STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 21, 2000
v CHRISTOPHER DALE WILSON, Defendant-Appellant.	No. 218289 Oakland Circuit Court LC No. 95-140520-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	
v CHRISTOPHER DALE WILSON, Defendant-Appellee.	No. 218723 Oakland Circuit Court LC No. 95-140520-FH

Before: Wilder, P.J., and Holbrook, Jr. and McDonald, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of possession of fifty grams or more, but less than 225 grams, of cocaine, MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii). Defendant was sentenced as an habitual offender, second offense, MCL 769.10; MSA 29.1082, to eighty-five months to thirty years in prison. In Docket No. 218289 of these consolidated cases, defendant appeals as of right; in Docket No. 218723, the prosecution appeals as of right. We affirm defendant's conviction, but we vacate defendant's sentence and remand for resentencing.

In Docket No. 218289, defendant argues the trial court erred in finding that during a traffic stop he consented to a search of the vehicle he was driving, and consequently erred in denying his motion to suppress cocaine found in the vehicle. This Court reviews de novo the trial court's ultimate decision regarding a motion to suppress; however, the trial court's findings of historical fact in deciding the motion are reviewed for clear error. *People v Garvin*, 235 Mich

App 90, 96-97; 597 NW2d 194 (1999); *People v Parker*, 230 Mich App 337, 339; 584 NW2d 336 (1998). A finding of fact is clearly erroneous when, after a review of the entire record, this Court is left with a definite and firm conviction that the trial court made a mistake. *Parker, supra* at 339.

The lawfulness of a search or seizure depends on its reasonableness. *Vernonia School Dist v Acton*, 515 US 646, 652; 115 S Ct 2386; 132 L Ed 2d 564 (1995); *People v Orlando*, 305 Mich 686, 690; 9 NW2d 893 (1943); *People v Armendarez*, 188 Mich App 61, 66; 468 NW2d 893 (1991). The Fourth Amendment generally requires police to secure a warrant before conducting a search, *Maryland v Dyson*, 527 US 465; 119 S Ct 2013, 2014; 144 L Ed 2d 442 (1999); *People v Levine*, 461 Mich 172, 178-179; 600 NW2d 622 (1999), and searches and seizures conducted without a warrant are unreasonable per se, subject to several specifically established and well-delineated exceptions, *People v Borchard-Ruhland*, 460 Mich 278, 293-294; 597 NW2d 1 (1999).

Fourth Amendment rights are waivable, and a defendant may always consent to a search. *People v Marsack*, 231 Mich App 364, 378; 586 NW2d 234 (1998); *People v Goforth*, 222 Mich App 306, 309; 564 NW2d 526 (1997). Accordingly, "[o]ne established exception to the general warrant and probable cause requirements is a search conducted pursuant to consent." *Borchard-Ruhland, supra* at 294, citing *Schneckloth v Bustamonte*, 412 US 218, 219; 93 S Ct 2041; 36 L Ed 2d 854 (1973). The consent exception to the warrant requirement allows a search and seizure when consent is unequivocal, specific, and freely and intelligently given. *Marsack, supra* at 378. The validity of the consent depends on the totality of the circumstances. *Id.*

Defendant first argues the trial court's finding that consent was actually given was clearly erroneous. The trial court did, as defendant notes, find that defendant's responses to the police officer's requests for permission to search the vehicle were not discernible on the audio tape recording of the traffic stop. However, the trial court found that the contents of the audio tape in its entirety supported a finding that defendant did, indeed, consent to the search. The court noted that the officer, prior to seeking consent to search, indicated to the dispatcher that he intended to "see if [defendant] gives me the O.K." The court further noted that, had defendant denied consent when it was first requested, it would not have been logical for the officer to ask defendant the series of questions which followed the original question and response.

We conclude that the trial court did not clearly err in determining that defendant consented to the search of the vehicle. In the instant case, the trial court was forced to make a credibility determination. The officer who conducted the search testified that defendant unequivocally consented to the search by answering " 'no' " to the question, " 'Do you have a problem if I look through your car?' " Defendant testified that he said " 'no' " when the officer asked if he could search the van, and that he therefore did not consent to the search. The court found that the totality of circumstances indicated that consent was, in fact, given. It cannot be said that the trial court clearly erred in so finding.

