

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LYMALLE NIA HARVEY,

Defendant-Appellee.

UNPUBLISHED
October 31, 2000

No. 220302
Oakland Circuit Court
LC No. 98-161448-FH

Before: Griffin, P.J., and Cavanagh and Gage, JJ.

PER CURIAM.

Plaintiff appeals by delayed leave granted the sentence imposed on defendant's plea-based conviction for delivery of more than 50 but less than 225 grams of heroin. MCL 333.7401(2)(a); MSA 14.15(7401)(2)(a). We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded guilty to delivery of heroin, along with charges for carrying a concealed weapon, possession of marijuana, and felony-firearm after the court gave a minimum sentence evaluation of three years under *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993). As substantial and compelling reasons for departing from the presumptive mandatory minimum ten-year sentence, the trial court cited the fact that defendant had only one prior misdemeanor conviction, his young age of 29, his work history, family support, and success in therapy.

The legislative intent behind the mandatory minimum sentences prescribed for certain drug offenses was to impose stiff minimum sentences on persons engaged in drug trafficking. *People v Fields*, 448 Mich 58, 64; 528 NW2d 176 (1995). The amendments allowing for deviations from the mandatory sentence must be read consistently with that legislative intent. *Id.* at 68. Such deviations were contemplated only for exceptional cases. *Id.*

In determining whether substantial and compelling reasons to deviate from the mandatory minimum sentence exist, courts may consider factors such as whether mitigating circumstances surrounded the offense; the defendant's prior criminal record; and the defendant's age, his work history, and his post-arrest behavior. *Id.* at 76-77. The sentencing court must specifically articulate the reasons

why the factors it relies upon provide substantial and compelling reasons to except the case from the legislatively mandated sentencing regime. *People v Johnson (On Remand)*, 223 Mich App 170, 173-174; 566 NW2d 28 (1997).

The court properly considered defendant's prior record. At the age of 29, defendant was neither a juvenile who committed a youthful indiscretion or a long-established solid citizen. Defendant did have a history of employment, but his family support was more a credit to the members of his family than to him. Although defendant successfully participated in therapy, he continued to deny his involvement in drug dealing, despite the evidence obtained at the time of his arrest.

Defendant was arrested based on an anonymous tip that a drug deal was about to take place. When police approached defendant, he ran, dropping a plastic baggie containing approximately 70 grams of heroin, valued at \$8,000. Defendant also dropped a loaded handgun. Police found two bags of marijuana, a \$100 bill and fifty \$20 bills, a pager, and a phone book on defendant's person. In his car they found a cell phone and scales. Despite this evidence, defendant claimed that he was merely helping his cousin, and was not involved in drug dealing. The factors cited are not substantial and compelling.

In imposing sentence the court noted that defendant did not have five felonies, and he was not Oakland County's criminal of the year. The court expressed doubts as to the effectiveness of the statute, where over 45,000 people are in prison, and that has not solved the drug problem. Where the court likely considered these inapplicable factors, and the factors explicitly considered do not constitute substantial and compelling reasons for imposing a lesser sentence, the trial court abused its discretion in departing from the presumptive mandatory minimum sentence. See *Johnson, supra*. In addition, the extent of the deviation, seven years under the presumptively proportionate mandated sentence, indicates that the sentence imposed was disproportionately lenient. See *People v Perry*, 216 Mich App 277, 284; 549 NW2d 42 (1996).

Reversed and remanded for resentencing. Defendant has the option to withdraw his plea in lieu of resentencing. *Cobbs, supra* at 283. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Mark J. Cavanagh
/s/ Hilda R. Gage