

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOSEPH SMITH,

Defendant-Appellee.

UNPUBLISHED

December 20, 2002

No. 233705

Wayne Circuit Court

LC No. 97-002906

Before: Owens, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Plaintiff appeals as of right the sentence of six to twenty years' imposed on defendant's conviction of possession of more than 50 but less than 225 grams of cocaine, MCL 333.7403(2)(a)(iii). We remand for resentencing on that conviction only. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In 1997, defendant was charged with possession of more than 50 but less than 225 grams of cocaine, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court granted motions filed by defendant and co-defendant Richard Smith¹ to dismiss the charges; however, another panel of this Court reversed the trial court's decision.² Defendant was tried by a jury and convicted.

The offense of possession of more than 50 but less than 225 grams of cocaine carries a mandatory term of not less than ten years nor more than twenty years in prison. MCL 333.7403(2)(a)(iii). The trial court noted that the sentencing guidelines recommended a

¹ The record does not reveal the relationship, if any, between the men. Richard Smith is not involved in this appeal.

² *People v Richard Smith & Joseph Smith*, unpublished opinion per curiam of the Court of Appeals, issued March 31, 2000 (Docket No. 212282).

minimum term range of fifty-seven to ninety-five months for the controlled substance offense.³ The trial court sentenced defendant to concurrent terms of six to twenty years' for the controlled substance offense and nine months' to five years' for the offense of carrying a concealed weapon. The trial court noted that the minimum terms were within the guidelines. The trial court did not acknowledge that the controlled substance offense carried a mandatory ten-year minimum term, and did not state any reasons for departing below the mandated minimum term. The trial court also imposed a consecutive two-year term for the conviction of felony-firearm.

In certain instances a trial court may depart from a mandated minimum term of imprisonment if it finds on the record that substantial and compelling reasons exist to do so. MCL 333.7403(3). To constitute a substantial and compelling reason for departing from a mandated sentence, a reason must be objective and verifiable, and must irresistibly hold the attention of the court. *People v Fields*, 448 Mich 58, 67; 528 NW2d 176 (1995). We review the trial court's determination of the existence of a substantial and compelling reason for departure for clear error. The determination that the reason is objective and verifiable is reviewed as a matter of law. The determination that the reason constituted a substantial and compelling reason to depart from a mandated term is reviewed for an abuse of discretion. *Id.*, 77-78.

We remand for resentencing on the controlled substance offense only.⁴ That offense carries a mandatory ten-year minimum term; however, the trial court imposed a six-year minimum term. The trial court erred as a matter of law by relying on statutory sentencing guidelines that were inapplicable to the matter before it. See MCL 769.34(1); *Reynolds*, *supra*. The trial court's sentence for the conviction of possession of more than 50 but less than 225 grams of cocaine was based on a misconception of law; therefore, the sentence is invalid. Defendant must be resentenced on that conviction. See *People v Thenghkam*, 240 Mich App 29, 70; 610 NW2d 571 (2000). The resentencing must be conducted without reference to the inapplicable statutory sentencing guidelines. If upon resentencing the trial court determines that substantial and compelling reasons exist to depart below the mandated ten-year minimum term, it must articulate those reasons on the record. See *Fields*, *supra*.

Remanded for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ William B. Murphy
/s/ Mark J. Cavanagh

³ It appears that the probation department calculated the guidelines range for the controlled substance offense using the statutory sentencing guidelines. The statutory sentencing guidelines apply only to offenses committed after January 1, 1999. MCL 769.34(1). The judicial sentencing guidelines apply to offenses committed prior to January 1, 1999. The offenses for which defendant was sentenced occurred in 1997; therefore, the statutory sentencing guidelines should not have been considered. See *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000).

⁴ Plaintiff does not challenge the sentences imposed for the convictions of carrying a concealed weapon and felony-firearm.