

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JULIA FAY FERGUSON,

Defendant-Appellee.

UNPUBLISHED

November 14, 2000

No. 222487

Oakland Circuit Court

LC Nos. 97-152083-FH;

97-152223-FH

Before: Wilder, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

This prosecutor's appeal is before this Court pursuant to the Michigan Supreme Court's order remanding for consideration as on leave granted.¹ We vacate defendant Julia Fay Ferguson's sentences for possession with intent to deliver heroin and remand for resentencing.

I. Basic Facts And Procedural History

The trial court consolidated the two separate cases that are involved in this appeal. In Docket No. 97-152223-FH, the prosecutor charged Ferguson with possession with intent to deliver less than fifty grams of heroin,² possession of less than twenty-five grams of cocaine,³ and possession of alprazolam without a prescription.⁴ In Docket No. 97-152083-FH, the prosecutor charged Ferguson with possession with intent to deliver less than fifty grams of heroin,⁵ fleeing and eluding a police officer,⁶ and driving with a suspended or revoked license.⁷

¹ 461 Mich 866 (1999).

² MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv).

³ MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v).

⁴ MCL 333.7403(2)(b); MSA 14.15(7403)(2)(b).

⁵ MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv).

⁶ MCL 750.479a; MSA 28.747(1).

⁷ MCL 257.904(1); MSA 9.2604(1).

Ferguson pleaded guilty to each of these offenses after the trial court made a preliminary estimate of the sentences it would impose pursuant to *People v Cobbs*.⁸ The trial court estimated that, for Docket No. 97-152223-FH, it would impose a prison sentence of one to twenty years for the heroin offense, thirty days to one year for the cocaine offense, and two years' probation for the alprazolam offense. In relation to Docket No. 97-152083-FH, the trial court estimated that it would impose lifetime probation for the heroin offense, ninety days to four years' imprisonment for fleeing and eluding a police officer, and two years' probation for the license violation.

The trial court did not sentence Ferguson immediately. Rather, Ferguson, who was free on bond, failed to appear at her scheduled sentencing hearing. Slightly more than seven months later, the police arrested Ferguson on a new charge. She was incarcerated for approximately six weeks before being sentenced in these cases.

The sentencing hearing finally took place approximately nine months after Ferguson entered her guilty pleas. In Docket No. 97-152223-FH, the trial court sentenced Ferguson to consecutive prison terms of one to twenty years for the heroin offense, ninety days to four years for the cocaine offense, and ninety days to two years for the alprazolam offense. In Docket No. 97-152083-FH, the trial court sentenced Ferguson to two to twenty years' imprisonment for the heroin conviction, to be served consecutive to sentences of fifty days in jail for fleeing and eluding and driving with a suspended or revoked license, with credit for forty-four days she had already served in jail. Although not identical to the sentences the trial court mentioned at the hearing when Ferguson entered her guilty pleas, the sentences the trial court imposed roughly tracked the sentences it mentioned at the plea proceeding in terms of severity.

On appeal, the prosecutor continues to maintain that these sentences are too lenient. However, as far as we can tell, the prosecutor only challenges the sentences the trial court imposed for possession of heroin. The prosecutor contends that the trial court should have sentenced Ferguson to consecutive 60 to 160 month prison terms for each heroin guilty plea.

II. Waiver

Before we address the merits of the prosecutors arguments on appeal, we must resolve Ferguson's argument that, pursuant to *People v Blount*,⁹ the prosecutor waived the right to challenge the sentences the trial court imposed. *Blount* holds that a defendant who pleads guilty and is sentenced as was agreed waives the right to appeal the sentence absent an effort to withdraw the plea.¹⁰ As the *Blount* Court stated, "A bargain is indeed a bargain."¹¹

While we do not quarrel with the proposition that a prosecutor must also be held to the terms of a plea bargain,¹² Ferguson's argument is misplaced because she did not enter her guilty

⁸ *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

⁹ *People v Blount*, 197 Mich App 174; 494 NW2d 829 (1992).

¹⁰ *Id.* at 175.

¹¹ *Id.*

¹² See generally *People v Shuler*, 188 Mich App 548, 549-550; 470 NW2d 492 (1991).

pleas pursuant to a plea agreement. Rather, she relied on the procedure outlined in *Cobbs, supra*, in order to determine the trial court's preliminary inclination toward sentencing. This *Cobbs* plea did not involve the prosecutor. In fact, throughout the trial court proceedings, the prosecutor objected that the sentences the trial court was contemplating, and actually imposed, were too lenient. This conduct contradicts any inference of waiver. Accordingly, we conclude that the prosecutor is not precluded from challenging the proportionality of Ferguson's sentences.

