

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK EDWARD LEE,

Defendant-Appellant.

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UNPUBLISHED  
February 26, 2002

No. 226144  
Calhoun Circuit Court  
LC No. 99-000862-FH

Before: O’Connell, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Defendant was charged with one count of felon in possession of a firearm, MCL 750.224f, one count of felony-firearm, MCL 750.227b, and one count of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). The jury convicted defendant on the first two charges. However, on the third charge, the jury found defendant guilty of the lesser included offense of possessing less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v). The trial court sentenced defendant to a term of twenty-three to sixty months’ imprisonment on the felon in possession charge, and thirty-six to ninety-six months’ imprisonment on the possession charge. While those terms were concurrent to each other, they were consecutive to the mandatory two-year sentence on the felony-firearm charge. Defendant does not contest the validity of his convictions. However, he appeals as of right from the thirty-six to ninety-six month sentence on the possession charge. We vacate that sentence and remand to the trial court for resentencing.

Defendant committed the instant offenses on February 25, 1999. Accordingly, the legislative sentencing guidelines apply in the present case. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). At sentencing, the trial court made the necessary factual determinations and scored a PRV Level F, OV Level III.<sup>1</sup> Possession of less than twenty-five grams of cocaine qualifies as a class G offense. Therefore, the guidelines range for defendant’s minimum sentence on the possession charge was seven to twenty-three months. Because the trial court imposed a minimum sentence of thirty-six months, it departed upwards from the sentencing guidelines.

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<sup>1</sup> Defendant does not contest the trial court’s scoring of the offense or prior record variables.

A court is permitted to impose a sentence which departs from the legislative sentencing guidelines only when the court has a “substantial and compelling reason for that departure and states on the record the reasons for departure.” MCL 769.34(3). Moreover, the Legislature has further restricted the factors a sentencing court may take into account when considering a departure from the guidelines:

The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight. [MCL 769.34(3)(b).]

This Court has explained that “substantial and compelling” reasons for departure exist only in exceptional cases. *People v Babcock*, 244 Mich App 64, 75; 624 NW2d 479 (2000). Further, “[t]he reasons justifying departure should ‘keenly’ or ‘irresistibly’ grab our attention, and we should recognize them as being ‘of considerable worth’ in deciding the length of a sentence.” *Id.*, quoting *People v Fields*, 448 Mich 58, 67; 528 NW2d 176 (1995). When this Court finds that a trial court lacked substantial and compelling reasons for departure from the legislative guidelines, we must remand the matter to the trial court for resentencing. MCL 769.34(11).

Defendant first argues that the trial court erred because its stated reasons for departing upward from the guidelines do not constitute “substantial and compelling” reasons. We agree. The trial court’s first stated reason for its upward departure was defendant’s poor rehabilitation potential:

[B]ut there’s something that isn’t in the guidelines and it’s something that in a case such as [defendant’s] is a factor and that is that the guidelines take no account in any place form or fashion of the response or the failure to respond—respond of a defendant to sentences that they’ve been previously been given. They consider your prior convictions but they don’t consider your prior sentences, the length of them, whether they had any impact upon you, whether they changed your behavior.

And like so many people in your position, unfortunately, you have a consistent record of getting into trouble with the law and as the sentences have been imposed and you’ve complied with them, there does not seem to have been much by way of rehabilitation, not much by way of change of attitude, to say the least, and particularly in regard to a previous possession of cocaine [offense] which took place not too long ago and then to come out with another conviction of possession of cocaine shows a singular lack of ability to respond to the sentences that have been imposed upon you over the years.

Therefore, that is a factor not considered in the guidelines and for which I believe there is—should be some leeway for the Court to impose a sentence slightly above the guidelines . . .

In cases involving controlled substance offenses, prior record variables 1-7 evaluate a defendant in terms of the number and severity of his past felony and misdemeanor convictions, as well as his juvenile adjudications. As the number and severity of incidents increase, the defendant is assessed higher scores which translate into a harsher sentence. This scoring system adequately assesses the objective nature of a defendant's criminal history. In the present case, defendant's PRV score of 115 reflects his six prior felonies, three misdemeanors, and his juvenile adjudications. Because defendant's prior record is already taken into account by the sentencing guidelines, it may not be reapplied as justification for departure from the guidelines. MCL 769.34(3)(b).

To the extent that the trial court's reasoning for its upward departure concerns defendant's attitude about his prior criminal record, rather than the criminal record itself, we conclude that this does not constitute an adequate grounds for departure. All factors justifying deviation from the guidelines must be objective and verifiable. *Babcock, supra* at 78-79. In *Babcock*, the trial court departed from the guidelines because the defendant "still didn't fully appreciate what he's done." *Id.* at 79. On appeal, this Court found such a rationale to be subjective, and therefore an impermissible ground for departure. *Id.* In the present case, the trial court made the same subjective assessment relating to defendant's attitude toward his prior record. Accordingly, we conclude that the trial court's justification fails to rise to the level of "substantial and compelling" grounds for departure.

The trial court also justified its upward departure based on the nature of defendant's conviction. On the departure evaluation form, the trial court stated that the "[g]uidelines do not adequately account for the fact that [the] offense is a second offense of possession of [a] controlled substance." It is true that defendant was charged under MCL 333.7413(2), which provides that a defendant convicted of a second controlled substance offense may be punished by imprisonment for a term of not more than twice the term otherwise authorized. Therefore, the maximum penalty for defendant's possession offense rose from four to eight years' imprisonment. MCL 333.7403(2)(a)(v); MCL 333.7413(2). However, we conclude that the comprehensive nature of the guidelines took into account both the number of defendant's prior convictions and the nature of those convictions. The guidelines' instructions regarding "controlled substance enhancements" state:

If the offender is subject to discretionary sentence enhancement on the basis of a prior Controlled Substances conviction (MCL 333.7413 *et seq.*), the Offense and Prior Record Variable Levels and Crime Class should be determined for the substantive offense of conviction. The guideline sentence range will be determined by the Grid for the substantive offense of conviction.

Thus, the legislature has made the determination that the conviction offense grid is adequate when sentencing under the repeat drug offender provision. Because the guidelines adequately consider the factor stated by the sentencing court, this factor does not support a departure under MCL 769.34(3)(b).

We vacate defendant's sentence on the possession charge and remand for resentencing.

Any time that defendant has served on the vacated sentence must be considered as time served on any sentence imposed on remand. MCL 769.34(12).

Remanded. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Michael R. Smolenski