

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

BERNARD DORSEY,

Defendant-Appellee.

UNPUBLISHED

December 13, 1996

No. 178108

LC No. 94-132064-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/

Cross-Appellant,

v

TERRY D. PACK,

Defendant-Appellant/

Cross-Appellee.

No. 178157

LC Nos. 94-131587-FH;

94-131588-FH;

94-131795-FH;

94-131796-FH

Before: Young, P.J., and O'Connell and W.J. Nykamp,* JJ.

PER CURIAM.

In Docket No. 178108, defendant Dorsey pleaded guilty to possession with intent to deliver 225 grams or more but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), and was sentenced to ten to thirty years' imprisonment. Plaintiff appeals as of right. We remand.

* Circuit judge, sitting on the Court of Appeals by assignment.

In Docket No. 178157, defendant Pack pleaded guilty in four separate cases to delivery of 225 grams or more but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 143.15(7401)(2)(a)(ii), delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), delivery of 50 grams or more but less than 225 grams of cocaine (two counts), MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii) and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant Pack was sentenced to consecutive prison terms of, respectively, five to thirty years, one to twenty years, five to twenty years, three to twenty years (two terms) and two years. Defendant appeals as of right and plaintiff cross appeals. We remand.

Issues raised in Docket No. 178108

Plaintiff argues that the trial court erred in departing from the statutorily prescribed minimum sentence for defendant's offense because substantial and compelling reasons did not exist to justify a departure. MCL 333.7401(4); MSA 14.15(7401)(4); *People v Fields*, 448 Mich 58, 62; 528 NW2d 176 (1995).

In sentencing defendant Dorsey, the trial court listed several reasons for departing from the statutory minimum term. However, not all of the reasons expressed by the court were objective and verifiable, such as the fact that defendant accepted responsibility for his actions. This factor was subjective and should not have been considered by the court. *Fields, supra*, p 80. Because the court considered an inappropriate factor, we remand to the trial court for a determination whether it still finds substantial and compelling reasons to deviate when confined to only appropriate considerations. *Id.*

As a result of our disposition of this issue, we need not address plaintiff's remaining issue regarding the proportionality of defendant Dorsey's sentence. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Issue raised on appeal in Docket No. 178157

Defendant Pack argues that if the Supreme Court rules against the imposition of consecutive sentences in multiple controlled substance offense cases, he should be a beneficiary of that ruling. However, the Supreme Court has recently decided the issue of consecutive sentences for multiple controlled substance offenses against defendant's position. *People v Morris*, 450 Mich 316; 537 NW2d 842 (1995). Defendant is, therefore, not entitled to any relief.

Issues raised on cross appeal in Docket No. 178157

As in Docket No. 178108, plaintiff claims the trial court erred in departing from the statutorily prescribed minimum sentence because there were not substantial and compelling reasons to justify a departure. MCL 333.7401(4); MSA 14.15(7401)(4); *Fields, supra*, p 62.

In sentencing defendant Pack, the trial court articulated several reasons for departing from the statutory minimum, one of which was that defendant had a child that needed care. While objective and verifiable, we believe this factor was irrelevant and improper to consider. Accordingly, we remand to

the trial court for a determination whether it still finds substantial and compelling reasons to deviate when confined to only the appropriate considerations. *Fields, supra*, p 80. Should the lower court find that substantial and compelling reasons to depart do not exist or that defendant's total minimum sentence should exceed eighteen years, defendant should be allowed an opportunity to withdraw his plea because the sentence would no longer be in accordance with defendant's plea, which was tendered pursuant to *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993).

Plaintiff also argues that the court improperly considered the consecutive nature of defendant Pack's sentences. *People v Hardy*, 212 Mich App 318, 320-321; 537 NW2d 267 (1995). While the court did expressly recognize that defendant's sentences were to be imposed consecutively pursuant to MCL 333.7401; MSA 14.15(7401), it is not clear from the record whether the court considered the consecutive sentencing in any improper fashion. Because it is not clear from the record whether this is so, we simply direct the trial court on remand to disregard this factor in reviewing defendant's sentence.

Both cases are remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Robert P. Young
/s/ Peter D. O'Connell
/s/ Wesley J. Nykamp