III. Sentencing

A. Standard Of Review

This Court reviews a sentence determined under the judicial sentencing guidelines to determine if the trial court abused its discretion when imposing that sentence.¹³

B. Legal Standard For Sentencing

In *People v Kowalski*,¹⁴ this Court explained the standards that define a trial court's sentencing discretion:

A sentence must be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The Michigan Sentencing Guidelines, while not legislatively mandated, nevertheless establish a useful "barometer" to measure the proportionality of a sentence. *Id.* If a sentence falls outside the guidelines range, there must be a specific explanation. *People v Fleming*, 428 Mich 408, 415; 410 NW2d 266 (1987). Moreover, "in the absence of factors not adequately reflected in the guidelines [a departure] should alert the appellate court to the possibility that the trial court has violated the principle of proportionality and thus abused its sentencing discretion." *Milbourn, supra* at 660; *People v Houston*, 448 Mich 312, 321; 532 NW2d 508 (1995).

In sum, this Court may not overturn a sentence unless it is disproportionate or otherwise invalid.¹⁵

C. Drug Addiction As A Reason For A Downward Departure

The sentencing guidelines proposed a minimum sentence for the two heroin offenses that ranged from 60 to 160 months. The trial court actually imposed minimum sentences of twelve

¹³ *People v Phillips (On Rehearing)*, 203 Mich App 287, 290; 512 NW2d 62 (1994).

¹⁴ *People v Kowalski*, 236 Mich App 470, 472-473; 601 NW2d 122 (1999).

¹⁵ *In re Dana Jenkins*, 438 Mich 364, 369, n 3; 475 NW2d 279 (1991).

and twenty-four months for each conviction¹⁶ without providing any written justification for this downward departure.¹⁷ The trial court explained the light sentences it was imposing, saying:

I went below the guidelines because I think you're addicted to drugs, and the things that you do are irrational, illegal –

* * *

– amoral. But, look, you're addicted, so I have to consider that. It's like having a person with pneumonia who keeps coughing. Do I say to them, if you don't stop coughing, I'm going to give you 90 days in the county jail? That's ridiculous. I can't change your addiction. So I'm trying to be fair to you . . .

So I went below the guidelines because she [Ferguson] has demonstrated a commitment here, which I believe will be to her benefit and [a] benefit to the taxpayers. Okay.

In essence, the trial court believed that Ferguson's drug addiction mitigated her crime of possessing heroin with the intent to deliver it.

The problem with the trial court's reasoning is that it completely ignored the circumstances surrounding each heroin offense. There are no statements on the record explaining why these were the proper sentences for these two crimes. Furthermore, whether Ferguson actually had "demonstrated a commitment" to lead a drug-free life is debatable given that her most recent drug-free period was confined solely to her incarceration in the county jail. While this is progress that we encourage, and it may be relevant to her potential for rehabilitation, this one factor does not explain why she is the unusual drug offender who does not require a sentence within the guidelines. Simply speaking, the trial court abused its discretion by failing to consider any of the circumstances surrounding the offense and by failing to explain why her drug use makes her any less culpable than many other drug users who commit this same crime and are punished according to the guidelines.¹⁸

¹⁶ Although the prosecutor discusses these consecutive sentences in tandem, at places discussing the cumulative minimum sentence the trial court did impose and arguably should have imposed, we must look at them separately. *People v Green*, 228 Mich App 684, 698; 580 NW2d 444 (1998), citing *People v Warner*, 190 Mich App 734, 736; 476 NW2d 660 (1991).

¹⁷ The trial court did not impose a sentence below the one year minimum prison sentence mandated in MCL 333.7401(2)(a)(iv); MSA 4.15(7401)(2)(a)(iv) for either offense. Accordingly, it did not have to articulate "substantial and compelling" reasons for its sentencing decision. See *People v Fields*, 448 Mich 58, 76; 528 NW2d 176 (1995), citing MCL 333.7401(4); MSA 14.15(7401)(4). Rather, as all sentencing courts must do, the trial court in this case had to explain why the sentences it actually imposed reflected the seriousness of the offense and Ferguson as an offender. See *Milbourn*, *supra* at 636.

¹⁸ *Milbourn*, *supra* at 636, 661

We vacate the sentences for the two heroin convictions subject to Ferguson's right to withdraw her *Cobbs* pleas for these two offenses. We remand for resentencing under the judicial sentencing guidelines.¹⁹ We do not retain jurisdiction and express no opinion on whether the sentences can or should be enhanced under MCL 333.7413(2); MSA 14.15(7413)(2).

/s/ Kurtis T. Wilder

/s/ Michael R. Smolenski

/s/ William C. Whitbeck

¹⁹ The new sentencing guidelines do not apply here because, even though the sentence was imposed after their adoption, the crimes were committed before the new guidelines were implemented.