

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TONEY DEL GREENE,

Defendant-Appellant.

UNPUBLISHED

February 27, 1998

No. 191570

Monroe Circuit Court

LC No. 95-026580-FH

Before: Neff, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant was sentenced to five to thirty years' imprisonment as a second habitual offender, MCL 769.10; MSA 28.1082. We affirm.

Defendant's first issue on appeal is that the trial court abused its discretion when it denied defendant's request for a continuance. We disagree. Several factors should be considered in evaluating whether the trial court abused its discretion by refusing a defense request for a continuance. *People v Williams*, 386 Mich 565, 578; 194 NW2d 337 (1972); *People v Suchy*, 143 Mich App 136, 142; 371 NW2d 502 (1985). Those factors are: (1) whether the defendant is asserting a constitutional right; (2) whether the defendant has a legitimate reason for asserting the right; (3) whether the defendant asserted the right in a timely fashion; (4) whether prior adjournments occurred at the defendant's request; and (5) whether the defendant has demonstrated prejudice. *Williams, supra*, 386 Mich 578; *Suchy, supra*, 143 Mich App 142.

Reviewing these factors, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a continuance. Defendant substituted counsel and requested a continuance on the scheduled trial date to allow his newly retained counsel time to prepare. Accordingly, defendant was asserting the Sixth Amendment guarantee of effective assistance of counsel, and general principles of due process were also implicated because of the claim of lack of adequate time to prepare for trial. *People v Storch*, 176 Mich App 414, 426; 440 NW2d 14 (1989); *Suchy, supra*, 143 Mich App 142. However, there is no indication of, nor does defendant assert, a legitimate reason for his

substitution of counsel on the day of trial. In cases which warranted a continuance, the defendants have had important reasons for their requests, such as surprise witnesses or bona fide disputes with their attorneys. *Williams, supra*, 386 Mich 565; *Storch, supra*, 176 Mich App 424; *Suchy, supra*, 143 Mich App 143. Such an important reason does not exist in this case.

Although the record does not reflect any prior adjournments at defendant's request, defendant has not demonstrated, and the record does not reflect, any resulting prejudice. The trial court postponed jury selection, opening statements and the beginning of the prosecution's case until the next afternoon, November 2, 1995, suspended trial on Friday, and then continued on Monday, November 6, 1995. Defense counsel was able to raise several motions before jury selection and defendant's previous counsel agreed to share everything in his files, notes and thoughts. Defendant's trial, in which defendant was charged with two counts of delivery of less than fifty grams of cocaine, was a one day trial with five witnesses. The jury acquitted defendant of the second delivery charge. The trial court did not abuse its discretion in denying a continuance as defendant did not suffer prejudice from the denial.

Defendant next argues that the prosecution failed to present sufficient evidence to support defendant's conviction. We disagree. Delivery is defined in MCL 333.7105(1); MSA 14.15(7105)(1) as the actual, constructive, or attempted transfer from one person to another of a controlled substance. *People v Maleski*, 220 Mich App 518, 521; 560 NW2d 71 (1996). The act of transferring a controlled substance is sufficient to sustain a finding of an actual delivery. *Maleski, supra*, 220 Mich App 522.

Viewed in a light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that defendant delivered less than fifty grams of cocaine. *People v Kozyra*, 219 Mich App 422, 428; 556 NW2d 512 (1996). After Officer Alderman, an undercover officer attempting a drug purchase, asked Johnson for \$20 worth of crack cocaine, Alderman watched defendant hand Johnson an object which Johnson, in turn, handed to Alderman which tested positive for crack cocaine. Alderman then watched Johnson hand defendant the \$20 bill Alderman had given Johnson in exchange for the crack. We find that such evidence is sufficient to support defendant's conviction.

Defendant's third issue on appeal is that he was denied effective assistance of counsel because his newly substituted counsel was unable to adequately prepare for trial. We disagree. Defendant has not fully preserved this issue for review by moving for a new trial or seeking an evidentiary hearing before the trial court. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). Therefore, this Court will review this issue on the basis of the existing record. *Marji, supra*, 180 Mich App 533.

Defendant has not demonstrated that counsel's performance was objectively unreasonable and that there is a reasonable probability that, but for counsel's lack of time for preparation, the result of the proceedings would have been different. *People v Mitchell*, 454 Mich 145, 158; 560 NW2d 600 (1997). Except for defendant's assertion that trial counsel would have prepared differently if she had been given more time, defendant does not point to any errors that counsel made to establish a performance so deficient as to have caused him prejudice. Therefore, defendant has not overcome the presumption that he received effective assistance of counsel.

Defendant's final argument on appeal is that his sentence violates the principle of proportionality. We disagree. In reviewing sentences imposed for habitual offenders, this Court must determine whether there has been an abuse of discretion. *People v Hansford*, 454 Mich 320, 323; 562 NW2d 460 (1997); *People v Cervantes*, 448 Mich 620, 625; 532 NW2d 831 (1995). An abuse of discretion occurs when the defendant's sentence violates the principle of proportionality. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996).

We conclude that defendant's sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Taking into account that defendant was given a chance with probation on a prior concealed weapon conviction, that he did not take that chance to remain free of problems with the law and violated that probation, that defendant thinks its appropriate to dodge traffic laws by using aliases and the present conviction of delivery of cocaine, defendant's sentence is proportionate.

Affirmed.

/s/ Janet T. Neff
/s/ David H. Sawyer
/s/ William B. Murphy