STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

VASHON FLOWERS,

Defendant-Appellant.

UNPUBLISHED
September 18, 1998

No. 199220
Muskegon Circuit Court
LC No. 96-139522-FH

Before: Doctoroff, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions 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), possession of marihuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d), and resisting and obstructing an officer in the discharge of duty, MCL 750.479; MSA 28.747. Defendant was sentenced as a second drug offender to eight to forty years' imprisonment for the possession with intent to deliver cocaine conviction and to one to two years' imprisonment for the possession of marihuana conviction. See MCL 333.7413(2); MSA 14.15(7413)(2). Defendant was sentenced as a second habitual offender to two to three years' imprisonment for the resisting arrest conviction. See MCL 769.10; MSA 28.1082. We affirm.

Defendant's convictions arose out of a controlled drug buy devised by the Muskegon police department, in which a confidential informant was given a twenty-dollar bill with a pre-recorded serial number and sent into a particular area of Muskegon to purchase one rock of cocaine. The informant returned with one rock of crack cocaine and told the arresting officer that he had purchased it from defendant, who was known to both the informant and the police from prior contact. The informant also described defendant's clothing and appearance in detail. Thereafter, the arresting officer spotted defendant near the area where the purchase occurred. Defendant matched the informant's description of the seller's physical appearance and clothing. When the arresting officer approached him, defendant began to run. Eventually, defendant was overtaken and arrested in a struggle. A search of defendant revealed marihuana and crack cocaine. An inventory of defendant's belongings at the jail revealed the marked twenty-dollar bill.

Defendant first argues that the trial court should have granted his motion to suppress the evidence seized as a result of his arrest on the basis that the police lacked probable cause to make the warrantless arrest. We disagree. A trial court's ruling on a motion to suppress evidence is entitled to deference and is not to be disturbed on appeal unless clearly erroneous. *People v Faucett*, 442 Mich 153, 170; 499 NW2d 764 (1993).

Here, defendant's specific contention on appeal is that the trial court erred in finding probable cause for defendant's arrest in the absence of any evidence of the veracity or reliability of the confidential informant. It is not surprising that no evidence of the confidential informant's veracity or reliability was introduced at the suppression hearing, as defendant did not challenge the veracity or reliability of the confidential informant in his motion to suppress. Instead, defendant argued only that, on the basis of the objective facts available to them, the police should not have believed that defendant was the person described by the confidential informant. Accordingly, only this allegation was addressed at the suppression hearing. Because no factual record was created with respect to the aspect of the arresting officer's probable cause determination now challenged on appeal, this Court has nothing to review, and defendant is not entitled to relief. Cf. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997).

Defendant next argues that the trial court abused its discretion in permitting the arresting officer to testify that the confidential informant told him that he purchased cocaine from defendant. We disagree. Defendant contends that the admission of the officer's testimony regarding the confidential informant's statements (1) constituted inadmissible hearsay and (2) denied him the right to confront the confidential informant. Defendant preserved this claim of error with respect to the hearsay issue by objecting on that ground at trial.[1] The decision to admit or exclude evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

Hearsay is a statement, other than the one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. MRE 801(c); *People v Harris*, 201 Mich App 147, 150-151; 505 NW2d 889 (1993). In order to prove that defendant was guilty of resisting arrest in this case, the prosecution was required to establish that defendant was lawfully arrested on probable cause. See *People v Chatfield*, 143 Mich App 542, 548; 372 NW2d 611 (1985); *People v Reed*, 43 Mich App 51, 53; 203 NW2d 756 (1972). Whether probable cause existed was dependent on the facts and circumstances within the arresting officer's knowledge. See *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). The prosecutor explained that he was offering the arresting officer's testimony regarding the confidential informant's statement not for the purpose of proving the truth of the matter asserted (that the confidential informant purchased cocaine from defendant) but rather to prove the facts upon which the arresting officer relied in making his probable cause determination. Accordingly, the trial court did not abuse its discretion when it overruled defendant's hearsay objection. MRE 801(c).

Defendant's Confrontation Clause[2] argument was not raised before the trial court. Normally, this Court will not review an issue that is raised for the first time on appeal. However, when a defendant presents an issue involving a significant constitutional question that may be decisive to the outcome of his

case, appellate review is appropriate. E.g. *People v Pitts*, 222 Mich App 260; 564 NW2d 93 (1997). Because we conclude that this issue would not be decisive to the outcome of defendant's case, appellate review of this sub-issue is not appropriate.

Next, defendant argues that he was denied a fair trial by the improper introduction of "drug profile" evidence through the expert testimony of Detective Kenneth Wansten. We disagree. Wansten testified that quantities of narcotics possessed by defendant combined with the absence of paraphernalia indicated an intent to distribute. To preserve an evidentiary issue for appellate review, a party must make a timely objection at trial specifying the same ground as is asserted on appeal. MRE 103(a)(1); *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). In this case, defendant failed to preserve this allegation of error by objecting to the testimony on this ground at trial. Absent an objection, this Court may take notice of plain errors affecting substantial rights. MRE 103(d). Because we are persuaded that the error now alleged on appeal was not a plain error affecting substantial rights,[3] we decline to review this issue.

Defendant also argues that he was denied a fair trial as a result of the cumulative effect of the alleged evidentiary errors contested in the previous two issues on appeal. We disagree. "Although one error in a case may not necessarily provide a basis for reversal, it is possible that the cumulative effect of a number of minor errors may add up to reversible error." *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). Here, because there was no error on either issue, there was no "cumulative effect."

Finally, defendant argues that his eight-year minimum sentence for the possession with intent to deliver cocaine conviction was disproportionately severe. We disagree. Sentencing decisions are subject to review by this Court on an abuse of discretion standard. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). A sentence constitutes an abuse of the trial court's discretion if it violates the principle of proportionality. The principle of proportionality requires sentences to be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id.* at 636. In this case, defendant's minimum sentence was within the sentencing guidelines' recommended minimum sentence range. A sentence within the sentencing guidelines is presumptively proportionate, and can only be disproportionate if unusual circumstances exist. See *id.* at 661; *People v Rivera*, 216 Mich App 648, 652; 550 NW2d 593 (1996). If a defendant believes that such "unusual circumstances" exist, the defendant must present those circumstances in open court to be considered by the sentencing judge before sentencing. If this is not done, the defendant may not raise the issue on appeal. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). Here, the factors cited by defendant on appeal are not sufficiently unusual, cf. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994), nor were they presented to the trial court. Accordingly, we hold that the trial court did not abuse its discretion in imposing defendant's sentence.

Affirmed.

/s/ Martin M. Doctoroff
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

[1] Defendant did not object to the admission of the confidential informant's statements on any other ground.

[2] See US Const, Am VI; Const 1963, art 1, § 20.

[3] This Court, in *People v Hubbard*, 209 Mich App 234, 239; 530 NW2d 130 (1995), explained that "courts generally have allowed expert testimony explaining the significance of seized contraband or other items of personal property."