

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD PETER FORTNEY, a/k/a DONNIE,

Defendant-Appellant.

UNPUBLISHED

July 22, 1997

No. 183216

Genesee Circuit Court

LC No. 94-051326

Before: McDonald, P.J., and Griffin and Bandstra, JJ.

MEMORANDUM.

Defendant pleaded guilty to delivery of marijuana, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c), delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and to being a second habitual offender, MCL 769.10; MSA 28.1082. He was sentenced to consecutive prison terms of two to six years for delivery of marijuana and three to thirty years for delivery of less than fifty grams of cocaine. Defendant now appeals as of right. We affirm.

Defendant argues that the trial court erred in refusing to consider his claim of “sentence entrapment” as a reason to depart downward from the sentencing guidelines recommendation and to impose concurrent sentences. We conclude that defendant has waived this issue. At the sentencing hearing, defense counsel initially raised this issue, arguing that the activities of the police in making repeated buys of drugs from defendant improperly enhanced defendant’s sentence. When defendant later attempted to tell the trial judge about “the way” in which the undercover police officer kept approaching him, the trial judge told defendant that, if defendant wanted, he could raise the entrapment issue and have a hearing on the issue, but defendant declined. Thus, defendant had the opportunity to raise the issue of sentence entrapment and have the trial court address the issue, but defendant rejected the trial court’s offer. Defendant cannot now claim error where he was offered, but rejected, a hearing below. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995).

Defendant also asserts that his sentences violate the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). We disagree. Because defendant is an habitual offender, reference to the sentencing guidelines in any fashion is inappropriate, and

review is limited to whether the sentence is disproportionate. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). We have reviewed the circumstances surrounding this offense and offender, including the dismissal of five other cases against defendant involving the sale of drugs in exchange for defendant's guilty pleas, and conclude that defendant's sentences are proportionate. *Milbourn, supra*.

We affirm.

/s/ Gary R. McDonald
/s/ Richard Allen Griffin
/s/ Richard A. Bandstra