STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JESUS MANUEL QUEZADA, a/k/a JESUS ANTILLON,

Defendant-Appellee.

UNPUBLISHED
February 23, 1999

No. 192370
Oakland Circuit Court
LC No. 95-140108 FH

Before: Markman, P.J., and Bandstra and J. F. Kowalski*, JJ.

MEMORANDUM.

Defendant pleaded nolo contendere to delivery of more than 5 kilograms, but less than 45 kilograms of marijuana, MCL 333.7401(1) and (2)(d)(ii); MSA 14.15(7401)(1) and (2)(d)(ii), and to conspiracy, MCL 750.157a; MSA 28.354(1). The trial court sentenced defendant to one year in the county jail consistent with a preliminary sentencing evaluation placed on the record at the time of the plea-taking pursuant to *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993). The prosecutor appeals by leave. We vacate defendant's sentence and remand. This case is being decided without oral argument pursuant to MCR 7.214(E).

The prosecutor argues that defendant's one-year jail sentence is invalid under the indeterminate sentencing act, MCL 769.8; MSA 28.1080. We agree.

A "felony" offense is an offense for which the convicted offender may be punished by death or by imprisonment in the state prison. MCL 750.7; MSA 28.197; *People v Austin*, 191 Mich App 468, 469; 478 NW2d 708 (1991). Under the plain language employed in MCL 333.7401(2)(d)(ii); MSA 14.15(7401)(2)(d)(ii), delivery of more than 5 kilograms, but less than 45 kilograms of marijuana is a felony offense because it is punishable by imprisonment in a state prison "for not more than 7 years . . ." *Austin, supra*. The indeterminate sentencing act provides in pertinent part:

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* Circuit judge, sitting on the Court of Appeals by assignment.

> When a person is convicted for the first time for the commission of a felony, and the punishment prescribed by law for that offense may be imprisonment in a state prison, the court imposing sentence shall not fix a definite term of imprisonment, but shall fix a minimum term, except as otherwise provided in this chapter. The maximum penalty provided by law shall be the maximum sentence in all cases except as provided in this chapter and shall be stated by the judge in imposing the sentence. [MCL 769.8; MSA 28.1080.]

Because the instant convictions are defendant's first felony convictions and because defendant's convictions subjected him to potential imprisonment in the state prison, under the clear language of the indeterminate sentencing act the trial court was required to impose both a minimum and a maximum sentence that would require defendant to serve his sentences in a state prison. Compare *Austin, supra*; see *People v Kelly*, 186 Mich App 524, 529; 465 NW2d 569 (1990) ("the word 'shall' generally denotes a mandatory duty"). Accordingly, the one-year jail sentence was invalid.

Defendant misplaces his reliance on *People v Lyles*, 76 Mich App 688; 257 NW2d 220 (1977), to support his claim that the sentence imposed was valid. Although *Lyles* stands for the proposition that "the indeterminate sentence act is inapplicable to any sentence imposed pursuant to MCLA 769.28; MSA 28.1097(1)," *Lyles, supra* at 690, *Lyles* does not speak to whether the one-year sentence was statutorily authorized. The offense for which the defendant in *Lyles* was sentenced specifically allowed for the imposition of a one-year jail term. MCL 750.92; MSA 28.287. MCL 333.7401(2)(d)(ii) contains no similar allowance.

Because defendant's sentence was invalid, we vacate defendant's sentence and remand to allow defendant to either withdraw his pleas or affirm his pleas in light of his knowledge of the sentencing consequences. *Cobbs*, *supra* at 283. This disposition makes it unnecessary for us to address the prosecutor's remaining argument.

Sentence vacated and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen J. Markman
/s/ Richard A. Bandstra
/s/ John F. Kowalski