

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TODD EUGENE STEINBERG,

Defendant-Appellee.

UNPUBLISHED

July 7, 1998

No. 204595

Oakland Circuit Court

LC No. 94-133144 FH

Before: Griffin, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

Defendant pleaded guilty to possession with intent to deliver more than 50 but less than 225 grams of a controlled substance, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and habitual offender, fourth offense, MCL 769.12; MSA 28.1084. He was originally sentenced to a term of three to twenty years' imprisonment, a departure from the presumptive ten-year minimum term prescribed by § 7401(2)(a)(iii). In his prior appeal, this Court vacated defendant's sentence and remanded for resentencing. *People v Steinberg*, unpublished order of the Court of Appeals, entered February 14, 1997 (Docket No. 190892). Defendant was resentenced by a different judge to a term of six to twenty years' imprisonment. Plaintiff appeals as of right. We affirm.

I

Appellate review of a sentence below the presumptive statutory minimum involves three evaluations: (1) the existence or nonexistence of a particular factor is reviewed for clear error; (2) the determination whether a particular factor is objective and verifiable is reviewed as a matter of law; and (3) a trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum term is reviewed for an abuse of discretion. *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995).

Among the factors that may be considered by the sentencing court are: (1) whether there are mitigating circumstances surrounding the offense, (2) whether the defendant has a prior record, (3) the defendant's age, (4) the defendant's work history, and (5) factors that arise after the defendant's arrest

such as the defendant's cooperation with law enforcement officials. *Id.* at 76-77; *People v Johnson (On Remand)*, 223 Mich App 170, 173-174; 566 NW2d 28 (1997).

We agree that there were no mitigating circumstances surrounding defendant's crime and defendant's preincarceration conduct, including his prior record, which would constitute substantial and compelling reasons to depart from the presumptive minimum sentence. However, in finding substantial and compelling reasons to depart, the sentencing court focused on defendant's behavior in prison. Postincarceration conduct is a factor that may be considered. *Fields, supra* at 77. See also *People v Shinholster*, 196 Mich App 531, 535; 493 NW2d 502 (1992) (recognizing the defendant's "very good record" [despite three misconduct tickets] after four years in prison), which is cited with approval in *Fields, supra* at 78-79. Also, in *People v Harvey*, 203 Mich App 445, 448; 513 NW2d 185 (1994), this Court upheld a departure sentence, in part, because the defendant had been "an exemplary probationer" on a tether program related to a different offense. Similarly, in *People v Hellis*, 211 Mich App 634, 650; 536 NW2d 587 (1995), the fact that the defendant had completed an inpatient drug treatment program and was in an ongoing outpatient program was considered significant, notwithstanding a "fourteen-year criminal history."

While we agree that the trial court erroneously considered defendant's "mind set," which was not "objective and verifiable," see *People v Poppa*, 193 Mich App 184, 188; 483 NW2d 667 (1992), and that the probation officer's recommendation was also irrelevant, *People v Perry*, 216 Mich App 277, 282-283; 549 NW2d 42 (1996), we find no clear error in the trial court's findings and consideration of the remaining factors. Given those findings, we conclude that the sentencing court's decision to depart from the presumptive minimum sentence was not an abuse of discretion.

II

Finally, we conclude that defendant's sentence is not disproportionately lenient. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Cf. *People v Lankey (After Remand)*, 198 Mich App 187; 496 NW2d 571 (1993).

Affirmed.

/s/ Richard Allen Griffin

/s/ Roman S. Gribbs