STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY BOUYER,

Defendant-Appellant.

UNPUBLISHED
October 30, 1998

No. 200537
Oakland Circuit Court
LC Nos. 96-145613 FH; 96-145614 FH; 96-145615 FH; 96-145616 FH

Before: White, P.J., and Hood and Gage, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and two counts of delivery of between 50 and 224 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). Defendant was sentenced as a second offender, MCL 333.7413(2); MSA 14.15(7413)(2), having acknowledged a prior drug conviction. The court sentenced defendant to consecutive terms of one to forty years on each count of delivery of less than 50 grams and ten to forty years on each count of delivery of between 50 and 224 grams. Defendant appeals as of right from the convictions and sentences. We affirm.

I

Defendant argues that the trial court erred when it found that he failed to establish entrapment. We disagree.

We review a trial court's finding regarding entrapment under the clearly erroneous standard. *People v James Williams*, 196 Mich App 656, 661; 493 NW2d 507 (1992). A defendant has the burden of proving entrapment by a preponderance of the evidence. *People v Juillet*, 439 Mich 34, 61; 475 NW2d 786 (1991). Entrapment occurs if the police either engage in conduct so reprehensible that it cannot be tolerated by a civilized society or engage in impermissible conduct that would induce a law-abiding person situated similarly to the defendant to commit the crime. *People v Fabiano*, 192 Mich App 523, 531-532; 482 NW2d 467 (1992), citing *Juillet, supra* at 56-57.

To determine whether the government activity would induce criminal conduct, we analyze the following factors: 1) whether there existed any appeals to the defendant's sympathy as a friend; 2) whether the defendant had been known to commit the crime with which he was charged; 3) whether there were any long time lapses between the investigation and the arrest; 4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen; 5) whether there were offers of excessive consideration or other enticement; 6) whether there was a guarantee that the acts alleged as crimes were not illegal; 7) whether, and to what extent, any governmental pressure existed; 8) whether there existed sexual favors; 9) whether there were any threats of arrest; 10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant; 11) whether there was police control over any informant; and 12) whether the investigation is targeted. *Williams, supra* at 661-662.

The record supports defendant's arguments that he was not known by the police to be a drug dealer, and was not the target of an ongoing investigation; that the initial meeting between defendant and Detective Moilenan was set up through the informant; and that the government escalated the amount of cocaine purchased from defendant and went from buying crack cocaine to powder cocaine. Defendant does not argue that the remaining eight factors apply, however.

Defendant argues that he was an "exploitable target" for the informant and police because he was very poor and desperate for money and that he was induced to become involved with delivering cocaine by the potential profit. Defendant received $460 a month in disability payments, due to a head injury he had suffered eight years earlier, and food stamps. Defendant paid $300 or $350 a month in rent, owned two older cars and earned additional money doing odd jobs. Defendant does not argue that the government offered him excessive consideration and he testified that he made only fifty or one-hundred dollars from each sale. We are unable to conclude that a law-abiding citizen would be induced under the same circumstances to commit the crimes with which defendant was charged. The trial court did not err as a matter of law in concluding that no entrapment occurred under the first prong of the test.

Turning to the second prong, whether the police conduct was so reprehensible that it cannot be tolerated by a civilized society, the record indicates that the informant merely described defendant's car and told the police where defendant would be selling drugs. After the initial sale, defendant dealt directly with the undercover officer; defendant gave the undercover officer his pager and home phone numbers and told him to contact him directly. Defendant did not hesitate in selling the officer increasing amounts of cocaine, and the officer testified that the escalation was undertaken in an effort to learn the identity of defendant's supplier. There is no evidence that the police continued the purchases merely to enhance defendant's eventual sentence. *People v Ealy*, 222 Mich App 508, 511; 564 NW2d 168 (1997). Furnishing an opportunity to commit a crime does not constitute entrapment. *Williams, supra* at 663. We cannot conclude under these circumstances that the police conduct was so reprehensible that it cannot be tolerated in a civilized society.

We conclude that the trial court's finding that there was no entrapment was not clearly erroneous.

II

Defendant next argues that his minimum sentence of twenty-two years is disproportionate. We disagree.

