

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ALVIN HEINRICH,

Defendant-Appellant.

UNPUBLISHED

May 7, 1999

No. 205426

Saginaw Circuit Court

LC No. 94-009393 FH

Before: Kelly, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Defendant appeals by right his resentencing after remand from this Court on guilty plea based convictions for four counts of delivery of less than fifty grams of cocaine, and one count of possession with intent to deliver cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). We affirm.

Defendant was initially given consecutive three to twenty year sentences on the delivery convictions, and a concurrent one to four year sentence on the possession conviction. The trial court issued an amended judgment of sentence converting the possession sentence to run consecutively to the delivery sentences, as required by statute. In an unpublished, memorandum opinion, this Court remanded the matter for reconsideration of the scoring of the guidelines on the delivery sentences, and resentencing on the possession conviction. *People v David Alvin Heinrich*, unpublished memorandum opinion of the Court of Appeals, issued 2/25/97 (Docket No. 181160).

After remand, the trial court corrected the guidelines scoring, and imposed the same four consecutive three to twenty year sentences on the delivery counts. The court found that it had erroneously sentenced defendant on the possession count where defendant had pleaded guilty to possession with intent to deliver. The court resentenced defendant to a consecutive three to twenty year sentence on the fifth count.

As to defendant's first issue on appeal, there is no merit to defendant's claim that this Court should review the proportionality of his sentences in the aggregate. A sentencing court does not need to consider the length of consecutive mandatory sentences in setting an indeterminate sentence. *People v Miles*, 454 Mich 90, 94-95; 559 NW2d 299 (1997). Where a defendant is sentenced to consecutive

terms of incarceration, this Court will evaluate the proportionality of the individual sentences, and not the cumulative effect. *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996).

As to defendant's second issue on appeal, there is no showing that the trial court acted under the mistaken impression that it was required to impose a twenty year maximum sentence. Consequently, there is no basis for this Court to find that the trial court failed to recognize or exercise its discretion. *People v Green*, 205 Mich App 342, 346; 517 NW2d 782 (1994).

Finally, because defendant failed to provide this Court with a transcript of his April 29, 1997 resentencing hearing, we cannot review defendant's contention that nothing in the record overcomes the presumption that the trial court's sentence was vindictive. Therefore, we consider this issue abandoned on appeal. *People v Thompson*, 193 Mich App 58, 61; 483 NW2d 428 (1992); *People v Johnson*, 173 Mich App 706, 707; 434 NW2d 218 (1988). Nonetheless, we note that despite the fact that the court increased defendant's sentence on the possession with intent to deliver count on resentencing, the circumstances of the case dispel any presumption of vindictiveness that may arise. *People v Lyons (After Remand)*, 222 Mich App 319, 323-324; 564 NW2d 114 (1997). After remand, it was discovered that defendant was mistakenly sentenced for possession of cocaine, rather than possession with intent to deliver. The trial court's correction of this mistake resulted in defendant's increased sentence, and not vindictiveness on the part of the court.

Affirmed.

/s/ Michael J. Kelly

/s/ Janet T. Neff

/s/ Michael R. Smolenski