

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT VICTOR MICHIELUTTI,

Defendant-Appellant.

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FOR PUBLICATION

May 3, 2005

9:20 a.m.

No. 251706

Macomb Circuit Court

LC No. 02-001008-FH

Official Reported Version

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

O'CONNELL, J.

Defendant pleaded guilty of possession with intent to deliver 50 grams or more, but less than 225 grams, of cocaine, the former MCL 333.7401(2)(a)(iii), and was sentenced to serve ten to twenty years' imprisonment. Defendant appeals by leave granted. We vacate and remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that he should be resentenced so that he may benefit from retroactive application of amendments of MCL 333.7401, which eliminated the ten-year mandatory minimum sentence. However, we have squarely resolved this issue, determining that the abolition of the mandatory minimum sentence was intended to apply prospectively only. *People v Thomas*, 260 Mich App 450, 458-459; 678 NW2d 631 (2004). Accordingly, persons convicted under the earlier legislation may avail themselves of the parole provisions of the revised statute, not the elimination of the mandatory minimum. *Id.*; see also MCL 791.234.

Defendant alternatively argues that the trial court abused its discretion in refusing to find substantial and compelling reasons to impose a minimum sentence below the ten years that the statute required when the court imposed sentence. We agree that resentencing is required.

At the time of defendant's sentencing, MCL 333.7401(4) provided that "[t]he court may depart from the minimum term of imprisonment . . . if the court finds on the record that there are substantial and compelling reasons to do so." Substantial and compelling reasons for downward departures for the purposes of this statute included "only those factors that are objective and verifiable . . . ." *People v Fields*, 448 Mich 58, 62; 528 NW2d 176 (1995).

We review for clear error a sentencing court's determination whether a particular factor exists. We review de novo whether a factor is objective and verifiable and review for abuse of

discretion a sentencing court's determination that qualifying factors constitute substantial and compelling reasons to depart from the guidelines range. *Id.* at 77-78.

At sentencing, defendant raised the issues of his age, work history, criminal history, and family support. Defendant also specifically asked the court to depart downward from the mandatory sentence because he cooperated with law enforcement. On the issue of a downward departure, the trial court stated:

The statute requires a mandatory minimum sentence of ten years . . . unless there are substantial and compelling reasons to depart . . . . In order for there to be a departure from the mandatory minimum it's incumbent upon the defendant to make a showing of those substantial and compelling reasons.

Historically those reasons having [sic] included cooperation with law enforcement in order to reduce the criminal cartel in the delivery of narcotics. And historically from other similarly situated cases the only substantial and compelling reason that has been accepted has been the objective providing of assistance to law enforcement such that the criminal enterprise is diminished.

That showing has not been made here. While I'm sure that [defendant] in his heart would have liked to have cooperated, or rendered other assistance, so as to be able to make a showing of substantial and compelling reasons for departure, he found that he was not capable of doing that. . . .

The legislature has effectuated such a severe penalty because of the poison that drugs does [sic] to the community. . . .

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I have read the letters . . . . And while I'm sure there are aspects of your personality and being that are worthwhile . . . to the community, you did not traffic on your strengths but instead traffic [sic] upon your greed because the enterprise was for money alone. . . . And therefore the Court fails to find substantial and compelling reasons to depart from the mandatory minimum.

Defendant asserts that the trial court erred in concluding that providing assistance to law enforcement was the only basis on which a downward departure may rest. He protests that the trial court failed to recognize his lack of a criminal record as a valid factor for consideration, along with his work history, age, and family support. To the extent applicable, each of the first three is recognized as a valid, objective, and verifiable factor. *Fields, supra* at 77 (criminal record, work history, and age). Likewise, family support can serve as an objective and verifiable factor. See *People v Daniel*, 462 Mich 1, 5, 8; 609 NW2d 557 (2000); *People v Harvey*, 203 Mich App 445, 448; 513 NW2d 185 (1994). Defendant's presentence investigation report consistently indicates that defendant was forty-five years old, had no prior criminal record of any kind, and had always maintained steady employment. Because these were objective and verifiable factors raised at sentencing, the sentencing court should have, in the process of exercising its discretion, responded to each of them on the record. Without a record of the court's review of presented factors, the sentencing court forces us to assume that the court

properly or improperly exercised its discretion. *People v Triplett*, 432 Mich 568, 571-573; 442 NW2d 622 (1989). In a similar sentencing situation, the Supreme Court required a sentencing court to disclose its discernment of discretionary matters, and in this case the seriousness of imposing a mandatory ten-year sentence compels some measure of reasonable disclosure as well. *Id.*

