

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS ORR,

Defendant-Appellant.

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UNPUBLISHED

June 12, 1998

No. 201146

Berrien Circuit Court

LC No. 96-002562 FH

Before: Corrigan, C.J., and Hoekstra and Young, Jr., JJ.

PER CURIAM.

Following a jury trial, defendant was convicted 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). He was sentenced as an habitual offender, third offense, to four to forty years' imprisonment. Defendant now appeals his conviction and sentence as of right. We affirm.

I

On appeal, defendant claims three instances of ineffective assistance of counsel. In cases such as this, where a *Ginther*<sup>1</sup> hearing has not been held, our review is limited to mistakes that are apparent on the record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). To establish that defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, this Court must find that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced defendant as to deny him a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

First, defendant argues that defense counsel was ineffective when he failed to object to the testimony of Officer Neal regarding the "Safe Streets Program." Specifically, defendant claims that Officer Neal's statements led the jury to impermissibly infer that defendant fit the profile of a drug dealer because he was standing out on the street drinking in a known drug area. Although drug dealer profile evidence is not admissible as substantive evidence of guilt due to its speculative nature, *People v*

*Hubbard*, 209 Mich App 234, 241; 530 NW2d 130 (1995), Officer Neal's description of the Safe Streets Program did not rise to the level of impermissible profile evidence. Rather, Officer Neal merely explained that the purpose of the program was to target suspicious activity in areas known for drug trafficking in order to slow the sale of drugs. Even if some inference could be drawn by the jurors regarding defendant's presence in a known drug area, it was not a sufficiently strong inference so as to deny defendant a fair trial, even in the absence of an objection by defense counsel.

Second, defendant claims that defense counsel was ineffective when he failed to object to a prior consistent statement made by Officer Neal. Prior consistent statements are generally not admissible as substantive evidence because they unfairly bolster a witness' testimony. *People v Stricklin*, 162 Mich App 623, 627; 413 NW2d 457 (1987). Therefore, Officer Neal's statement was not admissible as a prior consistent statement; however, it was admissible under MRE 803(1) as a present sense impression. The statement described an event or condition made while he was perceiving the event or condition, and thus was admissible under the rule. Further, even if the officer's statement was inadmissible as a present sense impression, defense counsel's failure to object would not have denied defendant a fair trial. Two other officers also testified to the same substance of Officer Neal's statement. Therefore, Officer Neal's account of the events was well corroborated notwithstanding his prior consistent statement.

Finally, defendant claims that he was denied effective assistance of counsel because defense counsel did not object to witness Dewey Murdick's testimony regarding fingerprints. Murdick, the chief analyst of the Berrien County Forensic Laboratory, was qualified as an expert in analysis of controlled substances. In addition to testimony regarding the drug content of a baggy found at the scene of this incident, Murdick testified that he also unsuccessfully attempted to raise fingerprints from the outside bag. According to defendant, Murdick should not have been permitted to testify on that subject because he was not a fingerprint expert. Defendant argues that although no fingerprints were raised, Murdick's testimony regarding the difficulty of raising fingerprints from plastic baggies nonetheless denied him the ability to effectively argue that the lack of fingerprints was indicative that the package had been lying in the area for a long period of time. We disagree.

Although Murdick was not specifically qualified as a fingerprint expert, he was trained in the area of expertise and had performed the process hundreds of times. Defense counsel subjected Murdick to rigorous cross-examination and sought to cast doubt on Murdick's testimony during his closing argument by pointing out to the jury that he was not a "fingerprint man." Defense counsel's decision to not question the witness about his formal education and qualifications was likely a matter of trial strategy, for which we will not substitute our judgment. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). Therefore, defendant was not denied a fair trial by defense counsel's failure to object to Murdick's fingerprint testimony.

## II

Next, defendant claims that his sentence is disproportionate. The court sentenced defendant as an habitual offender, third offense, MCL 769.10; MSA 28.1082, to four to forty years' imprisonment. The sentencing guidelines do not apply to habitual offenders, *People v Gatewood*, 450 Mich 1025;

546 NW2d 252 (1996), and may not be considered by this Court in

determining an appropriate sentence for a habitual offender, *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). However, a sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). A sentencing court abuses its discretion when it violates the principle of proportionality. *Id.*

Defendant claims that his sentence should have been tailored to rehabilitation rather than simply incarceration and, thus, violates the principle of proportionality. However, given defendant's criminal history, which includes two felony convictions and several probation violations over a period of 5 ½ years, defendant's sentence is proportionate.

### III

Defendant further claims on appeal that his sentence violated Michigan's constitutional provision against cruel or unusual punishment, Const 1963, art 1, § 16, and the United States constitutional provision against cruel and unusual punishment, US Const, Ams V and XIV. However, because defendant's sentence is not disproportionate, it cannot be found cruel and unusual. *People v Bullock*, 440 Mich 15, 40-41; 485 NW2d 866 (1992); *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993). Therefore, defendant's constitutional claim is without merit.

Affirmed.

/s/ Maura D. Corrigan  
/s/ Joel P. Hoekstra  
/s/ Robert P. Young, Jr.

<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).