We review sentencing determinations for abuse of discretion. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). The trial court imposed the mandatory minimum sentences set forth in MCL 333.7401(2)(a)(iii)-(iv); MSA 14.15(7401)(2)(a)(iii)-(iv). Legislatively mandated sentences are presumptively proportionate. *Ealy*, *supra* at 512. A sentencing court may depart from a mandatory minimum sentence where substantial and compelling reasons justify such a departure. *Id.*; MCL 333.7401(4); MSA 14.15(7401)(4). The substantial and compelling reasons must be objective and verifiable. *People v Catanzarite*, 211 Mich App 573, 584; 536 NW2d 570 (1995). The factors to be considered may include, but are not limited to, 1) the facts of the crime that 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. *Id.* at 585.

Defense counsel argued at sentencing that the court should take into account the following mitigating circumstances: defendant lived in a run-down house, had an old car, had a head injury for which he received disability payments, and had certain learning disabilities.

Defendant had not argued diminished capacity and the issue of defendant having learning disabilities was not developed in the record. Defendant had two prior felony convictions, one for aggravated drug trafficking. Defendant did not argue that his age or behavior post-arrest justified a departure from the mandatory minimum sentences. Under these circumstances, we conclude that defendant did not present substantial and compelling reasons for the court to deviate from the mandatory minimum sentences, and the court did not abuse its discretion in not deviating from them. *Ealy*, *supra* at 512.

Defendant also argues that the consecutive nature of his sentences warrants a deviation from the mandatory minimum sentences. We decline to so hold, under the circumstance that this Court, in *People v Warner*, 190 Mich App 734; 476 NW2d 660 (1991), and the Supreme Court, in *People v Miles*, 454 Mich 90, 94-95; 559 NW2d 299 (1997), have held that a sentencing court need not consider the length of a consecutive or concurrent mandatory sentence when setting an indeterminate sentence, and that the proportionality of consecutive sentences is judged by considering the sentences separately, rather than in the aggregate. Thus, the trial court did not abuse its discretion when it did not consider the impact of the mandatory minimum sentences and their cumulative effect.

III

Defendant last argues that his sentence of 22 to 160 years constituted cruel or unusual punishment.

In determining whether a given punishment is cruel or unusual, a court must compare the gravity of the offense with the harshness of the penalty, the sentence imposed with sentences for other crimes within the jurisdiction, and the sentence imposed with sentences imposed for the same crime in other

jurisdictions. *People v Bullock*, 440 Mich 15, 33-34; 485 NW2d 866 (1992). In *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993), this Court found that a sentence that included two terms of ten to twenty years' imprisonment for each of two convictions of delivery of more than 50 grams but less than 225 grams of cocaine did not constitute cruel or unusual punishment. Const 1963, art 1, § 16. Defendant's sentence does not violate the prohibition against cruel or unusual punishment.

IV

In a supplemental brief filed in propria persona, defendant argues that he was denied effective assistance of counsel because his trial attorney did not interview or subpoena the police informant, Darryl Walker. Defendant argues that Walker might have provided exculpatory evidence.

In order to establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984) and *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). A reasonable probability is a probability sufficient to undermine the outcome. *Pickens*, *supra* at 314. Decisions regarding what evidence to present and whether to call a witness are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). This Court will not second-guess a defense counsel's strategy not to present certain evidence or call a witness to testify. *Id.* at 166.

Defendant does not argue, nor does the record support, that he and the informant were close friends. The record indicates that defendant only worked with the informant, and that the informant asked defendant to sell drugs to the undercover police officer. Defendant testified that his motive for doing this favor was to make money. Defendant did not testify that he was threatened or induced by Walker, or offered excessive consideration. Moreover, as noted above, the informant was involved only in arranging the initial sale between defendant and the undercover officer. After that, defendant gave the undercover officer his home phone and pager numbers and asked the officer to deal directly with him. Under these circumstances, defendant has not shown that but for defendant's failure to subpoena Walker, there is a reasonable probability that the result of the proceeding would have been different. *Stanaway*, *supra* at 687-688.

Affirmed.

/s/ Helene N. White
/s/ Harold Hood
/s/ Hilda R. Gage