STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED March 17, 2009
v	No. 282231 Wayne Circuit Court
SONJIA JEANNETTE JOHNSON, Defendant-Appellee/Cross-Appellant.	LC No. 07-010154-FH

Before: Murphy, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant was convicted in a bench trial of possession with intent to deliver 450 or more but less than 1,000 grams of cocaine, MCL 333.7401(2)(a)(ii), and possession with intent to distribute marijuana, MCL 333.7401(2)(d)(iii). She was sentenced to three years' probation. The prosecution appeals as of right the trial court's downward departure of defendant's sentence under the statutory sentencing guidelines. Defendant cross-appeals her convictions. We affirm.

The prosecution challenges the trial court's downward departure from the sentencing guidelines range, arguing that the court failed to provide substantial and compelling reasons or provide a sufficient justification for the extent of the departure. We ultimately affirm defendant's convictions; therefore, it is necessary to address the sentencing issue, and we shall begin with this issue.

The existence of a particular factor supporting a trial court's decision to depart from the sentencing guidelines is reviewed for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). This Court reviews the determination of whether the factor is objective and verifiable de novo. *Id.* Furthermore, this Court reviews the extent of the trial court's departure from the sentencing guidelines range, and whether the reason for the departure is substantial and compelling, for an abuse of discretion. *Id*. at 264-265. When the sentencing court selects an outcome falling outside a range of reasonable and principled outcomes an abuse of discretion occurs. *Id.* at 269.

Defendant's prior record variable (PRV) score was ten, placing her at level C. Her offense variable (OV) score totaled 75, placing her at level IV. Based on this scoring, defendant's minimum sentence range was 108 to 180 months. The maximum sentences are 30 years for the cocaine conviction and four years for the marijuana conviction. The trial court

sentenced defendant to 36 months' probation. The basis for the trial court's departure was primarily defendant's minimal degree of culpability based on the circumstances of the offense and, also, to a lesser extent, defendant's work history and her pursuit of post-secondary education.

Under Michigan's legislative sentencing guidelines, a trial court may only depart from the sentencing guidelines if it has a substantial and compelling reason to do so, and it states the reason on the record. MCL 769.34(2) and (3); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The court is not permitted to use a factor already considered in the offense or prior record variables unless the court finds that the characteristic has been given inadequate or disproportionate weight based on the facts of record. MCL 769.34(3)(b); *Abramski*, *supra* at 74. The trial court's reasons for departing from the guidelines range must be objective and verifiable. *Id*. "They must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention." *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). Appropriate objective and verifiable factors include: "(1) mitigating circumstances surrounding the offense, (2) the defendant's prior record, (3) the defendant's age, and (4) the defendant's work history." *People v Daniel*, 462 Mich 1, 7; 609 NW2d 557 (2000). Pursuit of post-secondary education is another factor this Court has found objective and verifiable. *People v Perry*, 216 Mich App 277, 280, 282; 549 NW2d 42 (1996).

Here, the trial court primarily relied on facts surrounding the crime that mitigated defendant's culpability, which is considered an objective and verifiable factor, and which is not considered under the offense and prior record variables. *Daniel*, *supra* at 7. The trial court found that defendant had aided and abetted the crime by leasing the apartment. However, the trial court found that there was no evidence she was engaged in actually selling or handling the drugs, nor did she have any knowledge of the quantity involved. The variables do not take into account whether a defendant has knowledge of the drug quantities involved. And the trial court repeatedly pointed out that the sentencing guidelines were so severe because of defendant's score of 75 on OV 15, MCL 777.45(1)(b), which was the only offense variable upon which points were scored, and the score was based solely on the amount of narcotics found in the apartment. We cannot conclude that the trial court abused its discretion in finding that the mitigating circumstances surrounding the offenses and defendant's minimal participation were substantial and compelling reasons warranting a downward departure.

Moreover, the trial court did not abuse its discretion in finding that defendant's continuous work history beginning at the age of eighteen and her pursuit of higher education were objective and verifiable mitigating factors constituting substantial and compelling reasons to downwardly depart. The facts here are distinguishable from *People v Claypool*, 470 Mich 715, 727; 684 NW2d 278 (2004), which held that employment as a cabdriver for less than two years did not constitute a substantial and compelling reason for departing from the sentencing guidelines. This is because the length and continuity of defendant's work history are particularly noteworthy. Defendant, who was 31 years old at the time of trial, had been consistently employed since the age of 18 and was currently employed at the Detroit Medical Center. Moreover, defendant's current pursuit of post-secondary education is an objective and verifiable factor. *Perry*, *supra* at 280, 282. The trial court did not abuse its discretion in finding that defendant's pursuit of post-secondary education was a substantial and compelling for departure, where she had been enrolled at Davenport University since 2005, studying medical coding.

