STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DON CORNELIUS LEE,

Defendant-Appellant.

UNPUBLISHED
July 1, 1997

No. 188472
Saginaw Circuit Court
LC No. 94-009884-FH

Before: Cavanagh, P.J., and Reilly and White, JJ.

PER CURIAM.

Defendant appeals from convictions of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), carrying a concealed weapon in a motor vehicle (CCW), MCL 750.227; MSA 28.424, and possession of a firearm while committing a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). Defendant was sentenced to two to twenty years' imprisonment for cocaine possession, and a concurrent term of two to five years' imprisonment for CCW, consecutive to two years' imprisonment for felony-firearm. Defendant's sentence for the cocaine possession conviction was enhanced pursuant to Michigan's habitual offender, second offense provision, MCL 769.10(1)(a); MSA 28.1082(1)(a). After defendant filed a claim of appeal,[1] the trial court entered a second amended judgment of sentence, on November 7, 1995, to make all the sentences consecutive. On appeal, defendant argues there was insufficient evidence to support convictions for CCW and felony firearm, that the trial court abused its discretion by admitting expert testimony that amounted to "drug profile" evidence that was used as substantive evidence of guilt, and that the trial court's second amended sentence is invalid because it increased the combined minimum sentencing term by two years, without a hearing, and improperly imposed consecutive sentences for carrying a concealed weapon and felony firearm without statutory authority. We reverse the felony-firearm conviction, affirm the CCW and possession with intent to deliver convictions, and remand for resentencing.

Evidence presented at trial established that on October 30, 1994, Saginaw Police Officer Fong and his partner, Officer Jacobs, were dispatched to 638 South 10th Street in Saginaw to look for three men in a burgundy and gray vehicle allegedly selling drugs. When the officers arrived at 638 South 10th

Street, they discovered a vehicle that matched the dispatcher's description and was occupied by three men. Two were seated in front and one was in the back. As Officer Fong left his vehicle, defendant, who had been seated in the driver's seat, left the vehicle and began walking toward the police and end of the driveway. Officer Fong ordered defendant to stop and put his hands in the air, and then approached defendant and patted him down. As this was taking place, Officer Jacobs and Officers Elmore and East, who had also responded to the dispatch, removed the other two men from the vehicle. When Officer Fong explained to defendant why the officers were there, defendant became belligerent and repeatedly asked why the officers were there. Officer Fong then handcuffed defendant and placed him in the patrol car.

Because Officer Fong had observed smoke and detected an odor of marijuana emanating from the vehicle, he decided to search it. He testified that after discovering that defendant owned the vehicle and after requesting and receiving defendant's consent to search, Officers Fong and Jacobs did so. The officers found a razor blade in the center console, a loaded .38 caliber revolver under the front passenger seat, five spent casings, and nine rocks of crack cocaine, weighing 1.43 grams, in a clear plastic container beneath the portable console between the driver and front passenger seats. The officers arrested defendant, conducted a more complete search of his person, and discovered a pager in his pants pocket and $87, i.e., three $20 bills, two $10 bills, one $5 bill and two $1 bills. Michael King, who had been seated in the front passenger seat of defendant's vehicle, also had a pager and some cash. King's fingerprints were identified on one of the bullet cartridge cases in the gun; however, no other prints were found corresponding to defendant or the two other occupants of defendant's vehicle.

In opening statement, the prosecutor stated that Todd would testify as an expert in packaging, manufacturing, and distribution of cocaine and would testify that the

> number of rocks of cocaine [nine] and the way it was cut up and the size of all that cocaine, the fact that they were in uniform sizes, indicates that whoever possessed it intended to distribute or sell it to someone else.
>
> They'll [the expert witnesses] further tell you that the fact that there was no crack pipes or any other tools for the use of that cocaine suggest that the person that possessed it was going to sell it as opposed to just use it himself.
>
> Officer Todd will further tell you that other factors corroborate his opinion that it was that the cocaine was to be sold, and those factors are that the razor blade that was found in the car can be used to cut the cocaine into pieces for sale and also the fact that two pagers were found in the car on that night. One pager was on the pants of the defendant, and another pager was in the possession of Mr. King, who was the front seat passenger. And Officer Todd will tell you it's common for people who sell cocaine to carry pagers and use those in their drug sales.

