

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOSE RICARDO RIVERA,

Defendant-Appellee.

UNPUBLISHED

July 16, 1999

No. 213820

Oakland Circuit Court

LC No. 93-124647 FH

Before: Gage, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of possession with intent to deliver between 50 and 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii).¹ The trial court sentenced defendant below the statutory minimum of ten years' imprisonment to a reduced term of five to twenty years' imprisonment. The prosecutor appeals as of right. MCL 770.12(1)(a); MSA 28.1109(1)(a). We vacate defendant's sentence and remand for resentencing.

The prosecutor contends that the trial court improperly sentenced defendant below the statutory minimum absent substantial and compelling reasons for doing so. A sentencing court may deviate from the statutory minimum only when substantial and compelling reasons exist for such a departure. MCL 333.7401(4); MSA 14.15(7401)(4). The substantial and compelling reasons justifying a downward departure must be objective and verifiable. *People v Fields*, 448 Mich 58, 62, 68; 528 NW2d 176 (1995). The existence or nonexistence of a particular factor is a factual determination for the sentencing court that this Court will review for clear error. *Id.* at 77. The determination that a particular factor is objective and verifiable, however, should be reviewed by the appellate courts as a matter of law. *Id.* at 77-78. The 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 an abuse of discretion. *Id.* at 78.

While this Court has great respect for the experience and wisdom of the trial judge, in this case insufficient compelling circumstances existed that would warrant a deviation from the minimum sentencing requirements. While a defendant's age and work history represent objective and verifiable factors that a court may appropriately consider in this context, *Fields*, *supra* at 77, defendant's age of

twenty-three years at the time he committed the underlying offense is not exceptional. *People v Pearson*, 185 Mich App 773, 779; 462 NW2d 839 (1990). Defendant apparently held various jobs over several years and at times worked sixty to seventy hours per week, but there was nothing extraordinary about defendant's work history. To the extent the trial court relied on the fact that defendant possessed only slightly more than fifty grams of cocaine as a mitigating circumstance, we conclude that the court clearly erred, *id.*, especially when we consider that the record otherwise revealed no mitigating circumstances that would tend to lessen defendant's culpability of the crime charged. *Fields, supra* at 76. The trial court also mentioned that it had considered defendant's prior record. No indication exists, however, that the trial court factored into its analysis defendant's record subsequent to his arrest on the instant charges. Factors that arise after the defendant's arrest should be assigned the same weight as preexisting factors such as age or employment history. *Id.* at 77. Defendant pleaded guilty and was sentenced to imprisonment for a drug offense that took place while the instant case had been dismissed and was previously on appeal. In addition, defendant tested positively for cocaine use in 1996 or 1997, subsequent to both the instant underlying offense and the offense underlying defendant's guilty plea. The trial court should have given these factors due consideration and balanced them against defendant's age, work history and prearrest criminal history. Furthermore, the trial court also relied on factors that were not objective or verifiable, such as defendant's remorsefulness and his potential for rehabilitation. *Id.* at 80. Thus, we conclude that the sentencing court abused its discretion when it sentenced defendant below the statutory mandatory minimum sentence when there were no substantial or compelling reasons to do so. *Id.* at 77-78.

The prosecutor next argues that defendant's sentence was disproportionately lenient. Appellate review of a defendant's sentence is limited to whether the sentencing court abused its discretion, which occurs when the court violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The proportionality principle requires that the sentence must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* A mandatory minimum sentence imposed by statute is presumably valid and proportionate. *People v Williams*, 189 Mich App 400, 404; 473 NW2d 727 (1991). Nevertheless, in unusual circumstances, a mandatory minimum sentence may violate proportionality. *Milbourn, supra* at 661. To demonstrate a need to vary from the statutory minimum, a defendant must present unusual circumstances to the court before his sentence is imposed. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). Defendant set forth his age, employment and virtual lack of criminal history as factors that would render the statutory ten-year minimum sentence disproportionate; however, none of these factors qualifies as an unusual circumstance. *People v Piotrowski*, 211 Mich App 527, 532-533; 536 NW2d 293 (1995); *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Because there were no unusual circumstances, we conclude that the trial court abused its discretion in sentencing defendant below the presumptively valid ten-year statutory minimum term.

We vacate defendant's sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Michael R. Smolenski
/s/ Brian K. Zahra

¹ The charges against defendant were initially dismissed by the trial court on the basis that defendant's arrest was illegal. This Court reversed, however, and remanded the case for further proceedings, finding that there was probable cause to arrest defendant. *People v Rivera*, unpublished opinion per curiam of the Court of Appeals, issued November 15, 1996 (Docket No. 184056).