

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JASON DESHAWN THOMAS,

Defendant-Appellee.

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UNPUBLISHED

August 3, 2001

No. 231333

Oakland Circuit Court

LC No. 96-149280-FH

96-149281-FH

Before: Doctoroff, P.J., and Saad and Wilder, JJ.

PER CURIAM.

The prosecution appeals as on leave granted<sup>1</sup> from the trial court's judgment sentencing defendant to two terms of five to twenty years' imprisonment for his conviction of two counts of delivery of more than 50 but less than 225 grams of cocaine, MCL 7401(2)(a)(iii), to be served consecutively, and time served for possession of marijuana, MCL 333.7403(2)(d). We reverse.

The prosecution first argues that the trial court erred in finding that defendant's criminal record contained only malum prohibitum rather than malum in se offenses, and in finding that this factor was a substantial and compelling reason to depart from the mandatory minimum sentence. The existence or non-existence of a particular factor justifying a departure is a factual determination for the sentencing court which we review for clear error. *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995).

The Legislature mandated a minimum sentence of ten years for the crime of delivery of more than 50 but less than 225 grams of cocaine. MCL 333.7401(2)(a)(iii). A sentencing court may depart from this minimum term if it finds on the record that there are substantial and compelling reasons to do so. MCL 333.7401(4). In deciding if there are substantial and compelling reasons to depart, the court may only use objective and verifiable factors and should place emphasis on mitigating circumstances surrounding the offense which do not warrant a finding of innocence, but do make the defendant less culpable. *Fields, supra* at 69-70, 76. The

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<sup>1</sup> Although this Court did not originally grant the prosecution's application for leave to appeal, the Supreme Court remanded the case as on leave granted. *People v Thomas*, 463 Mich 927; \_\_\_ NW2d \_\_\_ (2000).

court should also look at the defendant's prior record, age, and work history. *Id.* at 77. Factors arising after the defendant's arrest should be given the same weight as preexisting factors. *Id.* Whether a particular factor is objective and verifiable is a question of law. *Id.* at 77-78.

Here, the trial court found that the following factors existed: defendant (1) was only nineteen at the time he committed the offense; (2) had only one prior felony which was malum prohibitum and not malum in se and had no prior misdemeanors; (3) had a positive work history; (4) performed community service while in prison; and (5) admitted his guilt and pleaded guilty. The prosecution argues that the trial court erred in finding that defendant's prior record contained only mala prohibita crimes, but does not challenge the trial court's other findings.

Malum prohibitum is "[a]n act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral." Black's Law Dictionary (7<sup>th</sup> ed), p 971. Malum in se is "[a] crime or an act that is inherently immoral, such as murder, arson, or rape." *Id.* Here, defendant was convicted of unarmed robbery, and it is self evident that robbery is inherently immoral. The trial court clearly erred in finding that defendant's criminal history included only mala prohibita crimes, and because the court relied on this factor as a substantial and compelling reason to depart from the guidelines, we must vacate defendant's sentence and remand for resentencing.

The prosecution also argues that the trial court violated the principle of proportionality by imposing disproportionately lenient sentences for defendant's drug convictions. We review the proportionality of the sentence imposed by the trial court for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 634-635; 461 NW2d 1 (1990). The trial court abuses its discretion when it violates the principle of proportionality by imposing a sentence that is not proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* at 636.

Legislatively mandated sentences are presumptively proportionate. *People v Ealy*, 222 Mich App 508, 512; 564 NW2d 168 (1997). As noted above, the legislatively mandated sentence for defendant's two counts of delivery would be a minimum of ten years for each offense. MCL 333.7401(2)(a)(iii). Here, the trial court sentenced defendant to two consecutive five year terms, one-half the mandatory minimum, citing defendant's youth, his minimal criminal record, his work history, his community service, and his guilty plea as justification for the downward departure.

We disagree with the trial court's conclusion that defendant's criminal record was minimal and a positive factor. If anything, defendant's criminal record would be a negative factor, especially his violation of probation for the unarmed robbery conviction which showed a disregard for authority and the laws of society. Further, defendant's work history was minimal and he did not graduate from high school. In addition, the circumstances of the present case indicate that defendant was not a one-time offender who delivered a small amount of controlled substances. Rather, defendant made several deliveries involving significant amounts of money. It is apparent that the circumstances surrounding the offense and the offender do not warrant the drastic deviation from the minimum sentence, and the trial court abused its discretion by violating the principle of proportionality.

Sentence vacated and remanded for resentencing before a different judge. We do not retain jurisdiction.

/s/ Martin M. Doctoroff

/s/ Henry William Saad

/s/ Kurtis T. Wilder