Defendant's current enrollment and continued study in order to further her career keenly grabs one's attention.

"'A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for *that* departure and states on the record the reasons for departure.'" *Smith*, *supra* at 303-304, quoting MCL 769.34(3) (emphasis in *Smith*). The statutory language requires the trial court to "justify the *particular* departure in a case, i.e., 'that departure.'" *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001), quoting MCL 769.34(3). "[I]f it is unclear why the trial court made a particular departure, an appellate court cannot substitute its own judgment about why the departure was justified." *Smith*, *supra* at 304. "A sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear." *Id*. In its departure explanation, "the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been." *Id*. Thus, the "principle of proportionality" is the standard by which a particular departure is to be judged. *Id*. at 299-300. The premise of proportionality is that, "everything else being equal, the more egregious the offense, and the more recidivist the criminal, the greater the punishment." *Babcock*, *supra* at 263.

The crux of the prosecution's argument is that the extent of the downward departure was an abuse of discretion. The trial court's departure from the guidelines range of 108 to 180 months constituted a severe departure. However, the trial court properly justified this particular departure. In *Smith*, the Michigan Supreme Court remanded to the trial court for an explanation of the extent of the departure or resentencing because the trial court did not explain its decision and "comparing defendant's actual minimum sentences to the recommended minimum sentences for offenders with similar criminal histories suggests that defendant's sentences might be disproportionate." *Smith*, *supra* at 308-311. The Court in *Smith* outlined possible ways to aid in analyzing whether a departed sentence is proportionate, but the Court explicitly stated that these comparisons were not the only measures of whether a sentence is proportionate. *Id*. at 309. While reference to the sentencing range grid can be helpful, "a trial court that is contemplating a departure is not *required* to consider where a defendant's sentence falls in the sentencing range grid." *Id.* The minimum sentence of the defendant in *Smith* was higher when compared to the highest possible minimum sentences for other defendants with the same PRV level, which suggested that his sentence might be disproportionate. *Id*. at 306-308. Because of the extensive departure and the lack of an explanation, it was not possible to tell whether the trial abused its discretion in *Smith*. *Id*. at 311.

Defendant's sentence was three years' probation, while the lowest possible minimum sentence for someone in defendant's PRV level under the guidelines is 42 months. This means the trial court departed significantly below the lowest minimum guideline sentence available for someone in that PRV level. Despite this, the trial court presented a clear explanation for why this particular departure was warranted. The trial court's findings concerning defendant's minimal culpability, including the trial court's determinations that she lacked any knowledge regarding the scope of the drug activity, that she did not interact with the drugs, and that there was no "other indicia of persons having a substantial financial gain from the drug trade," all provide adequate justification for the extent of the departure, especially when considered in conjunction with her steady employment and college pursuits. The trial court emphasized

repeatedly that what made this case exceptional was that the amount of narcotics involved was driving defendant's minimum guidelines range, yet she did not have knowledge of the scope of the operation. Again, the minimum comparison suggested in *Smith* is not the only measure of proportionality. *Smith*, *supra* at 309. Moreover, in ascertaining whether the departure was proper, this Court must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Babcock, supra* at 270. Minimally, we cannot conclude that an abuse of discretion occurred with respect to the degree of the departure.

We now turn to defendant's appellate arguments challenging the convictions. Defendant argues that there was insufficient evidence to support her convictions because there was no evidence that she lived in the apartment or was ever even there. Defendant contends that excluding the fact that she leased the apartment there is no evidence to link her to the drug activity that was taking place within the apartment.

