

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MARSHALL MCNEIL,

Defendant-Appellee.

UNPUBLISHED

June 12, 1998

No. 203134

Recorder's Court

LC No. 90-012936

Before: Wahls, P.J., and Jansen and Gage, JJ.

MEMORANDUM.

Defendant pleaded guilty to possession with intent to deliver 50 or more grams, but less than 225 grams of cocaine, MCL 333.7401(1) and (2)(a)(iii); MSA 14.15(7401)(1) and (2)(a)(iii). The trial court originally sentenced defendant to 2-1/2 to 20 years' imprisonment. The prosecutor appealed. We vacated defendant's sentence and remanded for resentencing. On remand, the trial court sentenced defendant to the statutory minimum, ten to twenty years. Defendant appealed and this Court again remanded for resentencing. On second remand, the trial court resentenced defendant to 2-1/2 to 20 years' imprisonment. The prosecutor appealed. We affirmed, but our Supreme Court remanded for resentencing. On third remand, the trial court resentenced defendant to 3-1/2 to 20 years' imprisonment. The prosecutor appeals as of right for the third time. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Initially, we observe that the Parole Board's absolute discharging of defendant from his 2-1/2-to-20-year sentence does not render the prosecutor's challenges to the validity of defendant's sentence moot. *People v Hill (After Remand)*, 202 Mich App 520; 509 NW2d 856 (1993).

The trial court did not abuse its discretion when it concluded that defendant's work history, his education, his strong family and community support, the minor nature of his prior record, his exemplary conduct while incarcerated and on parole status and his successful rehabilitation as demonstrated by defendant's accomplishments since his parole discharge constitute substantial and compelling reasons for departure from the statutory minimum. MCL 333.7401(4); MSA 14.15(7401)(4); *People v Fields*, 448 Mich 58, 61-62, 76-78; 528 NW2d 166 (1995); *People v Shinholster*, 196 Mich App

531, 535; 493 NW2d 502 (1992). Additionally, the court correctly found these factors are objective and verifiable. *Fields, supra*, pp 68, 77-78; *Shinholster, supra*. These factors justify the departure made by the court.¹ *Shinholster, supra*.

Although the prosecutor correctly points out that the court clearly erred when it found that defendant had been paroled after serving only two years of his ten-year minimum sentence, *Fields, supra*, pp 77-78, this factual error is of insufficient magnitude to warrant resentencing.

Finally, although the trial court lacked the authority to suspend defendant's sentence, MCL 333.7401(3); MSA 14.15(7401)(3); *Dean v Dep't of Corrections*, 453 Mich 448, 460-461; 556 NW2d 458 (1996), the record reveals that the trial court mischaracterized its actions as a suspension of defendant's sentence. The court used the term suspension to convey no more than the fact that defendant had fully served his minimum sentence, once defendant was credited for time served while on parole, and that there was no need to place defendant in custody and return him to prison, particularly where defendant had been discharged from parole.

Affirmed.

/s/ Myron H. Wahls

/s/ Kathleen Jansen

/s/ Hilda R. Gage

¹ Although the most recent presentence investigation report indicates that a kilo of cocaine was found in a safe in defendant's home, the trial court struck this information from the presentence investigation report prepared for defendant's initial sentencing after the court determined that a kilo of soap powder, and not cocaine, was found in the safe.