of between 50 and 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), one count of distribution of imitation controlled substance, MCL 333.7341(3), (8); MSA 14.15(7341)(3), (8), and to being an habitual offender, third offense, MCL 769.11; MSA 28.1083. His nephew, defendant Christopher Wardlaw pleaded guilty to one count of conspiracy to deliver 225 to 649 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii); MCL 750.157a; MSA 28.354(1), two counts of delivery of less than 50 grams of cocaine, MCL

333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and three counts of delivery of between 50 and 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii).

The sentencing court determined that there were substantial and compelling reasons to deviate from the mandatory minimum sentences, pursuant to MCL 333.7401(4); MSA 14.15(7401)(4), and sentenced Roger to consecutive sentences of eleven to sixty years' imprisonment for the conspiracy count, lifetime probation for each of the two counts involving delivery of less than 50 grams of cocaine, two to forty years' imprisonment for each of the three counts involving delivery of between 50 and 225 grams of cocaine, and one year in jail with credit for time served for the count concerning distribution of imitation controlled substance. The court also sentenced Christopher to consecutive sentences of four to thirty years' imprisonment for the conspiracy count, one to twenty years' imprisonment for each of the two counts concerning delivery of less than 50 grams, and two to twenty years' imprisonment for each of the three counts concerning delivery of between 50 and 225 grams. This Court granted the prosecutor's delayed applications for leave to appeal the sentences. Defendants also raise the issue of sentencing entrapment on cross-appeal. We vacate defendants' sentences and remand for resentencing.

This case arises out of a series of cocaine transactions between defendants and an undercover officer for the Oakland County Narcotics Enforcement Team. The officer completed six transactions with defendants, five of which involved two to three ounces of cocaine and one of which involved an imitation controlled substance.[2] On several occasions, in order to complete delivery of the cocaine, defendants requested the officer to pick up defendant Roger Wardlaw at one address and drive him to another address, where Roger would retrieve the cocaine from defendant Christopher Wardlaw and deliver it to the officer.

Plaintiff argues that the sentencing court abused its discretion by deviating from the mandatory minimum sentences for reasons that were neither "substantial nor compelling" nor "objective and verifiable" as required by the Michigan Supreme Court in *People v Fields*, 448 Mich 58, 67-69; 528 NW2d 176 (1995). Because the sentencing court considered inappropriate factors in conjunction with appropriate factors and failed to explain why any of the factors it identified satisfied the statutory standard of deviation from the mandatory minimum sentences, we remand the case for resentencing.

When reviewing a sentencing court's decision to depart from a mandatory minimum sentence,

> we hold that the existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. The determination that a particular factor is objective and verifiable should be reviewed by the appellate courts as a matter of law. A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion. [*Fields, supra* at 77-78; citations omitted.]

See also *People v Perry*, 216 Mich App 277, 280; 549 NW2d 42 (1996).

The Legislature has articulated mandatory minimum sentences for drug offenses in order to deter illegal drug dealing. *Dean v Dep't of Corrections,* 453 Mich 448, 455-456; 556 NW2d 458 (1996); *Fields, supra* at 67-68. As applied to the charges in the present case, the mandatory minimum sentence for Count I, conspiracy to deliver 225 to 649 grams of cocaine, is twenty years' imprisonment. MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii); MCL 750.157a; MSA 28.354(1). Counts III, VI, and VII, delivery of between 50 and 225 grams of cocaine, each carry a mandatory minimum sentence of ten years' imprisonment. MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). Delivery of less than 50 grams requires at least one year imprisonment or lifetime probation. MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Pursuant to MCL 333.7401(3); MSA 14.15(7401)(3), the sentences are consecutive. Thus, the prosecution argues that Roger should have been sentenced to at least 50 years' imprisonment and lifetime probation, in light of his habitual offender status, and Christopher should have also received fifty years and lifetime probation pursuant to these statutory minimum sentences.