Here, the trial court acknowledged only the lack of success in assisting law enforcement, to the exclusion of four factors that could legitimately have warranted a downward departure. The trial court simply failed to address the other factors. Accordingly, we vacate defendant's sentence and remand this case to the trial court to consider on the record the question of a downward departure, addressing all the applicable factors.<sup>1</sup> We emphasize, however, that we are only seeking correction, if necessary, of the court's failure to consider properly presented factors and further clarification of what role, if any, these potential factors played in the ultimate sentencing decision. *Id.* Unfortunately, the trial court accepted some of the factors as applicable to defendant, but it did not apply them to his case. With other factors, it failed to address their validity. Given the current state of uncertainty in the record and the additional legal guidance this opinion provides, the simplest way to achieve the correct review is to vacate defendant's sentence and remand for resentencing.<sup>2</sup> Nevertheless, we do not require a different result. A factor's validity is a question of fact that we do not decide on appeal, but leave to the sentencing court's capable power of discernment. Moreover, the sentencing court should not mistake anything in our opinion as a decision on the ultimate issue whether these factors are substantial and compelling. This determination remains within the sentencing court's discretion. *People v Claypool*, 470 Mich 715, 723; 684 NW2d 278 (2004). Rather, we primarily remand for an articulated review and application of defendant's facts to the appropriate legal principles.

Finally, as noted above, several recent opinions have held that the new sentencing strictures in MCL 333.7401 do not apply retrospectively. *Thomas, supra*; *People v Doxey*, 263 Mich App 115, 123; 687 NW2d 360 (2004). While we agree that these opinions properly reflect the Legislature's intent on prospective application, neither the revised statutes nor these decisions limit the sentencing court's ability, in its discretion, to deviate from the mandatory minimum on the basis of substantial and compelling reasons. See former MCL 333.7401(4); *Claypool, supra* at 719-720. As in *People v Schultz*, 435 Mich 517; 460 NW2d 505 (1990) (opinion by Archer, J., joined by Levin and Cavanagh, JJ.), the Legislature preserved the sentencing court's discretion when it revamped MCL 333.7401 and MCL 333.7403, indicating that it did not intend to chain the court to the mandatory sentences listed in the old, abolished scheme. In other words, while application of the new sentencing framework is certainly not mandatory in preamendment cases, neither is the blind implementation of the old sentencing scheme. In *Schultz*, the Supreme Court went even further and stated that the defendant did not need to show any substantial and

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<sup>1</sup> We note that we are not limited by the appellate confinements in MCL 769.34(10), because the mandatory minimum sentence imposed actually exceeds the guidelines in this case by several years.

<sup>2</sup> This is especially true in light of the fact that this case will be remanded to the original sentencing judge's successor.

compelling reasons before receiving the benefit of the revised statute. *Id.* at 532-533 (opinion by Archer, J.). The wayward Schultz and his contemptible coappellant, Sand, each received new sentences despite the disparity in the Court's esteem for them. *Id.*

While we are bound by precedent to stop short of adopting this approach, we acknowledge that the fundamental tenets in *Schulz* remain good law: The Legislature intentionally granted sentencing courts greater discretion to fashion an appropriate sentence for these violations, and in light of a dramatic and ameliorative change in legislative policy, courts should determine whether an offender's case merits application of the Legislature's newfound leniency. *Id.* Therefore, the new, ameliorative legislative policy qualifies as an objective and verifiable reason to depart from the former mandatory sentence.

If a court finds that an offender has objective and verifiable qualities that especially accord with the new legislative policy, the court, in its discretion, may consider all these reasons together and conclude that they yield substantial and compelling reasons to depart from the old mandatory sentence. We direct the sentencing court to consider this approach on remand. Our decision should not be interpreted as an invention of new law or an alteration of existing law, but it is intended to inject some reason and sound judgment into an area of law that is currently on the road to absurdity.

Sentence vacated and case remanded for resentencing. We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ Jane E. Markey

Markey, J., concurred.