

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN MICHA BROWN,

Defendant-Appellant.

---

UNPUBLISHED

August 1, 2000

No. 210799

Genesee Circuit Court

LC No. 97-001493-FH

Before: Hood, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of possession of cocaine less than twenty-five grams, MCL 333.7403(2)(a)(5); MSA 14.15(7403)(2)(a)(5). Defendant was sentenced as an habitual second offender, MCL 769.10; MSA 28.1082, to three and one-half to six years' imprisonment. We affirm.

Defendant presents four issues on appeal. Defendant first argues that the trial court abused its discretion when it sentenced defendant to three and one-half to six years' imprisonment. We disagree. In reviewing a trial court's sentencing decision, the appropriate standard of review is abuse of discretion. *People v Wesley*, 428 Mich 708, 712; 411 NW2d 159 (1987). Whether to impose an increased sentence as authorized by the habitual offender act is discretionary with the sentencing court. *People v Alexander*, 234 Mich App 665, 673; 599 NW2d 749 (1999). Defendant was convicted of possession of cocaine less than twenty-five grams, which has a statutory maximum sentence of four years' imprisonment. MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v). Defendant was sentenced under the habitual second offender statute that provides for a sentence enhancement not more than one and one-half times the maximum term prescribed for a first conviction of the offense. MCL 769.10; MSA 28.1082. Because defendant was sentenced as an habitual offender, the sentencing guidelines do not apply. *People v Hansford (After Remand)*, 454 Mich 320, 323; 562 NW2d 460 (1997).

In sentencing a defendant, a sentencing court may consider the defendant's criminal history, *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985), and the defendant's wilful, material and flagrant perjury or suborning of perjury in his own defense. *People v Houston*, 448 Mich 312,

324; 532 NW2d 508 (1995). In this case, the trial court articulated the following reasons for its sentence: (1) defendant's prior criminal history and probationary failures; and (2) defendant's misrepresentation to the jury concerning his drug involvement during his trial testimony. A review of the record reveals that defendant had two prior felony convictions for possession of cocaine and marijuana with intent to deliver. Defendant also had one prior misdemeanor offense for disorderly conduct. Defendant was sentenced to lifetime probation and four years' probation respectively for the felony convictions. However, defendant absconded from probation and was eventually incarcerated. On parole, defendant failed two substance abuse tests and absconded from parole supervision. Defendant was arrested for the instant offense while on parole. Therefore, we find that the trial court's three and one-half to six years sentence on defendant's conviction of possession of cocaine did not violate the principle of proportionality. The trial court tailored its sentence to the circumstances of the offense and to defendant. See *People v VanEttan*, 163 Mich App 593, 595; 415 NW2d 215 (1987).

Next, defendant argues that the trial court abused its discretion when it considered defendant's exercise of his right to a jury trial in sentencing. We disagree. Prior to trial, the court offered defendant the option to plead guilty to the possession of cocaine charge and receive a guidelines sentence in exchange for the prosecution's dismissal of the habitual offender charge. The court also offered defendant the option of pleading guilty to both the possession of cocaine charge and the habitual offender charge, with defendant being placed into a drug treatment program and the court deferring sentencing until after treatment. If defendant successfully completed treatment, the court would sentence defendant to probation; however, if defendant did not successfully complete the treatment program, the court would sentence defendant on the charges. Defendant decided to have the matter proceed to trial.

A sentencing court must articulate on the record the criteria considered and the reasons for the sentence imposed. *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987). The court cannot consider a defendant's exercise of his right to a jury or to a trial. *People v Godbold*, 230 Mich App 508, 512; 585 NW2d 13 (1998). Here, the court stated that defendant had three previous probationary sentences, absconded from a tether and residential treatment program, committed the instant offense while on parole, and lied to the jury. The trial court did not discuss a drug treatment program for defendant; however, the court stated that it was apparent that defendant had a serious drug problem.

Defendant argues that because the court did not state its reasons for not offering defendant a drug treatment program and probation that the court must have sentenced defendant more severely because defendant demanded a jury trial. However, a trial court is not bound by its previous sentence offer, nor is it unconstitutional for a defendant to receive a higher sentence on a trial conviction than was promised him if he would have pleaded guilty. *People v Rivers*, 147 Mich App 56, 60-61; 382 NW2d 731 (1985). See also *People v Bogedain*, 185 Mich App 349, 351; 460 NW2d 328 (1990). In this case, the trial court's sentence of defendant was supported by the record. There is no evidence that the trial court impermissibly sentenced defendant to a more severe sentence because defendant exercised his right to a jury trial.

Next, defendant argues that the trial court abused its discretion when it allowed the prosecutor to question defendant, on cross-examination, regarding his prior criminal convictions. We disagree.

The trial court's decision to allow impeachment with prior convictions is within its sound discretion and will not be reversed on appeal absent an abuse of that discretion. *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995).

