

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRACEY D. TATE,

Defendant-Appellant.

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UNPUBLISHED

April 3, 2001

No. 220733

Oakland Circuit Court

LC No. 95-139538-FH

Before: K. F. Kelly, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivering between 50 and 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and conspiracy to deliver between 50 and 225 grams of cocaine, MCL 750.157a; MSA 28.354(1). The trial court sentenced defendant to consecutive terms of 10 to 20 years' imprisonment for the delivery conviction and 10 to 20 years' imprisonment for the conspiracy conviction. We affirm.

Defendant first argues that there was insufficient evidence to support his delivery conviction. When reviewing sufficiency questions, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

Defendant contends that there was insufficient evidence to support his delivery conviction because police never determined that the substance defendant handed to Derosia was cocaine. Defendant's argument implies that the substance he handed to Derosia was different than the substance that Clarence Smith later handed to Derosia, because the evidence presented at trial indicated that the latter substance tested positive for cocaine.

The aiding and abetting statute, MCL 767.39; MSA 28.979, abolished the distinction between accessory and principal. As long as defendant aided and abetted Smith's physical delivery of cocaine to Derosia, he could be properly convicted of the delivery offense, even though he did not personally deliver the cocaine. In order to support a conviction based on an aiding and abetting theory, the proofs must demonstrate:

(1) [T]he crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. [*People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995).]<sup>1</sup>

On May 22, 1995, Derosia set up a rendezvous with Smith at the Walton Square Plaza to purchase cocaine. After Derosia arrived at the strip mall, defendant arrived in a vehicle and motioned for Derosia to follow him. Defendant got out of his car, went up to a phone booth and then returned to his car. Because Derosia did not follow him, defendant approached Derosia and asked him who he was there for. Derosia told defendant that he was there for Clarence, and defendant told Derosia that “it was over there at the pay phone, go get it before somebody else does.” Derosia got out of his car, went up to the phone booth, and retrieved a bag containing a white, powdery substance, which he suspected to be cocaine. Derosia inspected the bag and told defendant that it was “short,” i.e., less than the amount Derosia expected to receive from Smith. Further, Derosia told defendant that he only wanted to deal with Smith. In response, defendant took the bag of suspected cocaine and left the scene, returning shortly to the parking lot with Smith in the vehicle. Smith then completed the drug transaction with Derosia. The above testimony supports a finding that defendant performed acts that assisted Smith’s delivery of cocaine to Derosia, with knowledge that Smith intended to commit that crime. Thus, sufficient evidence was presented to support defendant’s conviction for delivery of 50 to 225 grams of cocaine, based on an aiding and abetting theory.

Defendant next argues that there was insufficient evidence to support his conspiracy conviction. Conspiracy is defined by common law as “a partnership in criminal purposes.” *People v Justice (After Remand)* 454 Mich 334, 345; 562 NW2d 652 (1997) (citations omitted). Under such a partnership, two or more individuals must voluntarily agree to effectuate the commission of a criminal offense. *Id.* There must be proof demonstrating that the parties specifically intended to further, promote, advance, or pursue an unlawful objective. *Id.* at 347. In order to support a conviction of conspiracy to deliver a controlled substance, the proofs must demonstrate:

(1) the defendant possessed the specific intent to deliver the statutory minimum as charged, (2) his coconspirators possessed the specific intent to deliver the statutory minimum as charged, and (3) the defendant and his coconspirators possessed the specific intent to combine to deliver the statutory minimum as charged to a third person. [*People v Mass*, 238 Mich App 333, 336; 605 NW2d 322 (1999), quoting *Justice, supra* at 349.]

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<sup>1</sup> On appeal, defendant essentially acknowledges that sufficient evidence existed to show that Smith delivered cocaine to Derosia. Therefore, the first element of aiding and abetting is not at issue on appeal. However, defendant does challenge the sufficiency of the evidence on the remaining two elements.

