

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JIMMIE BENTLEY,

Defendant-Appellant.

UNPUBLISHED

December 19, 1997

No. 182914

Saginaw Circuit Court

LC No. 94-008851-FH

Before: Hood, P.J., and McDonald and White, JJ.

PER CURIAM.

Defendant appeals by right his conviction of possession of less than twenty-five grams of cocaine, contrary to MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v). The court sentenced defendant as an habitual offender to sixty-four months' to eight years' imprisonment. We affirm.

Defendant first argues that his conviction must be vacated because it violated his constitutional right to be free from double jeopardy where his assets were previously seized in a civil forfeiture proceeding. We disagree. This Court recently clarified that in order for a defendant to prevail on such a claim, he must present the "clearest proof" that the forfeiture was so punitive in purpose or effect that it is equivalent to a criminal proceeding. *People v Acoff*, 220 Mich App 396, 398-399; 559 NW2d 103 (1996). Here, as in *Acoff*, defendant has failed to sustain this burden and therefore his double jeopardy claim must be rejected.

Defendant next argues that the trial court abused its discretion in sentencing defendant because his sentence is disproportionate. We disagree. Defendant's arguments regarding the sentencing guidelines are without merit because he was sentenced as an habitual offender. *People v Edgett*, 220 Mich App 686, 694; 560 NW2d 360 (1996). Further, the facts surrounding the offense and the offender do not demonstrate that the sentence was disproportionate.

Defendant also argues that the lower court erred in refusing to quash the supplemental information charging defendant as an habitual offender. We disagree. The record reveals that defendant was arraigned on March 14, 1994. On that same day plaintiff filed a supplemental information giving defendant notice that the prosecution sought to enhance his sentence under the

habitual offender statute. Subsequently, an amended supplemental information was filed to correct errors contained in the original supplemental information. Because the original supplemental information was timely filed, and the level of supplementation was not changed, see *People v Ellis*, 224 Mich App 752; ___ NW2d ___ (1997), defendant was given the required notice of the potential consequences should he be convicted of the underlying offense, and the controlling statute, MCL 769.13; MSA 28.1085, was satisfied. Consequently, the trial court did not err. *People v Manning*, 163 Mich App 641, 644-645; 415 NW2d 1 (1987).

Defendant further claims that the trial court erroneously sentenced him on a finding that he was guilty of possession with intent to deliver even though the jury acquitted him of that charge. After reviewing the record, we do not believe that the trial court made such a finding of guilt. Further, we disagree with defendant's assertion that the trial court failed to sufficiently articulate the reasons for the sentence given.

Defendant also asserts that his arrest was illegal because the police had no probable cause and that, therefore, the trial court erroneously failed to dismiss the case. To the contrary, the record reveals that there was a warrant for defendant's arrest issued in New Jersey for his failure to appear for sentencing after pleading guilty. Defendant's claim is without merit.

Defendant further argues that the trial court erred in allowing into evidence items seized during a search of defendant's house. However, defense counsel specifically waived any challenge to the validity of the search, because in his opinion, there was no evidence of any significance to suppress. Consequently, defendant cannot now claim error on the admission of this evidence. *People v Shuler*, 188 Mich App 548, 552; 470 NW2d 492 (1991). Furthermore, defendant's attack on the sufficiency of the affidavit supporting the search warrant is without merit.

Defendant asserts that he was flanked in the courtroom by four officers, and that he was thereby denied the presumption of innocence. However, defendant did not object below. Consequently, we conclude that defendant's conviction should not be reversed on this basis. *Shuler, supra* at 552.

Finally, defendant argues that he was denied the effective assistance of both trial and appellate counsel. We disagree. In regard to the trial, defendant's counsel made clear that the defense strategy was to admit possession and focus the defense on rebutting the prosecution's claim that defendant possessed with the intent to deliver. Defendant's testimony supported this tactic. We do not substitute our judgment for that of counsel regarding matters of trial strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Defendant's argument is particularly untenable where his trial strategy was successful. Regarding defendant's appellate counsel, the record does not support his factual claims. Further, as already discussed, the issues raised in defendant's supplemental appellate brief are without merit and therefore his appellate counsel was not ineffective for failing to include them in defendant's initial appellate brief.

Affirmed.

/s/ Harold Hood
/s/ Gary R. McDonald
/s/ Helene N. White