Defense counsel did not object to the above statements. In opening statement, defense counsel stated:

> And you're going to find out that contrary to what Mr. Reimers just told you, there were, in fact, some tools for the use of cocaine. A razor blade is the No. 1 use, as far as my experience, and I think the proofs will show that. Officer Todd will be here to testify that razor blades are commonly used for taking the cocaine and putting it into what's called a line. I don't know if any of you are familiar with how cocaine can be used, but one way is to sniff it through a line, and a razor blade is probably the most common tool to be used for that.
>
> But my client is charged with possession of cocaine with intent to deliver. The proofs will show that he never was in possession of it. It was never on his person. And there will be absolutely no proofs provided by anybody to show that he ever intended to sell this cocaine, let alone possess it.

At trial, Officer Todd testified that he had been a police officer for twenty-six years and had been assigned for two years to the narcotics unit, whose primary responsibility was to work mid- to upper-level drug traffickers. Todd testified he had approximately eight years' experience in narcotics and drug trafficking investigation. He further testified that he had attended courses given by the Michigan State Police and Drug Enforcement Administration, had participated in undercover operations in drug trafficking and had learned through that experience and training about the manufacture, packaging and distribution of narcotics. Todd testified he had been qualified as an expert in that area in probate, district, circuit and federal court. Defense counsel did not object when the prosecutor moved to qualify Todd as an expert in manufacturing, packaging and distribution of narcotics. Defense counsel requested and did voir dire Todd and then stated that he had "no comment regarding the People's motion." The trial court accepted Todd as an expert.

Todd testified that he had seen cocaine in rock form before and that the rocks he was shown, which had earlier been admitted as those recovered from the console of defendant's vehicle, would sell for twenty dollars each. Todd then explained to the jury how one goes about smoking a rock of crack cocaine. Todd further testified that he was familiar with pagers and their use in drug trafficking. He testified "they are commonly used in the drug trade for the supplier of cocaine to give out his pager number to purchasers, users" and that pagers allow sellers to be more free to roam around. Todd then testified how razor blades are used for breaking up cocaine rocks. He also testified that guns are often used in drug trafficking.

The prosecutor's questioning then turned from the general to the specific. Defense counsel's only objections during Todd's testimony came during the following colloquy:

> Q Okay. Now, if you were told that there were three individuals in a car, one in the rear seat and two in the front seat, and that those nine rocks of cocaine were found in the middle console area of the front seat and that the two front seat occupants

possessed pagers, plus a loaded firearm under the front seat, and a razor blade was found in the front seat, would you have an opinion as to what was going on in the car?

MR. PERRY: I'm going to object, Your Honor. I believe that's argumentative, suggestive, and it goes outside the scope of his expertise.

THE COURT: Overruled.

A It would be my opinion that the subjects in the vehicle were in the process of distributing cocaine, selling cocaine, crack cocaine.

Q Okay. Why do you reach that decision?

A It's based on the totality of everything that you've asked: the quantities of rocks, the uniform size, the fact that weapons were there, the fact that pagers were in there. You have to – I don't know what the situation was, where they were at, if they were parked in a drive-by street corner. I don't know that scenario, but it's just taking the totality of the situation, and that's the opinion I have.

Q Now, with regard to the cocaine itself, without mentioning the other factors, does the fact that there's nine rocks and that they're uniform in size or the same size make an impact on your decision?

A MR. PERRY: I'm going to object, Your Honor. That calls for speculation as to facts not in evidence as regards to the size of the rocks. These are very small. There's been no testimony thus far as to the weight of the individual rocks, no way to compare one to the other. I don't think that it can be testified to accurately.

THE COURT: Let me hear your question again.

