

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ISAAC T. WALKER,

Defendant-Appellee.

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UNPUBLISHED

August 16, 2002

No. 234948

Wayne Circuit Court

LC No. 00-010183

Before: Murray, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

The prosecution appeals as of right, challenging the trial court's finding that there were substantial and compelling reasons to depart from the mandatory 10-year minimum sentence for defendant's conviction of possession with intent to distribute 50 or more, but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii). Following a jury trial, defendant was sentenced to 3 to 20 years' imprisonment for the cocaine offense, MCL 333.7403(2)(a)(iii), and was sentenced to 2 to 20 years' imprisonment for his additional conviction of possession with intent to distribute less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), 333.7403(2)(a)(iii). We vacate the sentence and remand for resentencing.

"A trial court's determination regarding substantial and compelling reasons to depart from a statutorily mandated minimum sentence is reviewed for an abuse of discretion." *People v Nunez*, 242 Mich App 610, 617; 619 NW2d 550 (2000) (citation omitted). "The determination that a particular factor is objective and verifiable should be reviewed by the appellate courts as a matter of law." *People v Fields*, 448 Mich 58, 78; 528 NW2d 176 (1995). In *People v Izarraras-Placante*, 246 Mich App 490, 496-497; 633 NW2d 18 (2001), this Court addressed the trial court's refusal to depart from the statutorily mandated 10-year minimum sentence for the defendant's delivery and conspiracy convictions. The defendant requested a sentence within the recommended minimum statutory guidelines range of three years and nine months to six years and three months. The Court stated the following regarding departures from the mandatory statutory minimum: "Our Supreme Court has held that substantial and compelling reasons must be based on objective and verifiable factors. . . . Only in exceptional cases should sentencing judges deviate from the minimum prison terms mandated by statute." *Id.* at 497 (citations omitted); see also MCL 769.34(2)(a).

Only defendant's sentence for the cocaine possession offense was a departure from the mandatory statutory minimum, so the prosecution challenges only that sentence. Defendant

counters that his actual minimum sentence for the cocaine offense was within the guidelines range, and is, therefore, presumptively proportionate. We disagree with defendant.

The *Izarraras-Placante* Court noted that controlled substance offenses are subject to the statutory sentencing guidelines, but held that it is “inappropriate to rely on the recommended minimum sentence under the guidelines as a substantial and compelling reason to depart from the mandatory minimum terms prescribed by the statute.” *Id.* at 497-498. In other words, the *recommended* minimum guidelines are distinct from the *mandatory* statutory minimum. The *Izarraras-Placante* Court concluded that “only in cases where substantial and compelling reasons exist to warrant a departure may the court then consider the guidelines in determining the magnitude of the departure.” *Id.* at 499. The Court found this conclusion consistent with the recognized legislative goal of “keep[ing] drug dealers in prison for long periods, both to remove them from society and to deter others from following their example.” *Id.* Therefore, it is inappropriate to utilize the guidelines as a factor in determining whether substantial and compelling reasons to depart exist, except to determine the magnitude of the departure where substantial and compelling reasons are first found.

Next, we agree with plaintiff that the trial court did not have substantial and compelling reasons to depart from the mandatory minimum sentence in this case. In *People v Daniel*, 462 Mich 1, 10; 609 NW2d 557 (2000), the Michigan Supreme Court affirmed the restrictive definition of the words “substantial” and “compelling” in regard to departures from statutorily mandated minimum sentences under MCL 333.7401:

“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.” [*Daniel*, *supra* at 9, quoting *Fields*, *supra* at 67-68.]

In the instant case, defendant was sentenced to 3 to 20 years’ imprisonment for his conviction of the cocaine possession offense, although the mandatory minimum sentence is 10 years. See MCL 333.7401(2)(a)(iii).

First, we must determine if the factors relied on by the trial court for departure were objective and verifiable, and if so, we must then determine if the factors constituted substantial and compelling reasons for the departure in this case. Relying on *Fields*, *supra*, this Court set forth the following nonexclusive list of factors that may be used for the purpose of evaluating whether a departure from the mandatory minimum sentence is warranted: (1) mitigating

circumstances surrounding the offense; (2) the defendant's prior criminal record; (3) the defendant's age; (4) the defendant's work history; and (5) post-arrest factors, such as the defendant's cooperation with law officials. *People v Johnson (On Remand)*, 223 Mich App 170, 173; 566 NW2d 28 (1997), *People v Johnson (After Remand)*, unpublished opinion per curiam of the Court of Appeals, issued December 19, 2000 (Docket No. 219499), rev'd \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 118351, decided July 9, 2002). In the instant case, the trial court relied on defendant's steady record of employment, lack of significant criminal history, familial support, educational background, and the amount of drugs involved in defendant's possession conviction in finding substantial and compelling reasons to depart from the statutorily mandated minimum.

