

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS JAMES LOZON,

Defendant-Appellant.

UNPUBLISHED
February 22, 2002

No. 236650
Crawford Circuit Court
LC No. 00-001790-FH

Before: Smolenski, P.J., and Doctoroff and Owens, JJ.

MEMORANDUM.

Defendant appeals as on leave granted after remand from the Supreme Court of his ten to twenty year sentence and \$25,000 fine for possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). We remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The charge against defendant arose out of an offense that took place on March 8, 2000, and was governed by the legislative sentencing guidelines. MCL 769.34(2). The guidelines provided a range of ten to twenty-three months' for the minimum sentence. The trial court exceeded the guidelines, stating on the guidelines departure form that defendant had five prior felonies and two prior incarcerations. He introduced crack cocaine into a community that has never experienced that problem, and he was dealing the drug. The court stated that the guidelines maximum was grossly inappropriate for the offense and the offender, and that it invites criminal behavior.

It is the responsibility of a circuit judge to impose a sentence within the limits set by the Legislature. *People v Hegwood*, 465 Mich 432, 437; 636 NW2d 127 (2001). A judge's discretion to depart from the range stated in the guidelines is limited to those circumstances in which such a departure is allowed by the Legislature. *Id.*, 439. MCL 769.34(3) provides

A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.

Substantial and compelling reasons are to be found only in exceptional cases. *People v Fields*, 448 Mich 58, 67-68; 528 NW2d 176 (1995). The reasons should grab the court's

attention and should be recognized as being of considerable worth in deciding the length of the sentence. *Id.*; *People v Babcock*, 244 Mich App 64, 75; 624 NW2d 479 (2000). They must be objective and verifiable. *Id.* Factors already considered by the guidelines may not be used to justify a departure unless the court finds that the characteristic has been given inadequate weight. *Id.*, 79.

The reasons for departure stated by the trial court do not meet the statutory requirement. The court record does not contain facts showing that defendant's prior record was given inadequate weight. MCL 769.34(3)(b). Conjecture regarding the effect of defendant's actions on the community in general and the court's opinion regarding the harshness or leniency of the guidelines are subjective factors and cannot support a departure.

We vacate the sentence and remand for resentencing. MCL 769.34(11). We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Martin M. Doctoroff

/s/ Donald S. Owens