MR. REIMERS: Your Honor, I was asking whether just looking at the cocaine itself whether the size of the rocks and their uniformity has an impact on his opinion regarding whether they're for sale or for use.

THE COURT: Overruled.

MR. REIMERS: Thank you.

MR. PERRY: Then I'm going to object on the grounds of leading. He's actually testifying about the size and uniformity. There's never been anything spoken like that from a witness yet, Your Honor.

THE COURT: Overruled.

THE WITNESS: In examining the rocks, the rocks are uniform in size and shape. As I've stated before, they're of the size and shape of a $20 rock that's purchased on the street. It's commonly sold on the street. Therefore, the quantity, the uniform size, and weight of the rocks would lead me to believe that the person that had this would have it for further distribution, in lieu [sic] of the fact that there's no utensils to use it. So there's no product to use the cocaine.

MR. PERRY: I'm going to object again, Your Honor. That's speculation. How does he know there was [sic] no products? Nobody has told him that. He hasn't been suggest [sic] that. He hasn't been given a hypothetical question regarding that.

MR. REIMERS: He was given a hypothetical where the tools were not –

THE COURT: Overruled.

BY MR. REIMERS:

Q So the fact that there are no glass pipes or tools for the use would also affect your opinion, correct?

A That's correct, yes.

Todd then testified that he would not expect a common user of cocaine to carry nine rocks because if one has crack cocaine, one is going to smoke it until it's gone, as it is extremely addictive. When asked what the typical amount of crack cocaine a user would have, Todd testified that a user "will buy whatever he has the money to buy with," and that the amount would vary. He also testified that due to the addictive nature of the drug, a user most commonly would buy a twenty dollar rock at a time, although that would not always be the case.

Todd testified that he was familiar with the sale of crack from automobiles and that that is a very common way to sell cocaine "on a smaller level." He testified that most commonly there is more than one person involved in selling because one person will have the cocaine, another will usually have the money and there will be somebody to protect it. Todd answered "yes" when asked "So there's some form of business enterprise that sellers engage in?" and whether these sellers would share profits as a result of the enterprise.

On cross-examination, Todd testified that in the more than one hundred times that he had testified as an expert, he had never testified as an expert witness that cocaine was not being possessed for sale, but only for use. Todd testified that the nine rocks were uniform size and shape, but not equal in size or congruent. Todd admitted that if three guys got together, they could buy nine rocks of cocaine for personal use and that it was not true that every time a drug dealer deals in drugs he has two other people helping him. Todd admitted that he could not say that because there are three people in a car and cocaine is found in the car, that the three are drug sellers, and that he could not say that they were

aiding and abetting. Todd answered "no" when asked whether he had any personal knowledge of this case and testified that he was not present during any of the occurrences pertinent to the case.

The prosecution argued in closing argument regarding the question of who possessed the cocaine and gun that although there was no direct evidence, circumstantial evidence was "just as good as direct evidence." The prosecutor then made several references to Officer Todd's testimony:

> So let's look at the facts. We have three guys in the car. We have two in the front seat, both wearing pagers. And if you recall what Officer Todd testified to is that pagers are commonly used by drug dealers so that their clients or the buyers can get a hold of them so that they can make a dope deal.
>
> We have nine rocks in the car, $20 rocks each, and Officer Todd testified that the number of the rocks, being nine, and the uniformity in size is indicative that those particular rocks of cocaine are to be sold. They're not just to be used by a person that would want to use cocaine; that if a person had nine rocks of cocaine or $180 to buy nine rocks of cocaine and they were a user, that they would rather use their money more efficiently and go buy the powder form and manufacture their own so they could get 48 rocks as opposed to just nine.
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> Officer Todd also testified that the fact that there was a razor blade found in the car, which can be used to cut the cocaine into the nine rocks or into rocks which could be sold, further indicates that these rocks were being hold [sic] for the intent to sell them.
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> Also, the fact that there were no tools for the use of the cocaine. There were no crack pipes or any types of glass tubing or anything that is used to inhale or ingest cocaine found in that car. So that fact also leads to the conclusion that this cocaine was going to be sold. So we know that whoever had that cocaine in the car had it in order to sell it that night.
>
> If you recall Officer Todd's testimony, he also said that two or more people are commonly involved in the sale of drugs; that there's a certain type business enterprise that they engage in; that one person will be the dealer, and another person will be the enforcer. And he testified that guns are commonly in the possession of drug dealers because they have to protect their assets. They have to protect the cocaine that they have from robbery because if you have your cocaine and somebody robs you, you can't run to the police department and tell them, yeah, somebody ripped off my cocaine. So drug dealers carry guns as well.
>
> And, ladies and gentlemen, I think using your common sense you can figure out that that's exactly what was going on here. . . .

