

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DWAYNE HARRIS,

Defendant-Appellee.

UNPUBLISHED
October 17, 2000

No. 224272
Wayne Circuit Court
LC No. 99-001952

Before: Collins, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of conspiracy to deliver 50 grams or more but less than 225 grams of cocaine, MCL 750.157a; MSA 28.354(1); MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and delivery of 50 grams or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). Defendant was sentenced to two to twenty years' imprisonment for the conspiracy conviction and three to twenty years' imprisonment for the delivery conviction, the sentences to run consecutively pursuant to MCL 333.7401(3); MSA 14.15(7401)(3). The prosecutor appeals as of right the judgment of sentence. Defendant does not appeal his conviction. We reverse and vacate the judgment of sentence and remand for further proceedings consistent with this opinion.

The prosecutor contends that the trial court abused its discretion by failing to impose the statutory minimum sentences of ten years in prison for each conviction. A trial court may depart below the statutory minimum sentences applicable in the present case if there exists substantial and compelling reasons to do so. MCL 333.7401(4); MSA 14.15(7401)(4). However, the Supreme Court has instructed sentencing judges to deviate from statutory minimum sentences only in exceptional cases. *People v Daniel*, 462 Mich 1, 6; 609 NW2d 557 (2000). "[O]nly objective factors that are capable of verification may be used to assess whether there are substantial and compelling reasons to deviate from the minimum term of years imposed by the Legislature" *Id.*

This Court reviews a trial court's factual findings regarding the existence of an objective and verifiable factor to warrant a downward departure from a statutory minimum sentence under a clearly erroneous standard. *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995). Whether a factor is

objective and verifiable is determined as a matter of law. *Id.* at 77-78. A trial court's decision that an objective and verifiable factor constitutes a substantial and compelling reason to deviate from a statutory minimum sentence is reviewed for an abuse of discretion. *Id.* at 78.

To determine whether substantial and compelling reasons to depart from a mandatory minimum sentence exist, courts consider "(1) whether there are mitigating circumstances surrounding the offense; (2) whether the defendant has a prior record; (3) the defendant's age; . . . (4) the defendant's work history[.]" and (5) the defendant's post-arrest behavior and whether he cooperated with law enforcement officials. *People v Perry*, 216 Mich App 277, 281; 549 NW2d 42 (1996). It is insufficient for the trial court to simply list objective and verifiable factors and conclude that there exists substantial and compelling reasons to depart below a statutory minimum sentence. *Daniel, supra* at 8-9, quoting *People v Johnson (On Remand)*, 223 Mich App 170, 173-174; 566 NW2d 28 (1997). Rather, the trial court is obligated to articulate the reasons why those factors provide substantial and compelling reasons to depart from the minimum sentence. *Daniel, supra*.

In this case, the trial court cited defendant's lack of a juvenile record as one reason for departing below the mandatory minimum sentence. While defendant's record was a legitimate consideration, the trial court failed to articulate why this constituted a substantial and compelling reason to depart below the mandatory minimum sentences in this case. Even though defendant's presentence report did not indicate a juvenile criminal history, defendant was on probation for a conviction for carrying a concealed weapon when he was arrested for these crimes. Further, his presentence report indicates that defendant had six outstanding warrants for his arrest, four for disorderly conduct, one for a traffic violation, and one for unlawfully driving away an automobile. Thus, the trial court abused its discretion by departing below the minimum based, in part, on defendant's clean juvenile history while failing to consider defendant's adult criminal contacts.

Next, the trial court identified defendant's age and his time spent at St. Francis Boys' Home as factors justifying the sentences imposed on defendant. Again, the trial court did not indicate why these factors were substantial in this case and did not articulate why these factors constituted a compelling reason to deviate from the statutory minimum sentence. *Daniel, supra; Johnson, supra* at 175. The failure of the trial court to articulate its reasons for concluding why these factors constituted substantial and compelling reasons to deviate from the statutory minimum sentences constitutes an abuse of discretion. *Daniel, supra*.

The trial court also premised its downward departure on a finding that there existed mitigating factors surrounding defendant's crimes. In so doing, the trial court criticized the mandatory minimum sentencing statutes for drug offenses by noting that persons with no actual power or control in drug organizations are most often punished under these statutes. The trial court reasoned that the intent of the statutory deviation provision is to allow trial courts to consider a defendant's "role" and "status" within the organization as a legitimate, mitigating factor at sentencing. The trial court found that defendant's role was confined to his delivery on October 31, 1998, and that, compared to Dwayne Davis, one of defendant's coconspirators, defendant appeared to be a minor player.