“Direct proof of the conspiracy is not essential; instead, proof may be derived from the circumstances, acts, and conduct of the parties. Inferences may be made because such evidence sheds light on the coconspirators’ intentions.” *Justice, supra* at 347. In the instant case, Derosia made an agreement to purchase three ounces of cocaine from Smith in a parking lot at the Walton Square Plaza. Defendant arrived at that pre-arranged location, at the proper time, and attempted to complete the drug transaction. When Derosia told defendant that the amount of cocaine was “short,” defendant left the parking lot and returned with Smith, who completed the transaction. Given these facts, the jury could have made the reasonable inference that defendant and Smith conspired to deliver three ounces of cocaine to Derosia. Therefore, there was sufficient evidence to support defendant’s conviction of conspiracy to deliver between 50 and 225 grams of cocaine.

Defendant next contends that the trial court abused its discretion when it imposed the mandated statutory minimum of ten years’ imprisonment for both of defendant’s convictions. The minimum sentence for delivering between 50 and 225 grams of cocaine is ten years’ imprisonment. MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). The same holds true for conspiracy to deliver between 50 and 225 grams of cocaine. MCL 750.157a(a); MSA 28.354(1)(a). A trial court may deviate from these mandatory minimum sentences only if the court can articulate substantial and compelling reasons to do so. MCL 333.7401(4); MSA 14.15(7401)(4). In *People v Fields*, 448 Mich 58, 67-68; 528 NW2d 176 (1995), the Michigan Supreme Court explained the meaning of the substantial and compelling standard:

. . . [I]t is evident that the words “substantial and compelling” constitute strong language. The Legislature did not wish that trial judges be able to deviate from the statutory minimum sentences for any reason. Instead, the reasons justifying departure should “keenly” or “irresistibly” grab our attention, and we should recognize them as being “of considerable worth” in deciding the length of a sentence.

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In this context “substantial and compelling” cannot acquire a meaning that would allow trial judges to regularly use broad discretion to deviate from the statutory minimum. Such an interpretation would defeat the intent of the statute. Rather, it is reasonable to conclude that the Legislature intended “substantial and compelling reasons” to exist only in exceptional cases.

Further, the reasons for departing from the mandatory minimum sentences must be based solely upon objective and verifiable factors. *Id.* at 68-69. In other words, a downward departure must be supported by actions or occurrences that are external to the minds of the judge, defendant and others involved in making the decision and that are capable of being confirmed. *Id.* at 66. In *People v Johnson (On Remand)*, 223 Mich App 170, 173; 566 NW2d 28 (1997), this Court set forth the following nonexclusive list of factors that a trial court may properly examine when considering whether to depart downward from the mandatory minimums:

- (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) factors that arise after the defendant's arrest such as the defendant's cooperation with law enforcement officials.

Before trial, the lower court rejected the *Cobbs*<sup>2</sup> sentencing agreement because it could not find substantial and compelling reasons to deviate from the statutory minimum sentences. At sentencing, the trial court indicated that a letter from defendant's daughter was the primary reason why it wanted to deviate from the minimum sentence. The trial court concluded that this was not a substantial and compelling reason, and with remorse, the trial court sentenced defendant to the mandatory minimum. We must emphasize that legislatively mandated sentences are presumed to be proportionate and valid. *Johnson, supra* at 175; *People v Ealy*, 222 Mich App 508, 512; 564 NW2d 168 (1997). Based on a thorough review of the record, it is clear that the trial court understood that the Legislature intended that drug traffickers receive the minimum mandatory sentence and that the circumstances surrounding defendant's case did not rise to the level required to support a downward departure from the statutory minimum. We conclude that the trial court's factual findings were not clearly erroneous and the trial court did not abuse its discretion when it imposed the mandatory minimum sentences.

Affirmed.

/s/ Kirsten Frank Kelly  
/s/ Michael R. Smolenski  
/s/ Patrick M. Meter

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<sup>2</sup> *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).