MCL 333.7401(4); MSA 14.15(7401)(4) permits the court to depart from the minimum mandatory sentences when it finds on the record that there are "substantial and compelling reasons" to do so. In interpreting this provision, our Supreme Court has cautioned that substantial and compelling reasons exist only in *exceptional* cases but it is not impossible to so conclude. *Field, supra* at 68, 70 n 5.[3] The Court has also stated:

> While the creation of the authority to depart from mandatory minimums was intended to ameliorate the harsh consequences of automatic imposition of statutory minimums, it cannot be argued seriously that the Legislature intended to afford either trial judges or corrections officials unfettered discretion. [*Dean, supra* at 462.]

Thus, when determining whether substantial and compelling reasons exist to support downward departure, the sentencing court may only consider factors which are "objective and verifiable." *Fields, supra* at 62, 68-70.

The *Fields* Court stated that when evaluating whether substantial and compelling reasons exist to depart below the mandatory minimum sentence, the court should place particular emphasis on mitigating circumstances surrounding the offense. *Id*. at 76. The Court also articulated a nonexclusive list of factors that the sentencing court may consider when determining whether a downward deviation is warranted: (1) the defendant's prior record, (2) the defendant's age, (3) the defendant's work history, and (4) factors that arise after defendant's arrest, such as his cooperation with law enforcement officials. *Id.* at 76-77; *People v Johnson (On Remand),* 223 Mich App 170, 173; 566 NW2d 28 (1997). This Court has cautioned that given the Legislature's desire to ensure that offenders receive the prescribed sentences unless exceptional circumstances justify departure, "*Fields* does not authorize the mere listing of garden variety 'factors,' even objective and verifiable ones, as a means of complying with legislative intent." *Johnson, supra* at 173.

> Accordingly, we reemphasize that the simple iteration of objective and verifiable factors alone is insufficient to meet the statutory standard: the sentencing court must <u>also specifically articulate the reasons why the factors it identifies and relies upon collectively</u>

provide "substantial and compelling" reasons to except the case from the legislatively mandated sentencing regime. [*Id.* at 173-174; emphasis added.]

In Christopher's case, the sentencing court cited the following factors as support for its decision to depart from the mandatory minimum sentences: (1) Christopher's admission of culpability and his potential for rehabilitation, (2) Christopher's age, and (3) the effect of consecutive sentencing. In Roger's case, the sentencing court relied upon: (1) the government's role in setting up the drug transactions, and the scope and the amount of the crimes, (2) Roger's age at the time of release from these sentences, and (3) the effect of consecutive sentences. Even assuming, arguendo, that these constituted sufficient "substantial and compelling factors" justifying deviation, we find that the sentencing court failed to articulate why any of these factors satisfied the statutory standard for sentencing deviation.

The sentencing court cited the fact that Christopher admitted culpability and his potential for rehabilitation as factors supporting downward departure. Christopher's potential for rehabilitation is not, however, an objective and verifiable factor. While admission of culpability might be considered an objective and verifiable factor, we find that Christopher's potential for rehabilitation is a subjective factor which should not have been considered. See *Fields, supra* at 80 (concluding it was improper for the sentencing court to consider the defendant's extreme remorse and his acceptance of responsibility for his actions); *Johnson, supra* at 174 (concluding that the fact that the defendant had tried to "turn himself around" was a subjective factor which should not have been considered). Also, while age is a proper consideration, we find nothing exceptional about either Christopher's age or Roger's age that would justify departing from the minimum sentence. Both men were adults and were part of the same family

Moreover, Roger had a criminal record, was on absconder's status from his parole at the time he was arrested for the instant offense, and was not gainfully employed. Cf. *People v Harvey*, 203 Mich App 445, 448-449; 513 NW2d 185 (1994). Christopher also had one prior adult offense for possession of a controlled substance and had sporadic employment over the past few years. Neither defendant presents an exceptional work history or a clean criminal record that might mitigate toward a downward departure from the mandatory minimum sentences. Furthermore, we do not deem Christopher's admission of guilt a "mitigating factor" under the first *Fields* example, particularly in light of the *Cobbs* plea.