We have reviewed the reasons for departure and conclude that none of those reasons, either alone or in combination with the others, warrant deviation from the statutorily mandated minimum sentence. The first factor relied on by the trial court was defendant's steady record of employment, which was verified at the sentencing hearing. This factor may be properly considered under *Fields*. See *Johnson, supra* at 174. Similarly, the second factor relating to defendant's prior criminal history may also be properly considered. *Id.* However, we note that the presentence investigation report indicates that defendant was convicted of the misdemeanor of assault and battery in 1998 rather than 1980. Therefore, although this factor is objective and verifiable, the trial court clearly erred in its determination regarding defendant's prior criminal history because the evidence reveals defendant was not crime free since 1980 as the trial court had concluded. The third factor, relating to defendant's verified familial support, may be considered under the substantial and compelling analysis. *Id.* at 78-79. Defendant's education also appears to be an appropriate factor under the analysis, which was verified in the presentence investigation report. *People v Perry*, 216 Mich App 277, 280; 549 NW2d 42 (1996).

The final factor mentioned by the trial court, regarding the fact that the drug amount was just over the threshold limit, is more troublesome. We hold that this was an inappropriate factor for consideration under the substantial and compelling analysis. See *People v Pearson*, 185 Mich App 773, 779; 462 NW2d 839 (1990) (despite defendant's claim that possession amount "just over the fifty grams" warranted sentencing departure, the amount was sufficient to support the conviction). In the present case, the trial court determined that the amount of drugs involved in this case was just over the threshold limit and could, therefore, be considered a factor under the substantial and compelling analysis. "The separation of powers doctrine, as provided by our constitution, prohibits our judicial branch from exercising powers that properly belong to the legislative branch." *People v Stephan*, 241 Mich App 482, 486; 616 NW2d 188 (2000); see also Const 1963, art 3, § 2. In *People v Hegwood*, 465 Mich 432, 436-437; 636 NW2d 127 (2001), the Michigan Supreme Court stated the following:

As the Court of Appeals explained in *People v Babcock*, 244 Mich App 64, 68; 624 NW2d 479 (2000), [after remand 250 Mich App 463; \_\_\_ NW2d \_\_\_ (2002),] the ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature. Const 1963, art 4, § 45. The authority to impose sentences and to administer the sentencing statutes enacted by the Legislature lies with the judiciary. See, e.g., MCL 769.1(1). It is, accordingly, the responsibility of a circuit judge to impose a sentence, but only *within the limits* set by the Legislature. *People v Milbourn*, 435 Mich 630, 651; 461 NW2d

1 (1990). For example, no matter how unusual the circumstances of an offense or an offender, a judge is constrained by the Legislature's determination of the maximum penalty and, if applicable, the minimum penalty. Thus, a judge cannot impose a twenty-year maximum sentence on an especially depraved individual convicted of unarmed robbery (a fifteen-year offense). Nor can a judge impose a one-year sentence on a previously upright citizen who has been convicted of felony-firearm (punishable with a flat two-year term for first-time offenders). [*Hegwood, supra* at 436-437 (emphasis in original).]

MCL 333.7401(2)(a)(iii) provides a minimum statutory sentence of 10 years' imprisonment, in keeping with the Legislature's policy to deter drug dealing. *Fields, supra* at 67-68, citing MCL 333.7401. "In interpreting statutes, words are to be given their common, generally accepted meaning. The Court should presume that each word has some meaning and should avoid a construction that would render a statute, or, any part of it, nugatory or surplusage." *People v Fox*, 232 Mich App 541, 553; 591 NW2d 384 (1998).

In accordance with these principles, we must give effect to the language utilized by the Legislature. In the present case, the trial court tried to avoid the exact language of the statute when it utilized the fact that the amount of drugs in this case was just over the threshold amount of fifty grams in its analysis finding substantial and compelling reasons for departure. The Legislature has established the various degrees of delivery offenses according to the weight in grams of the controlled substance involved in a particular case. See *Pearson, supra* at 779. Thus, the fact that the amount of drugs involved in this case was just above the fifty-gram threshold is inconsequential according to the statute. See MCL 333.7401. The use of this one inappropriate factor compels us to vacate this sentence. See, e.g., *Johnson, supra* at 175. Furthermore, we find it significant that defendant admittedly was pouring some of the cocaine down the kitchen drain when he was apprehended by the police, so it is impossible to know exactly how many grams of cocaine were actually involved in this case. Accordingly, we find that the trial court abused its discretion in considering the amount of drugs involved in this case as a substantial and compelling factor. See *Nunez, supra* at 617.

Ultimately, we hold that none the factors cited by the trial court are "keenly" or "irresistibly" interesting, or "of considerable worth." *Daniel, supra* at 9. Here, in addition to pouring cocaine down the kitchen sink, the police confiscated several paraphernalia items including a digital scale, lottery ticket papers, a McDonald's coffee spoon, a black plate held by defendant, a coffee grinder, a blender, and a glass measuring cup from defendant's home. Based on the above evidence presented at trial, we find that defendant's two-year college degree, familial support, extensive employment history, and his corrected criminal history do not represent substantial and compelling reasons to warrant a departure in this case. See generally *Daniel, supra*; *People v McNeil*, 450 Mich 1017; 544 NW2d 477 (1996); *Perry, supra* at 283.

We vacate the sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Christopher M. Murray  
/s/ E. Thomas Fitzgerald  
/s/ Peter D. O'Connell