Defendant further contends that the trial court clearly erred in finding that his consent was freely and intelligently given; defendant maintains that it is clear from the circumstances that he did not believe that he was free to refuse to consent to the search. The presence of coercion or

duress normally militates against a finding that consent was freely given. *Borchard-Ruhland*, *supra* at 294. However, defendant offers no evidence whatsoever to support a finding that he was in any way coerced into consenting. Although defendant claims that he did not know that he could have refused the search and left the scene, "the people need not prove that the person giving consent knew of the right to withhold consent." *Id*. It is clear from the record that defendant fully cooperated with the officer and that he never indicated any reluctance or unwillingness to allow the officer to search the van. Accordingly, we are not left with a "definite and firm conviction" that the trial court made a mistake in determining that consent was voluntarily given. *Parker*, *supra* at 339.

In Docket No. 218723, the prosecution contends the trial court abused its discretion in deviating from the mandatory ten-year minimum sentence imposed by MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii), and sentencing defendant to a minimum sentence of eighty-five months' imprisonment. We agree.

The Legislature has prescribed a minimum sentence of ten years in prison for a person convicted of possession of fifty or more, but less than 225, grams of cocaine. MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii). "It also, however, has empowered courts to depart from some of the minimum sentence prescriptions under certain circumstances." *People v Fields*, 448 Mich 58, 62; 528 NW2d 176 (1995). MCL 333.7403(3); MSA 14.15(7403)(3) provides, in relevant part, that

> [t]he court may depart from the minimum term of imprisonment authorized under subsection (2)(a)(ii), (iii), or (iv) if the court finds on the record that there are substantial and compelling reasons to do so.

As this Court emphasized in *People v Johnson (On Remand)*, 223 Mich App 170, 172-173; 566 NW2d 28 (1997), deviations from mandatory sentences are the exception, and not the rule:

> In *Fields*, our Supreme Court acknowledged that the legislative intent behind [the statutorily prescribed minimum sentence scheme] was to impose stiff minimum sentences on persons engaged in drug trafficking. As such, the Court reasoned that the amendments allowing for deviation from the mandatory sentence must be read consistently with "the overarching intent of the Legislature to deter people from committing drug-related crimes." The Court explained further that the Legislature's use of strong language in the phrase "substantial and compelling reasons" indicates that deviations from the mandatory sentence were contemplated only for *exceptional* cases. Accordingly, the *Fields* Court held that a sentencing court must articulate on the record "objective and verifiable factors" that provide "substantial" and "compelling" bases to depart from the mandatory minimum prescribed by the statute. [citations omitted; emphasis in original.]

Although a sentencing court is permitted to deviate from a mandatory sentence in some circumstances, *Fields*, *supra* at 62, it must articulate on the record "objective and verifiable" factors that provide "substantial and compelling" reasons to do so, *id*. at 68; *Johnson*, *supra* at 173. Such factors include (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 his cooperation with law enforcement officials. *Fields*, *supra* at 76-77; *Johnson*, *supra* at 173. The sentencing court may not, however, rely on subjective factors when departing from a mandatory sentence. *Id*. at 174-175.

We conclude that the trial court abused its discretion in deviating from the mandatory ten-year minimum sentence. The court based its departure on (1) the "potential for inconsistent sentencing" under the mandatory sentencing scheme for drug crimes and (2) the fact that, under the new sentencing guidelines, defendant's recommended sentence was fifty-one to eighty-five months' imprisonment. The reasons articulated by the court for deviating from the mandatory minimum sentence prescribed by MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii) do not constitute "substantial and compelling" reasons such that a deviation was justified. As the prosecution notes, it is the province of the Legislature to correct any potential inconsistencies in statutory sentencing law. See *People v Bullock*, 440 Mich 15, 43 n 26; 485 NW2d 866 (1992); *People v Moore*, 432 Mich 311, 317 n 11; 439 NW2d 684 (1989). Furthermore, the sentencing guidelines do not apply to mandatory sentences. MCL 769.34(5); MSA 28.1097(3.4)(5) ("[i]f a crime has a mandatory determinant penalty or a mandatory penalty of life imprisonment, the court shall impose that penalty. This section [concerning application of the sentencing guidelines promulgated by order of the Michigan supreme court] does not apply to sentencing for that crime").

Because the trial court failed to articulate any "objective and verifiable" factors providing "substantial and compelling" reasons to deviate from the mandatory ten-year minimum sentence, *Fields*, *supra* at 68; *Johnson*, *supra* at 173, it erred in imposing a sentence of eighty-five months to thirty years in prison. Moreover, defendant has failed to identify any unusual circumstances to warrant a departure from the mandatory sentence; rather, he simply argued at sentencing that the trial court should, as a matter of principle, utilize the new sentencing guidelines rather than the statutorily-mandated sentencing scheme. Accordingly, we reverse defendant's sentence and remand this case so that defendant may be resentenced to the mandatory ten-year minimum sentence imposed by MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii).

Defendant's conviction is affirmed, but his sentence is vacated. This case is remanded for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald