

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ALFRED DWAYNE MILLER,

Defendant-Appellee.

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UNPUBLISHED

March 20, 1998

No. 195496

Oakland Circuit Court

LC No. 94-135377-FH

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PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

v

ALFRED DWAYNE MILLER,

Defendant-Appellant.

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No. 196875

Oakland Circuit Court

LC No. 94-135377-FH

Before: Jansen, P.J., and Doctoroff and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver more than 50 but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), conspiracy to possess cocaine with intent to deliver cocaine, MCL 750.157a; MSA 28.354(1), possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and carrying a concealed weapon, MCL 750.227; MSA 28.424. He was sentenced to three to twenty years' imprisonment for possession with intent to deliver cocaine, three to twenty years' imprisonment for conspiracy, two years' imprisonment for felony-firearm, and one to five years' imprisonment for carrying a concealed weapon. In Docket No. 195496, the prosecution appeals as of right from defendant's sentence. In Docket No. 196875, defendant appeals as of right from his convictions. We affirm defendant's convictions, but remand for resentencing.

The prosecution argues that the trial court abused its discretion by deviating from the mandatory minimum sentences required by statute for reasons that were neither substantial nor compelling. We agree.

Defendant is subject to the mandatory prison term set forth in MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii) for his conviction of possession with intent to deliver more than 50 but less than 225 grams of cocaine, *People v Northrop*, 213 Mich App 494, 498; 541 NW2d 275 (1995), and to the mandatory prison term set forth in MCL 750.157a; MSA 28.354(1) for the conviction of conspiracy to possess with intent to deliver cocaine. The purpose of the mandatory minimum sentences is to keep drug dealers away from society for long and definite periods by using harsh sentences. *Id.* The applicable minimum term is presumed appropriate and thus presumed to be proportionate and valid. *People v Poppa*, 193 Mich App 184, 188, 189; 483 NW2d 667 (1992).

A trial court may depart from the minimum term of imprisonment if the court finds on the record that there are substantial and compelling reasons to do so. MCL 333.7401(4); MSA 14.15(7401)(4). *People v Fields*, 448 Mich 58, 65; 528 NW2d 176 (1995). Factors to be considered may include, but are not limited to: (1) the facts of the crime mitigate the defendant's culpability, (2) the defendant's prior record, (3) the defendant's age, (4) the defendant's work history, (5) the defendant's cooperation with police following arrest, and (6) the defendant's criminal history. *People v Catanzarite*, 211 Mich App 573, 585; 536 NW2d 570 (1995). The substantial and compelling reasons must be objective and verifiable. *Fields, supra* at 62. Objective and verifiable factors are those actions or occurrences that are external to the minds of the judge, defendant and others involved in making the decision and are capable of being confirmed. *Id.* at 66. The existence of nonexistence of a particular factor is a factual determination for the sentencing court that is reviewed on appeal under the clearly erroneous standard. *Id.* at 77. This Court reviews a trial court's determination that the objective and verifiable factors present in a case constitute substantial and compelling reasons to depart from the statutory minimum sentence for an abuse of discretion. *Id.* at 78. A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

In the present case, the trial court found the following factors to be substantial and compelling reasons to deviate from the mandatory minimum sentences: (1) defendant's age; (2) defendant's lack of prior felonies; (3) the duplicitous nature of the conspiracy and delivery charges; (4) character reference letters; (5) defendant's permanent disability; and (6) the sentence of a codefendant. We are satisfied that defendant's age and prior record are objective and verifiable factors and were appropriate to consider. *Fields, supra* at 68. Moreover, assuming the trial court used the character reference letters to determine defendant's educational background, family support and lengthy work history, these were also appropriate factors to consider. However, information contained in the letters that was not objective and verifiable should not be considered by the trial court.

The trial court's consideration of the "duplicitous" nature of the convictions as a factor in finding a substantial and compelling reason to depart from the minimum sentence was clearly erroneous. The offense of possession with intent to deliver cocaine and the conspiracy to deliver cocaine are distinct offenses. *People v Sammons*, 191 Mich App 351, 374-375; 478 NW2d 901 (1991). MCL

333.7401(3); MSA 14.15(7401)(3) specifically requires that a term of imprisonment imposed pursuant to MCL 333.7401(2)(iii) shall run consecutively with any term of imprisonment imposed for the commission of another felony. *Id.* Therefore, the trial court clearly erred in finding that separate convictions and punishment for possession with intent to deliver cocaine and conspiracy to deliver cocaine would be duplicitous, and this factor should not have been considered in determining whether a downward departure from the mandatory sentence was appropriate.

Defendant's disability, while objective and verifiable, was not a proper factor to consider in determining whether substantial and compelling reasons existed to deviate from the mandatory minimum sentence. Moreover, this Court has stated that a codefendant's sentence is not a substantial and compelling reason to depart from a mandatory minimum sentence, as the policy of this state favors individualized sentencing for every defendant. *People v Clark*, 185 Mich App 127, 131; 460 NW2d 246 (1990).

