

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AHMAD AZIZ EAST,

Defendant-Appellant.

UNPUBLISHED

March 2, 2004

No. 244149

Wayne Circuit Court

LC No. 02-002771

Before: Schuette, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his eight to sixty year sentences for possession with intent to deliver less than 50 grams of cocaine within 1,000 feet of school property, and delivery of less than 50 grams of cocaine within 1,000 feet of school property, MCL 333.7410. While we affirm defendant's convictions, we reverse his sentence and remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

Defendant's convictions arose out of a police "buy and bust" operation. Police officer Brian Watson testified that he was working undercover at a party store directly across from an alternative high school that was in session. Watson was approached by an individual who offered to sell him narcotics. Watson paid the individual who then walked up to defendant and handed him money. Defendant ran across the street to the school parking lot where he retrieved cocaine in zip-locked packets from under a dumpster. He returned and gave the cocaine to the individual.

Watson radioed other officers and told them that the deal had been completed. Other officers then arrested defendant. They discovered \$1,162 in cash on defendant's person. They did not find any narcotics on defendant. After a bench trial, defendant was found guilty of possession with intent to deliver less than 50 grams of cocaine within 1,000 feet of school property, and delivery of less than 50 grams of cocaine within 1,000 feet of school property, MCL 333.7410. He was sentenced to 8 to 60 years imprisonment for each count, to be served concurrently.

II. STANDARD OF REVIEW

The imposition of a sentence is reviewed for an abuse of discretion. *People v Sexton*, 250

III. ANALYSIS

It appears that the trial court imposed the eight to sixty year sentence based upon a sentencing provision of MCL 333.7410. It provides that a violator shall be punished by a term of imprisonment of not less than two years or more than 3 times that authorized by section 7401(2)(a)(iv) (section 7401(2)(a)(iv) authorizes a maximum sentence of 20 years). However, MCL 333.7410 is an enumerated felony covered by the legislative sentencing guidelines. MCL 777.18. Under MCL 777.21(4), defendant's offense class (D), offense variable level (5) and prior record variable level (25) were determined based on the underlying offense of delivery of and possession with intent to deliver less than 50 grams of cocaine, MCL 333. 7401(2)(a)(iv). Defendant's sentencing guidelines were computed as 0 to 17 months.

A sentencing court may depart from the appropriate sentence range established under the sentencing guidelines if the court has a substantial and compelling reason for the departure, and states the reason on the record. MCL 769.34(3). The existence of a particular factor is a factual determination reviewed for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). The determination that a factor is objective and verifiable is reviewed as a matter of law. *Id.* The determination that the objective and verifiable factors constitute substantial and compelling reasons to depart from the statutory minimum sentence is reviewed for abuse of discretion. *Id.*, 265.

Substantial and compelling reasons exist only in exceptional cases and reasons justifying departure should keenly or irresistibly grab the court's attention and be recognized as having considerable worth in determining the length of a sentence. *Id.*, 257. In departing from the guidelines range, the trial court must consider whether its sentence is proportionate to the seriousness of the defendant's conduct and his criminal history. If it is not, the departure is necessarily not justified by a substantial and compelling reason. *Id.*, 264.

It is not enough that there exists some potentially substantial and compelling reason to depart if that reason is not articulated on the record. *Id.*, 258. If there is a reason that is not articulated, the Court must remand the case to the trial court for resentencing or rearticulation. *Id.*, 259. The obligation of this Court is to review the trial court's determination that a substantial and compelling reason exists for the departure. *Id.*

In passing sentence, the trial court gave no explanation why the calculated range was insufficient for the offense or the offender. The court failed to articulate a substantial and compelling reason for departure, and it made no findings that would explain why a 96-month minimum sentence was warranted when the guidelines range was 0 to 17 months. If the sentence constituted a departure from the guidelines range and the reasons were not articulated, this Court may not independently determine that a sufficient reason exists, but must remand for rearticulation or resentencing. *Id.*, 258-259.

We note that if the upper limit of a guidelines range is eighteen months or less, the court must impose an intermediate sanction – which may include probation, drug treatment, special alternative incarceration, mental health treatment, community corrections placement, a fine, community service, house arrest, electronic monitoring or a jail term – unless there are

substantial and compelling reasons to sentence the defendant to imprisonment. MCL 769.31(c), MCL 769.34(4), *People v Stauffer*, 465 Mich 633, 635-636; 640 NW2d 869 (2002).

We note that the facts and circumstances of this case, the selling of illegal drugs near a school for troubled children, are compelling and may well warrant the imposition of a sentence that is a significant upward departure from the sentencing guidelines. If on remand the trial court determines that an upward departure is warranted, it must articulate substantial and compelling reasons for the departure that are supported by objective and verifiable factors on the record.

Reversed and remanded for resentencing. We do not retain jurisdiction.

/s/ Bill Schuette

/s/ Patrick M. Meter

/s/ Donald S. Owens