A challenge to the sufficiency of evidence in a bench trial is reviewed by this Court de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). This Court must "'view the evidence in a light most favorable to the prosecution and determine if any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.'" *Id*., quoting *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992). When reviewing a sufficiency of evidence claim, all conflicts in the evidence must be resolved in favor of the prosecution. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). It is solely the trier of fact's role to weigh the evidence and judge the credibility of witnesses. *Wolfe, supra* at 514. Therefore, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

The prosecution must prove four elements beyond a reasonable doubt in order to support a conviction for possession with intent to deliver more than 450 grams but less than 1,000 grams of cocaine: (1) that the substance is cocaine, (2) that the cocaine amounted to between 450 to 1,000 grams, (3) that defendant was not authorized to possess the cocaine, and (4) that defendant possessed it knowingly and with the intent to deliver. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005); MCL 333.7401(2)(a)(ii). The elements for possession with intent to deliver marijuana are the same except that the substance is marijuana and the amount at issue is less than five kilograms. MCL 333.7401(2)(d)(iii).

The element of knowing possession with intent to deliver has two components: possession and intent. *Wolfe, supra* at 519. Possession can be shown by circumstantial evidence and any reasonable inferences drawn from the evidence. *People v Nunez*, 242 Mich App 610, 615-616; 619 NW2d 550 (2000). "An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (citations omitted). Actual physical possession is not required to meet the possession element because possession may be either actual or constructive. *Nunez, supra* at 615. Intent to deliver has been inferred from the quantity of narcotics possessed, from the way in which those narcotics are packaged, and from other circumstances surrounding the arrest. *Wolfe,*

supra at 524. Also, knowledge of the amount of a controlled substance is not an element of a possession with intent to deliver charge. *People v Marion*, 250 Mich App 446, 450-451; 647 NW2d 521 (2002); see also *People v Mass*, 464 Mich 615, 627; 628 NW2d 540 (2001) (knowledge of the amount of a controlled substance is not an element of a drug delivery charge).

Defendant was convicted as an aider and abettor. Because the common law distinction between a principal and an aider and abettor has been abolished by statute, all persons who aid and abet in the commission of a felony can be tried as principals. *People v Robinson*, 475 Mich 1, 8; 715 NW2d 44 (2006). To establish aiding and abetting, a prosecutor must show that: "'(1) the charged crime was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement which assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement.'" *Id*. at 8, quoting *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004). The state of mind of an aider and abettor may be inferred from all the facts and circumstances. *Carines, supra* at 759. These include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Id*. at 757-758.

First, viewing the evidence in the light most favorable to the prosecution, there is sufficient evidence that another person committed the crimes charged. For the cocaine conviction, it is undisputed that the amount in question satisfied the statutory requirement. Further, there is no suggestion that anyone was authorized to possess this substance. The evidence also showed that Tyrell Anderson, for whom defendant claimed to have leased the apartment, or whoever had access to the apartment, was storing large quantities of cocaine and was in engaged in the process of turning powder cocaine into crack cocaine. There were four small plastic bags of powder cocaine and two small plastic bags of crack cocaine as well as the wrapper for a kilo of cocaine found inside the apartment. The amount of narcotics, the packaging in small plastic bags, and the jars used for turning powder to crack cocaine lead to the reasonable inference that the person who had access to this apartment possessed cocaine with the intent to deliver it. With regard to the marijuana conviction, marijuana was found stored in a bedroom in nine individual freezer bags. It is undisputed that the amount in question satisfied the statutory requirement, and there is no suggestion that anyone was authorized to possess this substance. The large quantity of marijuana packaged in this way also permitted a reasonable inference that Anderson, or whoever had control over the apartment, possessed the marijuana with the intent to deliver it.

Second, defendant performed acts or gave encouragement, which assisted the commission of the crime. Defendant leased the apartment where the drugs were found. It is not disputed that she signed the lease and was making payments for the apartment through money orders after allegedly receiving cash from Anderson. This act assisted the commission of the crimes because she provided a forum for these activities to take place.

Finally, there must be sufficient evidence that defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that she gave her assistance. The trial court inferred that defendant had knowledge that there was drug activity in the apartment based on the items of proof of residence found within, including the lease and lease application. The trial court did not find defendant credible regarding her story that she merely signed the lease, handed over the keys to Anderson, whom she had a relationship with in

the past, and never went back. The trial court found that it was inconsistent with common sense and reason to rent a place under those circumstances but not go to the place, keep a key, nor even keep the lease documents with her. The trial court also inferred that defendant's arrangement in paying rent indicated that she was trying to disassociate herself from what was going on at the apartment, where she would take rent from Anderson and then pay the rent by money order.

