

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DEON LAMONT CLAYPOOL,

Defendant-Appellee.

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UNPUBLISHED

October 18, 2002

No. 238984

Oakland Circuit Court

LC No. 01-177566-FH

Before: Fitzgerald, P.J., and Bandstra and Gage, JJ.

PER CURIAM.

The prosecution appeals by delayed leave granted, challenging the trial court's finding that there were substantial and compelling reasons to depart from the mandatory ten-year minimum sentence for defendant's conviction of delivery of more than 50 but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii).<sup>1</sup> We affirm.

A defendant convicted of delivering a controlled substance is subject to the mandatory prison terms set forth in the Public Health Code, MCL 333.7401 *et seq.* Pursuant to MCL 333.7401(2)(a)(iii), delivery of more than 50 but less than 225 grams of cocaine carries a mandatory minimum sentence of ten years' imprisonment. A trial court may, however, depart from this statutorily mandated minimum sentence if it finds on the record that there are substantial and compelling reasons to do so. MCL 333.7401(4); *People v Fields*, 448 Mich 58, 64-79; 528 NW2d 176 (1995).

Substantial and compelling 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 the sentence." *Fields, supra* at 67. Moreover, "only objective factors that are capable of verification may be used to assess whether there are substantial and compelling reasons to deviate from the minimum sentence imposed by the Legislature for certain drug offenses." *People v Daniel*, 462 Mich 1, 6; 609 NW2d 557 (2000). Objective and verifiable factors that are appropriate to consider include any mitigating circumstances surrounding the offense, as well as the defendant's age, prior criminal record, and work history. *Id.* at 6-7. The

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<sup>1</sup> Defendant was also sentenced on convictions of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v), resisting and obstructing a police officer, MCL 750.479, and possession of marijuana, MCL 333.7403(2)(d). These sentences, however, are not at issue in this appeal.

existence or nonexistence of a particular factor that might justify a downward departure from a minimum statutory sentence is a factual determination for the sentencing court that is reviewed on appeal for clear error. *Fields, supra* at 77. The determination that a factor is objective and verifiable is reviewed on appeal as a question of law. *Id.* at 77-78. The determination whether factors constitute substantial and compelling reasons to depart from the minimum sentence is reviewed on appeal for an abuse of discretion. *Id.* An abuse of discretion exists if the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, passion, or bias. *Id.* at 78.

In this case, the prosecution argues that the trial court abused its discretion in departing downward by two years from the ten-year mandatory minimum sentence, and that the extent of the departure violated the principle of proportionality. We disagree.

The trial court cited three reasons for its downward departure from the mandatory minimum sentence. The first of these reasons was defendant's age and prior criminal history. As noted above, these factors may be properly considered when determining whether substantial and compelling reasons to depart from the statutorily mandated minimum sentence exist. *Daniel, supra*. While defendant's age, twenty-six at the time he committed the instant offenses, is not exceptional and therefore does not itself warrant a downward departure, see *People v Pearson*, 185 Mich App 773, 779; 462 NW2d 839 (1990), we note that the trial court considered defendant's age in conjunction with his prior criminal record, which, at the time of the instant offenses included only one criminal misdemeanor for retail fraud in 1992.<sup>2</sup> Given the relatively minor nature of this single offense over the course of defendant's twenty-six years, we find no error in the trial court's conclusion that defendant's lack of a prior criminal record constitutes a substantial and compelling reason to depart from the mandatory minimum sentence.

The trial court also cited defendant's history of employment as a taxi cab driver since 1998. However, defendant's employment as a taxi cab driver for a period of less than two years, although similarly a proper consideration under *Daniel, supra*, does not "keenly" or "irresistibly" grab one's attention and, therefore, does not warrant a downward departure. *Fields, supra* at 67.