Defense counsel did not object to the prosecutor's use of Todd's testimony in closing argument.

The trial court gave the following limiting instructions regarding the testimony of police officers and use of expert testimony:

> You have heard testimony from witnesses who are police officers. The fact that they are police officers does not make their testimony any more or less believable than that of any other witness.
>
> You've heard testimony from witnesses who have been given [sic] you their opinions as experts in their respective fields of narcotics identification, narcotics manufacturing, packaging, trafficking in narcotics, and fingerprint analysis. Those individuals were Miss Pommade, Detective John Todd, and Sergeant Galvin Smith.
>
> Experts are allowed to give opinions in court about matters they're experts on. However, you don't have to believe an expert's testimony. Instead, you should decide whether you believe it and how important you think it is.
>
> When you decide whether you believe an expert's opinion, think carefully about the reasons and facts he or she gave for his or her opinion and whether those facts are true. You should also think about the expert's qualifications and whether his or her opinion makes sense when you think about all the other evidence in the case.

The jury found defendant guilty of all three counts. This appeal ensued.

I

Defendant first argues that the prosecution failed to present sufficient evidence to support a conviction of felony-firearm or CCW. We agree as to the felony-firearm, but disagree as to the CCW.

A

To convict of felony-firearm, the prosecution must prove that the defendant carried or possessed a firearm during the commission or attempted commission of a felony. *People v Williams*, 212 Mich App 607, 608; 538 NW2d 89 (1995). Absent actual personal possession of a firearm during the commission of a felony, the prosecution may establish that a defendant aided and abetted the crime of having a firearm in one's possession during the commission of a felony by establishing that the defendant procured, counselled, aided, or abetted and so assisted in obtaining the proscribed possession, or in retaining such possession otherwise obtained. *People v Johnson*, 411 Mich 50, 54; 303 NW2d 442 (1981).

In this case, the prosecution presented no direct evidence that defendant possessed or aided and abetted another's possession of the firearm. Because the prosecution failed to prove a necessary element of the felony-firearm charge, the evidence was insufficient to support defendant's conviction of that charge. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified on other grounds 441 Mich 1201 (1992). We reverse defendant's conviction of felony-firearm.

B

Defendant also argues that the evidence was insufficient to support his CCW conviction. To sustain a conviction for CCW, the evidence must establish that the defendant carried a pistol concealed on or about his person or, whether concealed or otherwise, in a vehicle operated or occupied by the defendant without a license to carry the pistol as provided by law. MCL 750.227(2); MSA 28.424(2). The prosecution need not show actual physical possession, but may sustain its burden of proof by showing that the carrying of a weapon in the vehicle was within the scope of a common unlawful enterprise, and the gun was being carried for the purpose of

furthering the unlawful enterprise. *People v Stone*, 100 Mich App 24, 27-28; 298 NW2d 607 (1980). Because the evidence in the instant case was sufficient to support an inference that defendant knowingly carried King and his weapon to further a common unlawful enterprise, the evidence was sufficient to support defendant's conviction for CCW. We therefore affirm defendant's CCW conviction.

