

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN ANTHONY FOSSANO,

Defendant-Appellant.

UNPUBLISHED

April 10, 2001

No. 220597

Oakland Circuit Court

LC No. 98-164040-FH

Before: Talbot, P.J., and Sawyer and F.L. Borchard*, JJ.

PER CURIAM.

Defendant appeals as of right from a jury conviction of possession of 50 to 224 grams of cocaine, MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii), for which he was sentenced to the mandatory ten to twenty years in prison. We affirm.

Defendant first contends that the trial court erred when, during instructions, it referred to possession as a “lesser included offense” of possession with intent to deliver, with which defendant was originally charged, because both offenses carry the same penalty. We disagree. It is the elements of the offenses which determine whether one is a lesser included offense of the other and the penalties applicable to the offenses are irrelevant to that determination. *People v Torres (On Remand)*, 222 Mich App 411, 419-421; 564 NW2d 149 (1997).

Defendant next contends that he is entitled to resentencing because the trial court failed to consider various factors which supported a finding of substantial and compelling reasons to depart from the mandatory minimum sentence. The determination regarding the existence, or nonexistence, of a particular reason or factor is reviewed on appeal under the clearly erroneous standard, *People v Perry*, 216 Mich App 277, 280; 549 NW2d 42 (1996), but the trial court’s determination whether a departure from the mandatory minimum sentence is justified by substantial and compelling reasons is reviewed for an abuse of discretion. *People v Nunez*, 242 Mich App 610, 617; 619 NW2d 550 (2000).

The court may depart from the statutory minimum term of imprisonment if it finds “substantial and compelling reasons to do so.” MCL 333.7403(3); MSA 14.15(7403)(3). “[T]he Legislature intended ‘substantial and compelling reasons’ to exist only in exceptional cases.”

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

People v Fields, 448 Mich 58, 68; 528 NW2d 176 (1995). “[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 for certain drug offenses.” *People v Daniel*, 462 Mich 1, 6; 609 NW2d 557 (2000). Appropriate objective factors include “(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.” *People v Johnson (On Remand)*, 223 Mich App 170, 173; 566 NW2d 28 (1997).

Mitigating circumstances include the circumstances surrounding the commission of the offense, the defendant’s role in the offense, and the state’s role, as where the police purposefully escalate the crime. *Fields, supra* at 76, 79. The trial court did not err in concluding that there were no mitigating circumstances in this case. Although defendant was not a “major player” in that the police did not target him for a sting operation and that he was not involved in negotiating for the sale of the cocaine, the evidence supported a finding that his role was greater than that of a chauffeur for the codefendant. Nor does the evidence indicate that the police escalated the crime, i.e., sell ever increasing amounts of cocaine to defendant and effectuate an arrest only after he bought a large amount. Accordingly, we find no abuse of discretion in the court’s decision to impose the mandatory minimum sentence.

Affirmed.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Fred L. Borchard