The same, however, is not true of the trial court's third stated reason for departing from the statutorily mandated minimum sentence, i.e., the government's involvement in arranging the drug deals with defendant so as to escalate his sentence. In *People v Shinholster*, 196 Mich App 531, 535; 493 NW2d 502 (1992), this Court held that the trial court properly considered the government's actions, which, while not constituting entrapment, purposefully escalated the defendant's crime, as one of several reasons justifying a downward departure.<sup>3</sup> We find the trial court's consideration of the government's role in the instant matter equally appropriate. The

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<sup>2</sup> All of the drug-related convictions in defendant's record relate to the transactions initiated by police officers after defendant's arrest and subsequent release on bond in December 2000, for possession of cocaine and marijuana.

<sup>3</sup> In *Fields, supra* at 78-79, three of the four justices in the majority agreed that this was a permissible factor to consider, with the fourth refusing to approve of *Shinholster* on the ground that "[t]he question of whether defendant's successive criminal acts not involving police entrapment can amount to a mitigating circumstance is far too significant to be resolved in the context of a record that does not present that question." *Id.* at 82 n 1 (Boyle, J., concurring).

record indicates that defendant was arrested in December 2000 for possession of cocaine and marijuana, then released on bond. Thereafter, police officers made three successive purchases of crack cocaine from defendant. On March 7, 2001, the purchase price was \$1,100 for one ounce. On March 12, 2001, the purchase price was \$2,000 for 49.2 grams. On March 14, 2001, the purchase price was \$4,000 for approximately 4.5 ounces. Thus, it objectively appears that the police made additional purchases that resulted in escalating the seriousness of the offenses of which defendant was convicted. This fact is verified in the PSIR and, pursuant to *Shinholster*, the trial court properly considered this factor as justification for a downward departure from the mandatory minimum sentence.

Citing *People v Izarraras-Placante*, 246 Mich App 490, 498; 633 NW2d 18 (2001), the prosecutor further argues that the trial court erred in considering that, even with the two-year departure at issue here, defendant's sentence still exceeded the maximum minimum sentence in the guidelines, which set forth a range of 36 to 60 months.<sup>4</sup> Again, we disagree. In *Izarraras-Placante*, this Court held that while the guidelines' recommended minimum sentence range cannot be used as a substantial and compelling reason to depart from the statutory minimum sentence, the guidelines can be considered in determining the magnitude of the departure. *Id.* at 498-499. Defendant argues that the trial court properly considered the guidelines when determining the extent of the departure, and did not use the guidelines in justifying the departure itself. After reviewing the trial court's remarks at sentencing in context, we agree with defendant's assessment of the trial court's remarks. Accordingly, we find no error in the trial court's consideration of the sentencing guidelines in departing from the statutory minimum sentence.

The prosecution additionally argues that, because there were not substantial and compelling reasons for the downward departure, the sentence is disproportionate. However, as discussed above, defendant's lack of a significant prior criminal record and the government's role in escalating the seriousness of the offense at issue here were substantial and compelling reasons justifying a downward departure. Moreover, the departure itself was proportionate.

A sentence is proportionate if it adequately reflects the seriousness of the crime and the defendant's prior record. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). In *People v Babcock (After Remand)*, 250 Mich App 463; 648 NW2d 221 (2002), this Court held that the principle of proportionality can be considered concerning the extent of a departure from the applicable sentencing guidelines range. *Id.* at 468-469; see also *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001). Additionally, this Court indicated that a trial court's reasons for a downward departure from the sentencing guidelines range can also serve to justify the extent of the departure. *Babcock, supra* at 472. We apply this approach to the instant case, although it involves a departure from the mandatory minimum sentence rather than the sentencing guidelines range.

The trial court did not abuse its discretion in imposing a sentence that departed downward from the mandatory minimum by two years because the sentence was proportionate to the seriousness of the crime and defendant's prior record. *Milbourn, supra*. Supporting the two-year downward departure are the facts that defendant had no prior drug-related convictions in his

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<sup>4</sup> Neither party argues that this sentencing guidelines range is incorrect.

record and that the police officers engaged in three successive narcotics transactions with defendant which escalated his sentence. For these reasons, the trial court's two-year departure from the mandatory minimum sentence is proportionate.

We affirm.

/s/ E. Thomas Fitzgerald

/s/ Richard A. Bandstra

/s/ Hilda R. Gage