

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD BROWNING,

Defendant-Appellant.

---

UNPUBLISHED

March 3, 1998

No. 198436

Recorder's Court

LC No. 96-000305

Before: Michael J. Kelly, P.J., and Fitzgerald and M.G. Harrison\*, JJ.

MEMORANDUM.

Defendant appeals by right his bench trial conviction of one count of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). We affirm.

Defendant first contends that his waiver of trial by jury was not knowingly, voluntarily, and understandingly tendered and was therefore improperly accepted. The record reveals that the trial court personally addressed defendant, advised him of his rights respecting trial by jury or by the court without a jury, and then inquired whether defendant wished to waive his right to trial by jury and be tried by the court without a jury. Defendant initially gave a response that was a non sequitur. The trial court then repeated the inquiry two more times, both times receiving an affirmative reply. When the court announced that it was accepting the waiver, it inquired of defendant whether this action met with his approval, receiving yet another affirmative response. The trial judge was clearly in the better position to determine whether defendant's waiver of trial by jury was knowing, voluntary, and understanding, and on this record its findings are not clearly erroneous. *Guilty Plea Cases*, 395 Mich 96, 126; 235 NW2d 132 (1975).

Inasmuch as defendant's waiver was, therefore, knowing, voluntary, and understanding, his counsel can hardly have been ineffective in failing to object to the waiver procedure. The decision whether to waive the right to trial by jury was, of course, defendant's, not his attorney's, and no

---

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

dereliction in counsel's performance has been identified. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

Finally, defendant contends that his two to twenty year sentence is disproportionate to the offense and the offender. Contrary to defendant's assertion, his sentence is well within the guideline range, which was one to three years on the minimum, as established by the sentence information report prepared, signed, and filed by the trial judge. Defendant has failed to overcome the presumption that a sentence within the guideline range is proportionate to the offense and the offender. *People v Eberhardt*, 205 Mich App 587; 518 NW2d 511 (1994).

Affirmed.

/s/ Michael J. Kelly

/s/ E. Thomas Fitzgerald

/s/ Michael G. Harrison