

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LATOSHA ANN CARTER,

Defendant-Appellee.

UNPUBLISHED
February 10, 2009

No. 279911
Kalamazoo Circuit Court
LC No. 05-002384-FH

Before: Servitto, P.J., and Donofrio and Fort Hood, JJ.

FORT HOOD, J. (*dissenting*).

I respectfully dissent. At the beginning of the sentencing hearing, it was agreed that the minimum guideline sentencing range was 51 to 85 months. However, the probation department recommended a substantial departure from the guidelines range of two years' probation. Counsel for defendant urged the sentencing court to follow the recommendation of the probation department, noting the letters of support from defendant's family and community that outlined her change in lifestyle, her employment record, her achievement of an associate's degree and pursuit of a bachelor's degree, and her involvement in the community. On the contrary, the prosecutor recommended that the minimum sentence for each offense be served consecutive to one another. The trial court stated:

Ms. Carter, in sentencing you I am attempting to balance punishment, rehabilitation, the protection of society, and the deterrent effect of the sentence. I'm also considering whether to depart downward from the guidelines in light of the recommendation presented to me.

As Counsel have noted, I presided at the trial in this case so I have a fairly good sense of what occurred.

There are a number of things that suggest rehabilitation in your case is very likely. Those include the offense occurred some years ago now. You have no history of conviction since then. Prior to that time you have a limited history as a juvenile.

As the report points out, you're employed. You have been for some time. You've earned an Associate's degree; you're working on an advanced degree.

No evidence of any substance abuse or issues like that in your life.

The Court has received letters of support for you that outline both your personal efforts and efforts in the community.

On the other hand, one of the things I find troubling, having listened to the evidence and even considering the report, is you seem to have almost no sense of the trouble you were getting yourself into potentially and the risk to others of the conduct you were engaging in, which involved the delivery of large quantities of controlled substance.

The Court is also mindful that – although it's not considered by the guidelines – in essence, based on the proofs, these transactions were organized by law enforcement, as the Court gathered from the proofs, basically in the hope to kind of work through you to get to somebody else who was, frankly, using you, who was putting you in the position of great personal risk so they could make money.

Ms. Carter, I have decided, reflecting on all of this, that I'm going to follow the recommendation. The Court recognizes this is a major departure from the guidelines.

The Court finds there are substantial and compelling reasons to do so, all of which are objective.

First, it is the recommendation of an experienced agent who scored the guidelines and was well aware of them.

I am departing based on your youth, relative absence of prior record – which the Court recognizes is scored by the guidelines – and, most importantly, your conduct since the offense.

While there's no evidence that you cooperated with law enforcement in any way, on a personal level you've done everything it looks like you reasonably could have to get your life in order. You are successful. You're pursuing further education that should only make you more successful.

I find all of these compelling reasons that in the Court's view fall within a range of principled outcomes; and I note, particularly, this is an outcome recommended by the agent who spent some time preparing this report.

Therefore, it is the sentence of this Court that you be placed on probation for two years. ... I am adding ... that you serve 12 months in the county jail subject to review at the end of probation with credit for three days served.

Appellate review of a sentence is not de novo, but limited. “[T]he trial court is optimally situated to understand a criminal case and to craft an appropriate sentence for one convicted in such a case.” *People v Babcock*, 469 Mich 247, 267; 666 NW2d 231 (2003). Therefore, the trial

court may depart from the sentencing guidelines range when a substantial and compelling reason exists for the departure. *Id.* The decision to depart may be based on an offense characteristic or an offender characteristic previously incorporated into the guidelines if the sentencing court finds that the characteristic has been given inadequate or disproportionate weight. *Id.* at 267-268; see also MCL 769.34(3)(b). To depart from the sentencing guidelines range, the sentencing court must state the substantial and compelling reason to depart on the record. MCL 769.34(3).

The Legislature gave the sentencing court the responsibility of making the difficult determination of rendering the appropriate sentence “largely on the basis of what has taken place in its direct observation.” *Babcock, supra* at 268. “Because of the trial court’s familiarity with the facts and its experience in sentencing, the trial court is better situated than the appellate court to determine whether a departure is warranted in a particular case.” *Id.* Review de novo would allow appellate judges to substitute their own judgment for that of the trial court. *Id.* Therefore, an abuse of discretion standard is applied to sentencing decisions, which acknowledges that there will be no single correct outcome because there may be more than one reasonable and principled outcomes. *Id.* at 269. “When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court’s judgment.” *Id.* That is, when the sentencing court chooses an outcome falling outside the range of outcomes, an abuse of discretion occurs. *Id.*

The appropriateness of a sentence should take into account four factors: (1) rehabilitation, (2) deterrence, (3) the protection of society, and (4) punishment. *People v Schultz*, 435 Mich 517, 531-532; 460 NW2d 505 (1990). “Indeterminate sentences are to be individually tailored, and the availability of judicial discretion is an integral aspect of indeterminate sentencing[.]” *Id.* at 531. “The sentencing courts of this state are authorized to exercise discretion and, in appropriate cases presenting substantial and compelling circumstances, to depart from the Public Health Code’s mandatory minimum terms.” *Id.* A defendant’s employment history is not taken into account in the sentencing guidelines and may be considered as an objective and verifiable reason to depart from the guidelines, although taken alone, it may not constitute a substantial and compelling reason to depart from the guidelines. *People v Young*, 276 Mich App 446, 456; 740 NW2d 347 (2007). Similarly, the age of a defendant, taken alone, may not warrant a substantial and compelling reason to depart. *Id.*

In the present case, the sentencing court presided over a trial where defendant and her boyfriend engaged in a drug transaction with a confidential informant. The confidential informant contacted police in an attempt to obtain favors for a relative who was in trouble with law enforcement. At the commencement of trial, it was learned that the confidential informant was never subpoenaed to appear at trial and refused to appear. The trial court ultimately excluded the earlier testimony by the confidential informant, citing the lack of effort by police to obtain his appearance at trial. Also at the start of trial, it acknowledged that a plea deal had been offered to defendant that would allow for the dismissal of one count of delivery of 50 or more but less than 450 grams of cocaine, MCL 333.7401(2)(a)(iii), and a *sentencing recommendation of probation*, with the prosecutor remaining silent as to jail time. At trial, the police officer who served as the liaison to the confidential informant acknowledged that he tried to get defendant to

cooperate with police against her boyfriend. The police officer testified that defendant's boyfriend¹ was more culpable than defendant, and she merely served as a "middleman" for him.

Although the offenses occurred in April 2004, the trial did not take place until June 2007. Between the time of the offenses and the time of trial, defendant had earned an associate's degree in business and held a part-time job at Borgess Medical Center. She was continuing her education in pursuit of a bachelor's degree. Defendant had since given birth to a child and was the primary caregiver. She also served as a tutor and mentor to children with behavioral and emotional disabilities in the Kalamazoo Public Schools. These factors were all objective and verifiable and documented by letters of support submitted by her supervisor and administrator at the school.

In the present case, defendant was given the same sentence that was recommended at the start of trial. She should not be penalized for exercising her right to a jury trial. Moreover, it was clear that the subject of investigation was not defendant, but her boyfriend. Defendant's age, employment, and educational development were objective and verifiable factors that when taken together with the goal of rehabilitation justified a downward departure. On this record, I cannot conclude that the trial court abused its discretion.

/s/ Karen M. Fort Hood

¹ In the record, it was learned that defendant's boyfriend was detained in another jurisdiction facing drug charges.