

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ANGELIKA MAVIS ESCUE,

Defendant-Appellee.

UNPUBLISHED

February 14, 1997

No. 184610

Genesee Circuit Court

LC No. 94-050040-FH

Before: Markman, P.J., and O'Connell and D. J. Kelly,* JJ.

PER CURIAM.

Defendant pleaded guilty to possession of 50 grams or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and was sentenced to two to twenty years' imprisonment. The prosecution appeals by right. We remand.

The prosecution argues that the trial court erred in deviating from the mandatory minimum sentence because substantial and compelling reasons did not exist to justify a departure. The mandatory minimum sentence for this offense is ten years. Section 7401(2)(a)(iii). A sentencing court may depart from such a mandatory minimum sentence if it "finds on the record that there are substantial and compelling reasons to do so." Section 7401(4). Section 7401(2)(a)(iii)'s mandatory minimum sentence reflects the Legislature's intent to remove drug dealers from society for extended periods and to deter drug offenses. *People v Fields*, 448 Mich 58, 67-68; 528 NW2d 176 (1995). In accordance with this purpose, the Legislature intended substantial and compelling reasons to depart from a mandatory minimum sentence to "exist only in exceptional cases." *Fields, supra* at 68. A sentencing court must use "objective and verifiable" factors to determine whether there are substantial and compelling reasons to depart from a mandatory minimum sentence. *Id.* at 68-70. Whether a particular factor exists is a factual determination that this Court reviews under the clearly erroneous standard. *Id.* at 77. Whether a particular factor is objective and verifiable is a legal question, which we review de novo. *Id.* at 77-78; *People v Perry*, 216 Mich App 277, 280; 549 NW2d 42 (1996). We review a sentencing court's determination "that the objective and verifiable factors present in a particular

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

case constitute substantial and compelling reasons to depart from the statutory minimum sentence” for an abuse of discretion. *Fields*, at 78.

Here, the trial judge stated, on the record, its reasons for deviating from the mandatory minimum sentence. Several of the factors considered were not objective and verifiable. Comments in the Presentence Investigation Report that defendant “is not seen as a significant trafficker, but more of an opportunist” and that “[u]nfortunately, the offense is nonprobational, even though the defendant would probably make a fair candidate for community supervision” appear to be casual, subjective conclusions rather than objective and verifiable observations. Use of such subjective analyses of a probation officer to justify a departure from a mandatory minimum sentence is improper. *Perry*, *supra* at 282-283. Next, the court noted that defendant “appear[ed] to be making a conscientious effort to improve [her] life” and that “the kind of person [her son] turns out to be” depends on defendant. These are also clearly subjective and, therefore, improper considerations in determining whether to depart below a mandatory minimum sentence. The court also relied on defendant’s admission of guilt. While a defendant’s oral expression of guilt is a verifiable action, this Court has found that a defendant’s intent while expressing guilt is within his or her own mind and is therefore subjective. *People v Krause*, 185 Mich App 353, 358; 460 NW2d 900 (1990), overruled on other grounds *Fields*, *supra* at 77. Therefore, none of these factors were objective and verifiable; accordingly, they were improper considerations for departing from the mandatory minimum sentence.

The trial court also cited some factors which were clearly objective and verifiable. The *Field* Court offered three observations regarding the use of such factors to depart from a mandatory minimum sentence. First, courts are to “place particular emphasis on mitigating circumstances surrounding the offense.” *Fields*, at 76. Second, a defendant’s prior record, age and work history are proper factors for consideration whether to depart from a mandatory minimum sentence. *Id.* Third, factors arising after a defendant’s arrest “should be assigned the same weight as preexisting factors such as age or employment history.” *Id.*

We first consider circumstances surrounding the offense. Here, the court found the fact that the controlled buy at issue involved a request for an amount of cocaine above fifty grams constituted a mitigating circumstance. Government activity that, while not constituting entrapment, purposefully escalates the crime is a mitigating circumstance surrounding the crime that “weighs heavily in favor of departure from the mandatory minimum sentence.” *Fields*, at 79. However, here defendant admitted to the police that she had brought five ounces of cocaine from California and had previously sold the other three ounces. Further, the police found drug paraphernalia (e.g., pager, triple beam scale) and \$20,000 cash in her home. In the context of this evidence, the fact that the police informant requested an amount of cocaine over fifty grams is not particularly compelling. Defendant was an active seller of the cocaine at issue, not merely a “mule” or “go-between” for a seller.

Second, we consider relevant factors relating to defendant’s background. Here, the court noted that defendant had no prior felony record. However, she did have a juvenile record and a conviction for impaired driving. It also noted her youth; but defendant was twenty-two years old at the time of the offense. In addition, the court found the fact that defendant was the parent of a five-year old child to be a mitigating factor. Undeniably, defendant’s conduct has impacted upon her child in a tragic

fashion. Nevertheless, it is not unreasonable to infer that defendant may well have cut and weighed drugs in front of her child, in which case the presence of her child might be seen as an aggravating rather than a mitigating factor in determining an appropriate sentence for defendant. The trial court also considered evidence of defendant's troubled background including a dysfunctional family, alleged molestation by her step-father, an attempted suicide and three stays at mental institutions. This evidence appears to be objective and verifiable. However, we fail to see how defendant's troubled childhood supports a departure from the mandatory minimum sentence for an offense committed well beyond the time of that childhood.

Third, we consider post-arrest factors. A defendant's "cooperation with law enforcement officials should be given special consideration by the sentencing court" because it assists the fight against drug-related crime. *Fields*, at 77. Here, the court noted that defendant "was very cooperative during the presentence investigation." However, defendant did not cooperate at all with the police in its investigation of defendant's suppliers. Because of its tenuous connection to combating other drug crimes, mere cooperation during the presentence investigation is not a strong mitigating factor. In the face of non-cooperation with law enforcement officers, defendant's limited cooperation with presentencing officials does not constitute a substantial and compelling reason to depart from the mandatory minimum sentence.

Taken together, we believe that the trial court abused its discretion in finding that the mitigating factors in this case rose to the level of being sufficiently "substantial and compelling" to warrant a departure from the mandatory minimum sentence. We neither find these factors to be "exceptional", *Fields*, at 68, nor such that the Legislature would have intended the general rule set forth in §7401(2)(1)(iii) to be inapplicable. Accordingly, we remand for resentencing consistent with § 7401(2)(a)(iii).¹ We do not retain jurisdiction.

/s/ Stephen J. Markman

/s/ Peter D. O'Connell

/s/ Daniel J. Kelly

¹ We do not agree with the prosecutor that resentencing should occur before another judge. Although the trial court's reference to a newspaper article describing the ongoing legislative debate over drug sentencing would not have been an appropriate consideration in departing below the mandatory minimum sentence, the court expressly acknowledged that it was not relying in any way upon the article in its sentencing determination. Resentencing before a different judge is not necessary here. See *People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986).