

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NEIL B. THOMAS,

Defendant-Appellant.

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UNPUBLISHED

July 25, 1997

No. 191962

Oakland Circuit Court

LC No. 93-122471 FH

Before: Jansen, P.J., and Wahls and P.R. Joslyn\*, JJ.

MEMORANDUM.

Defendant was convicted by jury of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(1) and (2)(a)(iv); MSA 14.15(7401)(1) and (2)(a)(iv), and possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(1) and (2)(a)(iv); MSA 14.15(7401)(1) and (2)(a)(iv). He received enhanced consecutive sentences of two to forty years imprisonment, reflecting his status as a repeat drug offender, MCL 333.7413; MSA 14.15(7413). Defendant appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that his convictions and sentences must be vacated because the trial court failed to secure a valid waiver of defendant's right to counsel. Assuming *arguendo* that the court secured a constitutionally invalid waiver of counsel, the error was harmless. *People v Mack*, 218 Mich App 359, 364; 554 NW2d 329 (1996). Despite the trial court's granting of defendant's request to proceed *pro se*, the record indicates that defendant was represented by counsel at trial.

Defendant next argues that the trial court erroneously denied his motion to dismiss that was premised on the prosecutor's failure to produce two endorsed *res gestae* witnesses. We agree with defendant that the prosecutor failed to exercise due diligence to secure the presence of the witnesses at trial. *People v Wolford*, 189 Mich App 478, 483-484; 473 NW2d 767 (1991); *People v DeMeyers*, 183 Mich App 286, 293; 454 NW2d 202 (1990); *People v Bell*, 169 Mich App 306, 309; 425 NW2d 537 (1988). Additionally, the trial court erred when it refused to address the issue of due diligence, and when it relieved the prosecutor of her obligation under MCL 767.40a(4); MSA

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\* Circuit judge, sitting on the Court of Appeals by assignment.

28.980(1)(4) to show good cause to delete witnesses from the witness list. Nevertheless, defendant is not entitled to appellate relief. The trial court twice offered defendant a three-week continuance in order to permit the location and production of the witnesses. *People v Burwick*, 450 Mich 281, 298; 537 NW2d 813 (1995). Defendant twice refused this opportunity to cure the statutory violation and present the testimony of the witnesses. He may not harbor error as an appellate parachute. *People v Hughes*, 217 Mich App 242, 247; 550 NW2d 871 (1996).

Finally, defendant argues that the trial court lacked jurisdiction to resentence defendant. Defendant is mistaken. The trial court had jurisdiction to resentence defendant pursuant to MCR 6.429(B)(1); *People v Thomas*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 191347, issued April 15, 1997).

Affirmed.

/s/ Kathleen Jansen

/s/ Myron H. Wahls

/s/ Patrick R. Joslyn