Generally, for the purpose of impeaching the credibility of a witness, evidence that the witness has been convicted of a crime may not be admitted. To be admitted for general impeachment purposes, such evidence must be elicited from the witness or established by public record during cross-examination. The crime must contain an element of dishonesty or false statement, or the crime must contain an element of theft and be punishable by imprisonment in excess of one year or death and the court must determine that the evidence has significant probative value on the issue of credibility. The court must further determine that the probative value of the evidence outweighs the prejudicial effect. MCL 600.2159; MSA 27A.2159; MRE 609; *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999).

In this case, defendant testified during direct examination, "I do not involve myself into [sic] with drugs." The prosecutor moved to impeach defendant's credibility with his prior drug related convictions and the trial court ruled that defendant's statement "opened the door" to cross-examination on the subject and granted the prosecution's motion. It is clear that defendant's prior drug convictions do not involve fraud, dishonesty, or theft; therefore, under MRE 609, they would not be admissible during cross-examination to impeach defendant. However, in *People v Douglas Taylor*, 422 Mich 407; 373 NW2d 579 (1985), this Court stated:

It remains within the trial court's discretion to admit at any time during the course of a trial evidence of prior convictions, notwithstanding a ruling to exclude such evidence under MRE 609, if it is being offered for some proper purpose other than to impeach a defendant's credibility in general. For instance, evidence of prior convictions is always admissible to show perjured testimony of the defendant regarding the existence or nature of prior convictions. . . . MRE 609 was not intended to apply where evidence of prior convictions is offered to rebut specific statements of the defendant who testifies at trial.

In regard to evidence of prior convictions offered to rebut specific testimony, we find that that particular use of such evidence is not within the contemplation of MRE 609 because it is not impeachment of a defendant's credibility for truthfulness or veracity in general, but rather for the narrow purpose to rebut specific testimony given by a defendant. Because this distinction may not be self-evident, it is advisable that a cautionary instruction be given at the time the evidence is offered or before the jury retires to deliberate regarding the limited use the jury may make of evidence of a prior conviction offered to rebut testimony. Moreover, as with any type of rebuttal evidence it is limited to only relevant evidence, MRE 401, and to that which the trial court determines that the probative value of the evidence is not substantially outweighed by its prejudicial effect, MRE 403. [*Id.* at 415 (citations omitted).]

The trial court did not abuse its discretion when it allowed the prosecutor to refute defendant's direct-examination testimony that he did not involve himself in drugs with his prior drug convictions. Defendant attempted to mislead the jury to believe that he had no drug involvement, when in fact, that was not true. See also *People v Moore*, 164 Mich App 378, 382-383; 417 NW2d 508 (1987), modified 433 Mich 851 (1989). Therefore, evidence of defendant's prior convictions was admissible to refute defendant's perjury even though such evidence would not have been admissible under MRE 609 to generally impeach defendant's credibility.

Defendant's final argument on appeal is that the prosecution failed to present sufficient evidence for the jury to find that defendant was guilty of possession of cocaine beyond a reasonable doubt. We again disagree. Due process requires that the prosecution introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Johnson, supra*, 460 Mich 723; *Godbold, supra*, 230 Mich App 522.

The offense of possession of a controlled substance requires proof that the defendant had actual or constructive possession of the substance. *People v Hellenthal*, 186 Mich App 484, 486; 465 NW2d 329 (1990). Possession may be established by evidence that the defendant exercised control or had the right to exercise control of the substance and knew it was present. *Id.* Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish possession. *Id.*

In this case, police officers approached defendant outside the Paradise Food Market suspecting possible drug transactions. After Officer Golidy placed his badge on his chest and announced, "Police," defendant fled. While Officer Hall pursued defendant, he observed defendant make a gesture as if to drop something; however, Hall did not see anything leave defendant's hand. After apprehending defendant, Hall returned to the area where he saw defendant make the hand gesture and found a baggie containing four suspected rocks of cocaine. Hall found the baggie on a patch of dirt beside a house. Hall did not find any other drugs or drug paraphernalia in the vicinity of the baggie. The parties stipulated to the chain of custody of the baggie and that the laboratory report indicated that the substances in the baggie contained less than twenty-five grams of cocaine. Although there was no direct evidence of defendant's possession of the baggie and suspected cocaine, circumstantial evidence and reasonable inferences arising from the evidence is sufficient to establish possession. *Hellenthal, supra*, 186 Mich App 486. Here, viewing the evidence in the light most favorable to the prosecution, the prosecution presented sufficient evidence for the jury to find beyond a reasonable doubt that defendant had possessed the cocaine and had dropped the baggie while fleeing from the police.

Affirmed.

/s/ Harold Hood

/s/ David H. Sawyer

/s/ Mark J. Cavanagh

