

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellant,

v

No. 207755

Oakland Circuit Court

DANNY MIKE DANIEL,

LC No. 97-150521 FH

Defendant-Appellee.

Before: Holbrook, Jr., P.J., and Markey and Whitbeck, JJ.

WHITBECK, J. (dissenting)

I respectfully dissent. I conclude that the trial court improperly considered, and at that heavily considered, a subjective factor, namely defendant's expressions of remorse, in deciding to exercise a "downward departure" in sentencing defendant for his conviction of delivery of more than 50, but less than 225, grams of cocaine, MCL 333.7402(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). While the circumstances of this case may have provided a basis for the trial court to properly exercise its discretion to depart from the generally mandatory ten-year minimum sentence for this crime, the trial court's rationale for its downward departure was inappropriate. Accordingly, I would remand for resentencing at which the decision whether to undertake a downward departure would be made with regard to only objective and verifiable factors.

As indicated in the majority opinion, a trial court must find on the record that there are "substantial and compelling reasons" in order to depart from the generally mandatory minimum sentence for the crime at issue. MCL 333.7401(4); MSA 14.15(7401)(4). A trial court may consider only "objective and verifiable" factors in determining whether there are substantial and compelling reasons for such a downward departure. *People v Fields*, 448 Mich 58, 62; 528 NW2d 176 (1995); *People v Perry*, 216 Mich App 277, 280; 549 NW2d 42 (1996). In this regard, the Michigan Supreme Court explicitly disapproved the consideration of a defendant's expressions of remorse in deciding whether to undertake a downward departure because that is a subjective factor. *Fields, supra* at 69, 80.

An appellate court cannot review whether the defendant has expressed remorse, or if he has a desire to help others, factors cited by the trial judge in this case. [*Id.* at 69.]

In the case at hand, the trial court's remarks at sentencing reflect that it improperly considered defendant's expressions of remorse as a factor – and indeed a heavy factor – in finding substantial and compelling reasons for a downward departure. In the course of setting forth its rationale for deviating from the generally mandatory minimum sentence, the trial court stated:

I'm also very impressed by your letter of remorse. I am impressed by the remorse that you've shown. So many of the people ... who come before me when I sentence them over the years, their only comment was, "I'm going to appeal you, Judge." That's what I get. There is a man that has not mentioned that; of course he has a right to. But he said he's very sorry. And remorse is very important to the re-establishment [sic] and to behavior modification.

Thus, I conclude that the trial court erred by considering defendant's expressions of remorse as a factor in deciding to depart from the generally mandatory minimum sentence.

However, as in *Fields, supra* at 80, the trial court also considered appropriate objective and verifiable factors in deciding to undertake a downward departure. In particular, the trial court stated that it was considering defendant's lack of a prior record, age and cooperation with law enforcement, all of which were appropriate objective and verifiable factors. *Id* at 76-77, 80.¹ The trial court also properly considered the existence of familial support for defendant as an objective and verifiable factor. See *id.* at 78 (noting with apparent approval the consideration in *People v Harvey*, 203 Mich App 445, 448; 513 NW2d 185 (1994) of the defendant's "strong family support"); *Perry, supra* at 280-282 (considering that the defendant lived with his mother and stepfather as an objective and verifiable factor).

In *Fields, supra*, the Michigan Supreme Court made it clear that the appropriate remedy in this situation is to remand for resentencing with only objective and verifiable factors to be considered by the trial court in determining whether to depart downward from the generally mandatory minimum sentence:

Sentencing normally is not a job for the appellate court, the usual procedure being to send the case back to the trial judge for resentencing if it is found that the sentence is in some respect deficient. It is unclear whether the trial judge in this case would have found substantial and compelling reasons to deviate from the statutory minimum solely on the basis of objective and verifiable factors.

Therefore we remand the case to the trial court for the judge to determine whether, under the standard announced today, he finds substantial and compelling reasons to deviate from the statutory minimum. [*Fields, supra* at 80 (citation omitted).]

See also *Perry, supra* at 283-284. Thus, I would remand this case for resentencing² at which the trial court would only consider objective and verifiable factors in deciding whether to undertake a downward departure. I underscore that I am not concluding at this point that a downward departure in this case would necessarily be inappropriate. Indeed, I am cognizant that defendant was only age seventeen, and

apparently a high school student, at the time of these crimes. A downward departure may well be justified, but to be legally proper it must be supported by an appropriate rationale.

I respectfully dissent.

/s/ William C. Whitbeck

¹ I note that the prosecution asserts in its brief, “The claim of the Defendant’s counsel that the Defendant cooperated with the police after his arrest is not verified by any information on the record or in the Presentence Report.” However, in light of my analysis, I find it premature to consider whether the trial court clearly erred, *Perry, supra* at 280, by finding that defendant assisted the police.

² Because defendant’s one to twenty year sentences on his other convictions have not been challenged on appeal, I would not disturb those sentences.