STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED July 1, 1997
v RAY ANTHONY HARVEY, Defendant-Appellee.	No. 194585 Oakland Circuit LC No. 95-140546

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED
v RAY ANTHONY HARVEY, Defendant-Appellant.	No. 194909 Oakland Circuit LC No. 95-140546

Before: Michael J. Kelly, P.J., and Wahls and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of delivery of between 50 and 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). The trial court sentenced defendant to consecutive terms of seven to thirty years' imprisonment pursuant to the sentence enhancement provision for subsequent controlled substance offenders, MCL 333.7413(2); MSA 14.15(7413)(2).[1] In Docket No. 194585, the prosecution appeals defendant's sentences as of right. In Docket No. 194909, defendant appeals his convictions as of right. We affirm.

Defendant's convictions arose from his involvement in two drug transactions which occurred on October 26, 1993 and November 9, 1993. The transactions were arranged through the cooperation of

an informant, Michael Pachorek, with the Oakland County Narcotic Enforcement Team (the NET). Pachorek only knew defendant by the name of "Ant." After speaking with defendant regarding prices for various quantities of drugs, and relaying this information to the NET, Pachorek arranged to purchase two ounces of cocaine for $2,400. Trooper Cindy Fellner, a member of the NET, drove Pachorek to the designated meeting place in her undercover vehicle. Defendant was seated in the passenger seat of a parked car. Pachorek exited Trooper Fellner's vehicle and entered the backseat of the car in which defendant was sitting. Defendant handed Pachorek the package containing the drugs, and Pachorek gave defendant the money. Pachorek returned to Trooper Fellner's vehicle and turned over the drugs to her. Pachorek arranged a second transaction involving the purchase of 4½ ounces of cocaine for the price of $5,000. Trooper Fellner again drove Pachorek to the arranged meeting location, and the exchange again occurred in a vehicle in which defendant was a passenger. During the exchange, Pachorek expressed interest in arranging a third transaction with defendant involving a "quarter kilo," an amount equivalent to 9 ounces of cocaine. Defendant replied that the transaction might occur after Pachorek sold the 4½ ounces. Subsequently, Pachorek arranged to purchase the "quarter kilo," but the transaction was not accomplished. Defendant was not arrested until approximately twenty months later during a traffic stop.

In Docket No. 194585, the prosecution argues that the trial court abused its discretion by departing from the statutorily mandated ten-year minimum sentences. We find no abuse of discretion. Initially, we note that the prosecution incorrectly asserts that the trial court was required to sentence defendant to consecutive terms of 20 to 30 years' imprisonment pursuant to MCL 333.7413(2); MSA 14.15(7413)(2). This statute does not mandate sentence enhancement but instead gives the trial court discretion to increase the sentence of a subsequent controlled substance offender. *People v Green*, 205 Mich App 342, 345; 517 NW2d 782 (1994). More importantly, we note that the trial court is authorized to depart from the statutorily mandated minimum sentences when it finds that there are substantial and compelling reasons to do so. MCL 333.7401(4); MSA 14.15(7401)(4). In the present case, the trial court noted that defendant was no longer a target of law enforcement interest and had apparently not been involved in illegal activity in the twenty months between the charged activity and his arrest. Moreover, the court implied that the law enforcement activity in the present case escalated the crime with which defendant was charged. We find that the trial court did not abuse its discretion in finding substantial and compelling reasons to depart from the mandatory minimum sentences in this case. *People v Fields*, 448 Mich 58, 78; 528 NW2d 176 (1995). The factors relied upon by the trial court were properly considered as circumstances which mitigated the offenses. *Id.* at 79.

In Docket No. 194909, defendant appeals his convictions as of right. Defendant first argues that the pre-arrest delay in this case denied him his right to a fair trial. We disagree. Criminal defendants are afforded limited protection against pre-arrest delay by the due process clause. *United States v Lovasco*, 431 US 783, 789; 97 S Ct 2044; 52 L Ed 2d 752 (1977); *People v White*, 208 Mich App 126, 134; 527 NW2d 34 (1994). However, in order to warrant dismissal of the charges, a defendant must establish that the delay resulted in "substantial prejudice" to his right to a fair trial and that the prosecution intended to "gain a tactical advantage" through the delay. *Id.*

Defendant has failed to meet this burden. Although he contends that if he had been arrested in a timely fashion, he could have presented several alibi witnesses who would have testified as to his whereabouts on the night in question, he has not identified any potential witnesses whose testimony was lost due to the delay. We find that this speculation is not sufficient to prove prejudice. *Id.* Moreover, two witnesses did testify that defendant was working on a construction project on the nights that the drug transactions occurred. Because defendant was able to present his defense of alibi to the jury, his claim of prejudice is unsupported. See *People v Reddish*, 181 Mich App 625, 628; 450 NW2d 16 (1989). Defendant has also failed to present any evidence or even to argue that the prosecution harbored any intent to achieve an advantage from the delay. Because he has not established prejudice and has not shown that the prosecution had an intent to achieve a tactical advantage from the delay, defendant's claim must fail.

Next, defendant argues that the trial court reversibly erred in admitting evidence of his previous arrest for possession of cocaine. We find that the trial court abused its discretion when, over defense objection, it allowed Officer Gross to testify that he knew defendant because he had previously arrested him for a drug offense and that during the arrest, he confiscated cocaine, $1700 in cash, and a pager from defendant. This evidence was not relevant to any issues of facts of consequence at trial. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993); modified 445 Mich 1205; 520 NW2d 338 (1994). However, we find that reversal is not required on this basis, because the error was harmless in light of the overwhelming evidence of defendant's guilt. *People v Lucas*, 188 Mich App 554, 580; 470 NW2d 460 (1991).

Finally, defendant argues that instances of prosecutorial misconduct denied him a fair trial. We decline to review this issue because defendant failed to object to any of the comments at trial, and we find that none of the remarks were improper or created prejudice that could not have been eliminated by a curative instruction. *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996).

Affirmed.

/s/ Michael J. Kelly
/s/ Myron H. Wahls
/s/ Hilda R. Gage

[1] Defendant had a prior controlled substance conviction for possession of less than 25 grams of cocaine, MCL 333.7403(2)(iv); MSA 14.15(7403)(2)(iv).