

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellant/Cross-Appellee,

v

No. 197568

Oakland Circuit Court

ROGER DUANE WARDLAW,

LC No. 95-138712 FH

Defendant-Appellee/Cross-Appellee,

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant/Cross-Appellee,

v

No. 197570

Oakland Circuit Court

CHRISTOPHER DAVID WARDLAW,

LC No. 95-138711 FH

Defendant-Appellee/Cross-Appellant.

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

KELLY, J. (concurring in part and dissenting in part).

I concur in the result.

I write only to remark that appellate courts have established a double standard with regard to reviewing the discretion of sentencing judges who depart upward from sentencing norms and guidelines and those who depart downward, finding substantial factors favoring mitigation. The general consensus appears to be that upward departures are favored, downward departures are deplored.

On the far side of sentence review, the Supreme Court has repeatedly affirmed draconian sentences. In *People v Phillips* (After Second Remand), 227 Mich App 28; ___ NW2d ___ (1998), now Justice Taylor has resoundingly rung in on the side of permanent imprisonment. Those

appellate judges and justices favoring reasonable sentences have dwindled to little more than a handful. Conversely, where the trial court has exercised its discretion in favor of downward departure, the appellate treatment has been far less congenial. See *People v Fields*, 448 Mich 58; 528 NW2d 176 (1996); *People v Perry*, 216 Mich App 277; 549 NW2d 42 (1996).

Were I writing on a clean slate, I would not hesitate to affirm the downward departure and the trial court's exercise of discretion in that regard as to both these defendants. In reviewing the record, it seems to me any reasonable reviewing court must conclude on these facts that Roger's total minimum sentence of eighteen years and Christopher's total minimum sentence of twelve years are sufficiently adequate to satisfy society's need to redress the criminal conduct perpetrated. I believe what the trial judge did here was right, reasonable, moral and just. I believe he should be affirmed. However, without resorting to the last resort of citing unpublished opinions, I cannot find enough support in *People v Shinholster*, 196 Mich App 531; 493 NW2d 502 (1992) or *People v Jones*, 207 Mich App 253; 523 NW2d 888 (1994) to write a principled dissent.

Suffice it to say that these low-level peddlers' minimum sentences without departure shock my conscience. Roger's minimum sentence would have totaled fifty-one years without deviation and Christopher's would have totaled fifty-two years. The difference between their minimum terms results from the fact that the court sentenced Rogers to lifetime probation for each of the two counts of involving less than fifty grams while it sentenced Christopher to one year imprisonment for each count. Without the police-induced combining of defendant's successive criminal acts, such huge sanctions do not, I think, justify prosecutorial building blocks let alone appellate sanctioning.

I would reverse if I could.

/s/ Michael J. Kelly