The sentencing court also cited government involvement in arranging the drug deals as a reason to deviate from the guidelines. In *People v Shinholster*, 196 Mich App 531, 535; 493 NW2d 502 (1992), this Court permitted the sentencing court to consider the government's actions, which, while not constituting entrapment, purposefully escalated the crime, as one of several reasons justifying downward departure.[4] In *Fields, supra* at 78-79, however, only three of the four Justices in the majority agreed that this was a permissible factor to consider, with the fourth refusing to approve of *Shinholster, supra*, stating "[t]he question of whether defendant's successive criminal acts not involving police entrapment can amount to a mitigating circumstance is far too significant to be resolved in the context of a record that does not present that question." *Id.* at 82 n 1 (Boyle, J., concurring). In *People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997), this Court stated that, "entrapment will not be found where the

police do nothing more than present the defendant with the opportunity to commit the crime of which he was convicted." Here, both defendants actively participated in the deals and on one occasion contacted the undercover officer to arrange a deal. Accordingly, we find that this factor does not support a downward deviation from the mandatory minimum sentences in the controlled substances act.

Further, the sentencing court considered the effect of consecutive sentencing as a justification for deviation. In light of the Legislature's affirmative imposition of consecutive sentences on convicted drug offenders, we find it illogical for the sentencing court to conclude that the consecutive nature of defendants' sentences is a reason to *deviate* from the statutorily-mandated minimum sentences. See MCL 333.7401(3); MSA 14.15(7401)(3). Accordingly, we find that this was not a substantial and compelling reason to deviate downward. *Fields, supra*.

Therefore, because the sentencing court considered impermissible factors and because it failed to articulate its rationale for deviating from the mandatory minimum sentences, the case must be remanded to the sentencing court "for a determination whether there are substantial and compelling reasons to deviate when only appropriate factors are considered." *Johnson, supra* at 175.

> To the extent that the trial court finds, upon appropriate factors, a basis for deviation, we also add a further caution, as did the *Perry* Court: the trial court must consider the *extent* of deviation it orders to avoid imposing a lenient, and hence, disproportionate, sentence. *Perry, supra*, 284. Legislatively mandated sentences are presumed to be proportionate and valid. *Id.; People v DiVietri*, 206 Mich App 61, 63; 520 NW2d 643 (1994).

We further acknowledge the wisdom of this Court's advice to the sentencing court in *Johnson, supra* at 175 n 3*:*

> In remanding this case, we are mindful that defendant's plea pursuant to *Cobbs, supra*, was taken in consideration of the judge's preliminary determination that defendant could be sentenced to five to thirty years of imprisonment. We wish to note for the benefit of the trial bench that, as *Fields* emphasizes, the Legislature, with rare exception, intended that drug traffickers receive the minimum mandatory sentence. Thus, judges should be especially careful in cases involving a defendant who is charged with one of the drug-related offenses enumerated under MCL 333.7401; MSA 14.15(7401) when applying the procedure articulated in *Cobbs*. [Emphasis added.]

Because we remand the case for resentencing, it is not necessary for us to address plaintiff's argument that the sentences were disproportionately lenient. Nevertheless, consistent with *Johnson, supra*, we advise the sentencing court to consider the *extent* of the deviation it orders, if any, to avoid imposing a disproportionate sentence. *Johnson, supra* at 175.

On cross-appeal, defendants contend that their cases should be dismissed because of sentencing entrapment. Although counsel for one of the defendants moved for an entrapment hearing, no hearing was held before or after defendants entered their pleas, and the trial court did not decide the

issue. Therefore, we decline to address the issue because it is not properly before this Court. *People v Martin*, 199 Mich App 124, 126; 501 NW2d 198 (1993).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Jane E. Markey

[1] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

[2] Defendants sometimes shorted the officer by providing less than the agreed amount.

[3] However, the Court also noted that the substantial and compelling reasons requirement "is not a threshold that is meant to be impossible to reach." *Fields, supra* at 70 n 5.

[4] We note that in *Fields, supra* at 78-79, three justices in the majority cited *Shinholster* with approval for consideration of this factor. However, Justice Boyle, the fourth justice in the majority, refused to join in their approval of the case. *Id.* at 82 n 1 (Boyle, J., concurring).