These are reasonable inferences that suggest defendant had knowledge about the drug operation Anderson intended to undertake using the apartment. Moreover, the trial court did not find defendant credible. As stated, it is solely the trier of fact's role to weigh the evidence and judge the credibility of witnesses. *Wolfe*, *supra* at 514. While defendant's connection to the apartment is minimal, based on the inferences fairly drawn by the trial court, and viewing the evidence in the light most favorable to the prosecution, there is sufficient evidence for a rational trier of fact to conclude that defendant had knowledge that the principal intended the commission of the crimes.

Defendant next argues that she was denied the effective assistance of counsel because her trial counsel failed to file a motion to suppress the evidence found as a result of a search warrant for the apartment, where the affidavit in support of the request for the search warrant was insufficient to find probable cause to search. We disagree.

Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews the factual findings for clear error and the constitutional question de novo. *Id.* However, because there was no hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court's review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

"'To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different.'" *People v Scott*, 275 Mich App 521, 526; 739 NW2d 702 (2007), quoting *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "Defendant must overcome the strong presumption that counsel's performance was sound trial strategy." *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004).

Probable cause to justify a search is required before a search warrant may be issued. US Const, Am IV; Const 1963, art 1, § 11; MCL 780.651(1). Generally, evidence obtained during an illegal search and seizure must be excluded. *People v Goldston*, 470 Mich 523, 528-532; 682 NW2d 479 (2004). Probable cause to issue a search warrant exists when there is a fair probability, under all of the circumstances outlined in the affidavit, that contraband or evidence of a crime will be found in a particular place, and we review the magistrate's determination to ensure that the magistrate had a substantial basis for finding probable cause. *People v Keller*, 479 Mich 467, 475; 739 NW2d 505 (2007). If the search warrant is supported by an affidavit that asserts probable cause, "the affidavit must contain facts within the knowledge of the affiant and not mere conclusions or beliefs." *People v Martin*, 271 Mich App 280, 298; 721 NW2d 815 (2006). Further, MCL 780.653 provides:

> The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:
>
> (a) If the person is named, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information.
>
> (b) If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.

There was probable cause to justify the issuance of the search warrant because based on the affidavit there was a fair probability contraband would be found in the apartment. The affiant, Officer Tooles, has been an officer for 22 years and is familiar with the different variety of narcotics and methods of selling narcotics. Tooles received information from a source of information (SOI) that he or she was inside the apartment and observed large amounts of cocaine. According to the affidavit, the SOI provided pictures of the cocaine to Tooles. The affidavit also stated that the SOI has been proven reliable and truthful. Background investigation revealed that defendant leased the apartment, and during his surveillance of the apartment, Tooles saw five individuals on foot walk up to the location, enter the apartment, stay for a few seconds, and then exit and leave the area.

Tooles's experience and his independent verification of the suspicious entries and then quick exits of the apartment by five individuals entitle him to a presumption of reliability. *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001). Moreover, the anonymous SOI spoke from personal knowledge, had been proven reliable and truthful, and Tooles stated that the SOI provided photographs, establishing the SOI's credibility. MCL 780.653(b). The affidavit provided sufficient evidence for a finding of probable cause. Therefore, challenging the search warrant would have constituted a meritless motion. Because counsel is not required to make a frivolous or meritless motion defendant was not denied the effective assistance of counsel. *Riley, supra* at 142.

Lastly, defendant argues that the verdict was against the great weight of the evidence. She contends that the lack of evidence connecting her to the drugs found in the apartment and the lack of evidence showing she was ever seen or had ever gone to the apartment weighs so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. We disagree.

The test to determine if a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). Conflicting testimony and questions of witness credibility are insufficient grounds for granting a new trial. *People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998). Except in extraordinary circumstances, such as where testimony contradicts indisputable physical facts or physical realities, deference must be given to the trier of fact's determination. *Id*. at 645-646.

Here, the evidence did not preponderate heavily against the verdict. There were large quantities of cocaine and marijuana found in an apartment that defendant had leased. While there was not evidence that defendant resided at this apartment or that she was seen there, the trial court drew reasonable inferences that defendant had knowledge of the drug activity based on the lease and lease application being found in the apartment, her relationship with the person for whom she leased the apartment, and her method of paying rent, which suggested that she wanted to disassociate herself from activity that was going on in the apartment. Therefore, the evidence did not preponderate heavily against the verdict.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey