

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ALVIN HEINRICH,

Defendant-Appellant.

UNPUBLISHED

February 25, 1997

No. 181160

Saginaw Circuit

LC No. 94-009393-FH

Before: D.F. Walsh,* P.J., and R.P. Griffin** and W.P. Cynar,* JJ.

MEMORANDUM.

Defendant pleaded guilty to four counts of delivery of less than fifty grams cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and one count of possession of less than fifty grams cocaine, MCL 333.7403(2)(a)(iv); MSA 14.15(7403)(2)(a)(iv). Defendant was sentenced to consecutive sentences of three to twenty years' imprisonment on the delivery convictions and one to four years' imprisonment on the possession conviction. He appeals as of right. We remand for reconsideration of the delivery sentences and for resentencing on the possession conviction. This case has been decided without oral argument pursuant to MCR 7.214(A).

Defendant argues that the trial court abused its discretion in scoring Offense Variable 8, Continuing Pattern of Criminal Behavior, at ten points. We find that the trial court did not make adequate findings to support that score. Defendant adequately challenged the finding that he earned a substantial portion of his income through the sale of drugs when he presented evidence that he lived in someone's basement and had little in the way of possessions. *People v Walker*, 428 Mich 261; 407 NW2d 367 (1987). The prosecution did not show that defendant received any income, other than drugs for his own use, from the sale of the drugs in this case. Although there may be facts to support a

*Former Court of Appeals judges, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.

**Former Supreme Court justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.

finding that defendant received a substantial portion of his income through the sale of drugs, those facts have not been presented by the prosecution or examined by the trial court. We therefore remand for an evidentiary hearing and for reconsideration of the sentences imposed in accordance with *People v Polus*, 197 Mich App 197, 202; 495 NW2d 402 (1992). Because of this ruling, it is unnecessary to review the novel due process arguments raised by defendant on appeal.

The trial court originally sentenced defendant under a mistake of law as to the necessity of imposing a consecutive sentence with regard to the possession conviction. Because the sentencing was completed under a mistake of law, remand for resentencing on the possession conviction only is the appropriate remedy. *People v Kaczorowski*, 190 Mich App 165; 75 NW2d 861 (1991); *People v McKee*, 167 Mich App 258; 421 NW2d 655 (1988); *People v Doss*, 122 Mich App 571; 332 NW2d 541 (1983).

Defendant's challenge to the proportionality of his consecutive sentences for the delivery convictions must fail. *People v Hardy*, 212 Mich App 318; 537 NW2d 267 (1995).

Remanded for reconsideration of the delivery sentences and for resentencing on the possession conviction. We do not retain jurisdiction.

/s/ Daniel F. Walsh

/s/ Robert P. Griffin

/s/ Walter P. Cynar