II

Defendant next argues that the trial court abused its discretion in admitting the testimony of Officer Todd, as it amounted to "drug profile" testimony and was used as substantive evidence of defendant's guilt. *People v Hubbard*, 209 Mich App 234; 530 NW2d 130 (1995). We agree with plaintiff that this issue was not preserved, and thus review for manifest injustice only. *People v Dunham*, 220 Mich App 268, 274; 559 NW2d 360 (1996).

We first note that the record does not support defendant's statement that he objected at trial to Officer Todd's being qualified as an expert. Defendant placed no such objection, and objected only to several questions asked of Todd well into direct examination, pertinent portions of which are quoted in the factual section, *supra*. Further, defendant did not object on the basis that Todd's testimony involved or constituted "drug profile evidence." Thus, the issue is not properly preserved, *People v Furman*, 158 Mich App 302, 329-330; 404 NW2d 246 (1987). Further, we conclude no manifest injustice will result where the bulk of the testimony was admissible and a cautionary instruction regarding expert testimony was given. *People v Ray*, 191 Mich App 706, 707-708; 479 NW2d 1 (1991).

III

Defendant next argues that, in response to a letter from the Department of Corrections, the trial court, without a hearing, and while defendant's appeal was already pending in this Court, entered a (second) amended judgment of sentence making all defendant's sentences consecutive, thus increasing the combined minimum term of defendant's sentence from four to six years. Defendant argues that the trial court thereby violated his right to a hearing. We agree.

MCR 6.429(A) authorizes a sentencing court to modify an invalid sentence after it has been imposed. Because MCL 750.227b(2); MSA 28.424(2) and MCL 333.7401(3); MSA 14.15(7401)(3) mandate that defendant's sentences be imposed consecutively, the concurrent sentences originally imposed were invalid. *People v Kaczorowski*, 190 Mich App 165, 174; 475 NW2d 861 (1991). On November 7, 1995, the trial judge entered an order that modified the invalid concurrent sentences to run consecutively, thus correcting the defective, invalid sentences. However, because defendant's claim of appeal had already been filed when the trial court entered its second amended judgment of sentence, the trial court lacked jurisdiction to impose the second amended judgment of sentence. MCR 7.208(A). Further, at the time of defendant's original sentencing on his three convictions, the court was unaware that defendant's sentences were required to be imposed consecutively. When a sentence is based on a misconception of the law, the defendant is usually entitled to resentencing. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997); *Kaczorowski, supra*. In *Kaczorowski*, this Court determined that, despite the trial court's misconception, resentencing was not

required because the sentencing court stated that the sentences would not have been different had the court known that consecutive sentencing was required. No similar statements were made by the court in the present case. Therefore, it is unclear whether the sentences would have been less had the court been aware of the legal requirements for cumulative sentencing.[2]

Sentencing is a critical stage of a criminal proceeding at which counsel's presence is required absent a waiver, *People v Evans*, 156 Mich App 68, 70; 401 NW2d 312 (1986). Thus, under the circumstances presented here, in the interest of affording due process, *Miles, supra* at 99, defendant should be granted a rehearing and resentencing with the assistance of counsel, who may convince the court to reduce the minimum sentences for violation of the controlled substance act and for carrying a concealed weapon, in light of the consecutive nature of the sentences.

Because we vacate defendant's felony-firearm conviction, we do not address defendant's remaining sentencing issue or his argument regarding double jeopardy.

Affirmed in part, reversed in part, and remanded for resentencing.

/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly
/s/ Helene N. White

[1] Defendant filed a claim of appeal on August 24, 1995. On August 28, 1995, the trial court amended defendant's judgment of sentence so that the felony-firearm sentence preceded and ran consecutively to the concurrent sentences for the two other convictions.

[2] The fact that the minimum sentences imposed originally exceeded the mandatory minimums, and then were imposed as cumulative sentences, does not affect their legality or alone justify resentencing. *People v Harden*, 434 Mich 196, 202; 454 NW2d 371 (1990). "The court is not bound to consider the length of the consecutive mandatory sentence . . . under *Milbourn*'s [*People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990)] principle of proportionality because each *sentence* is a separate determination." *Miles, supra*, at 101.