Because the sentencing court considered both appropriate and inappropriate factors in determining whether to depart from the statutory minimum sentence, we remand to the trial court to determine whether substantial and compelling reasons exist based only on permissible factors. See *People v Perry*, 216 Mich App 277, 282; 549 NW2d 42 (1996). Furthermore, we caution the court on remand that a finding of substantial and compelling circumstances should be an exception and not the rule, and that such reasons exist only in exceptional cases. *Id.*

In Docket No. 196875, defendant first argues on appeal that testimony regarding a prior cocaine transaction should not have been admitted into evidence by the trial court. However, because defendant failed to object, this evidentiary issue is unpreserved and cannot be raised on appeal absent compelling or extraordinary circumstances. MRE 103; *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). We are not persuaded that the alleged error, if any, was decisive to the outcome of the case, and we therefore decline to review this issue. *Id.* at 547, 551-552.

Defendant next argues that he was improperly convicted of felony-firearm and carrying a concealed weapon in violation of the double jeopardy clauses of the United States and Michigan constitutions. We disagree. In the present case, carrying a concealed weapon was not the predicate felony for the felony-firearm offense. Rather, both the felonies of possession with intent to deliver more than 50 but less than 225 grams of cocaine and conspiracy to deliver cocaine were used as the underlying felony in the felony-firearm conviction. Because defendant was convicted of both of these felonies, defendant's conviction of felony-firearm was proper and did not violate his double jeopardy protections. *People v Sturgis*, 427 Mich 392, 410; 397 NW2d 783 (1986).

Defendant further argues that his conviction of felony-firearm was improper because no nexus existed between the felonies of delivery and manufacture of cocaine and conspiracy to deliver cocaine and the possession of a firearm. We disagree. Possession may be constructive or actual and may be proved by circumstantial evidence. *People v Williams*, 212 Mich App 607, 609; 538 NW2d 89 (1995). A defendant may have constructive possession of a weapon if it is reasonably accessible to him and if its location is known to the defendant. *Id.* In the present case, the evidence was undisputed that the weapon was found in defendant's van at the location where the cocaine transaction took place.

Defendant testified that the doors of his van were locked except for the times he was in the van. In addition, the gun was found between the passenger and driver's side seat and was accessible to defendant. Therefore, the evidence supports a finding that defendant had constructive, if not actual, possession of the gun during the conspiracy to deliver and the delivery of the cocaine.

Next, defendant argues that inadmissible hearsay was admitted into evidence during the testimony of a co-conspirator. Again, because defendant failed to object, the issue is not preserved. Defendant has not directed this Court's attention to specific challenged statements. Moreover, upon a careful review of the testimony, we did not find any statements that constituted inadmissible hearsay. Even if the testimony had contained such statements, no manifest injustice would occur from our failure to review this issue in light of the overwhelming evidence of defendant's guilt. Any erroneous admission would be harmless error. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).

Defendant also argues that his conviction should be reversed because he was denied the effective assistance of counsel. We disagree. We review a claim of ineffective assistance of counsel to determine whether, under an objective standard of reasonableness, counsel made any errors so serious that he or she was not functioning as an attorney as guaranteed under the Sixth Amendment. *People v Reed*, 198 Mich App 639, 646; 499 NW2d 441 (1993).

Defendant first claims that counsel failed to preserve "crucial issues" for appellate review by failing to object at trial. However, defendant fails to advise this Court which crucial issues he believes were not preserved and does not address the merits of this argument. Defendant's failure to address the merits of his claim constitutes an abandonment of the issue. *People v McClain*, 218 Mich App 613, 615; 554 NW2d 608 (1996).

Defendant also contends that counsel should have filed pre-trial motions regarding several issues. However, the only issue defendant draws this Court's attention to are "404(b)(1) issues." We assume defendant is arguing that the introduction of evidence regarding a prior cocaine transaction violated MRE 404(b). However, the evidence was not offered solely to show defendant's criminal propensity or to establish that he acted in conformity with that propensity. Rather, it was offered to show a plan or system of selling cocaine as well as absence of mistake or accident. MRE 404(b); *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993) modified 445 Mich 1205; 520 NW2d 338 (1994); MCL 768.27; MSA 28.1050. This evidence was especially relevant in light of defendant's defense that he was merely in the area of the cocaine transactions and was not a participant. Therefore, the trial court should have properly denied any pre-trial motion defense counsel might have made to suppress this evidence. Defense counsel was not required to present and argue a frivolous or meritless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Defendant also argues that the pre-trial motions filed by his counsel "had no substance and contained minimal if any case authority." However, defendant presents no argument that the outcome of the motion hearings would have been different but for his counsel's alleged error.

Therefore, he has not demonstrated that he was prejudiced by the alleged error. *People v Pickens*, 446 Mich 298, 303, 314, 326; 527 NW2d 797 (1994). Finally, defendant argues that defense counsel's attitude during the course of the trial was inappropriate, "nonchalant and excessively relaxed." Again, defendant has not cited to any specific instances where this occurred and has not demonstrated any prejudice that occurred as a result of the alleged conduct. He therefore has abandoned this issue. *McClain, supra* at 615.

We affirm defendant's convictions, but remand for resentencing. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Martin M. Doctoroff