The trial court's conclusion that defendant played only a minor role in the drug organization is not supported by evidence at trial or by defendant's presentence report. Defendant's co-conspirator, Davis, was the focus of the controlled drug buys and was specifically targeted by the confidential informant and the police. Thus, the surveillance tapes focused on Davis' house and the police directed the informant to buy directly from Davis. However, it does not necessarily follow that defendant was an insignificant or innocent member of the organization such that he was less culpable of the charges at issue.

Defendant's conduct in this case falls squarely within the type of conduct proscribed by the mandatory minimum sentencing statute. The jury concluded that defendant illegally delivered over ninety-four grams of cocaine, an amount well within the amount prohibited by the statute. No assertion was made by the parties or by the trial court that defendant was an unsuspecting pawn in the transaction. Further, even though defendant was not convicted of as many charges as Davis, his participation in the offenses for which he *was* convicted was not passive or minor.

Even if we were to accept the trial court's conclusion that Davis was more culpable than defendant, such a finding would merely form a basis to impose a greater sentence on Davis, not a lesser sentence on defendant. The Legislature, as a matter of public policy, chose to enact statutory minimum, not maximum, sentences.

In short, there were no mitigating circumstances surrounding the crime itself that would suggest defendant should not be punished for his convictions as provided by the statute. Therefore, despite its general perception that defendant was not a kingpin in the organization, the trial court abused its discretion in departing below the mandatory minimum on that basis. *Daniel, supra; Johnson, supra.*

The trial court also justified its departure by noting that defendant's convictions and, therefore, his consecutive sentences, were based on one criminal transaction. This factor does not constitute a substantial and compelling reason for departure. Pursuant to MCL 333.7401(3); MSA 14.15(7401)(3):

A term of imprisonment imposed pursuant to subsection (2)(a) or section 7403(2)(a)(i), (ii), (iii), or (iv) shall be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony.

Defendant was convicted of two separate offenses, conspiracy and delivery. The Supreme Court has held that conspiracy to commit the enumerated drug offense constitutes "another felony" within the meaning of MCL 333.7401(3); MSA 14.15(7401)(3), so that consecutive sentencing is proper. *People v Denio*, 454 Mich 691, 705; 564 NW2d 13 (1997), citing *People v Morris*, 450 Mich 316, 328; 537 NW2d 842 (1995). In approving consecutive sentences for both convictions, the Supreme Court specifically found that "the Legislature intended to separately punish a defendant convicted both of conspiracy to commit a drug offense and of the substantive drug offense, even if he committed the offenses in the same criminal transaction." *Denio, supra* at 709-710. Further, the Supreme Court found that because the crime of conspiracy punishes planning and the drug statute punishes the actual commission of the offense, the two crimes are separate and distinct. *Id.* at 711-712. Because

consecutive sentences were properly imposed in this case, and because the trial court did not articulate mitigating factors regarding defendant's actual participation in the crimes for which he was convicted, the consecutive nature of his sentences did not constitute a substantial and compelling reason for departure.

In sum, we conclude that the trial court failed to articulate why some of the factors it listed at sentencing constituted substantial and compelling reasons for departure from the statutory minimum sentences applicable in this case. The trial court also considered improper factors that did not amount to substantial and compelling reasons for departure. Therefore, we vacate defendant's judgment of sentence and remand this case for resentencing. The trial court should determine whether there are substantial and compelling reasons for departure on the basis of appropriate factors. If the trial court finds substantial and compelling reasons for a departure from the statutory minimum sentence, it should, consistent with this opinion, fully and completely articulate the reasons for such departure. The trial court should consider whether this case justifies a downward departure in light of *Daniel, supra*; *People v McNeil*, 450 Mich 1017; 544 NW2d 477 (1996); and *Perry, supra* at 283. Because we remand for resentencing, we decline to consider the prosecutor's second contention, that defendant's minimum sentences of two and three years violated the principle of proportionality under *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

We reverse and vacate defendant's judgment of sentence, and we remand this matter to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction

/s/ Jeffrey G. Collins
/s/ Kathleen Jansen
/s/ Brian K. Zahra