

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN JULIUS STUTTS,

Defendant-Appellant.

UNPUBLISHED

December 19, 2000

No. 217956

Wayne Circuit Court

LC No. 98-005709

Before: Bandstra, C.J., and Wilder and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v). The trial court sentenced defendant to 1½ to 4 years' imprisonment. Defendant appeals of right. We affirm.

Defendant first argues that the minimum sentence imposed, which was an upward departure of six months from the high end of the sentencing guidelines range of zero to twelve months, was disproportionate. We disagree. This Court reviews sentencing decisions for an abuse of discretion. *People v McCrady*, 213 Mich App 474, 483; 540 NW2d 718 (1995). A court abuses its discretion when it violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Generally, the principle of proportionality requires that criminal sentences be proportionate to the seriousness of the circumstances surrounding both the offense and the offender. *Id.* Departures from the sentencing guidelines ranges are permitted, but are subject to careful scrutiny on appeal. *Id.* at 656-657; *People v Rockey*, 237 Mich App 74, 79; 601 NW2d 887 (1999). The sentencing court may deviate from the guidelines range when the range is disproportionate to the seriousness of the crime and the defendant's prior record. *People v Bennett*, 241 Mich App 511, 516; 616 NW2d 703 (2000).

In imposing sentence, the trial court noted defendant's failed rehabilitation while under Family Independence Agency supervision and that agency's characterization of him as a "victimizer." At the time defendant committed the offense charged in this case, he was nineteen years old and on probation for what was described as a "horrific and brutal" murder. The court also noted that the amount of cocaine in defendant's possession at the time of his arrest "was not a normal amount for personal use." Although defendant points out that he had only one felony

conviction, given that the felony was second-degree murder for which he was sentenced as a juvenile to probation, we do not believe that the court abused its discretion by deviating upward from the guidelines range by six months. The sentencing court could reasonably conclude that the guidelines range of zero to twelve months was not proportionate to the seriousness of the crime and defendant's prior record. *Bennett, supra*.

Defendant next argues that the trial court impermissibly made an independent finding that defendant was actually guilty of possession with intent to deliver and used this as the basis to justify departure from the guidelines' recommendation. Again, we disagree.

A trial court may not make an independent finding of guilt with respect to a crime of which defendant has not been convicted and then sentence defendant on the basis of that finding. *People v Dixon*, 217 Mich App 400, 410; 552 NW2d 663 (1996). However, a court may consider the evidence admitted at trial as an aggravating factor in determining the appropriate sentence. *People v Gould*, 225 Mich App 79, 89; 570 NW2d 140 (1997).

Here, the sentencing court referenced trial testimony indicating that defendant was in possession of an amount of cocaine not normally associated with personal use but rather an amount associated with the sale of cocaine. However, the court did not suggest that it believed that defendant was guilty of an offense of which he was not convicted. Indeed, in this case, defendant was never charged with the higher offense of possession with intent to deliver a controlled substance. Under these circumstances, we conclude that the trial court did not abuse its discretion in considering evidence adduced at trial when imposing sentence.

Defendant's final argument is that the trial court abused its discretion when it refused the jury's request for the transcript of the trial testimony. The record shows, however, that defense counsel expressed agreement with the court's decision to refuse the jury's request and instruct the jury to rely on its collective memory. Accordingly, defendant has waived his right to challenge the trial court's discretionary ruling under MCR 6.414(H). *People v Carter*, 462 Mich 206, 219; 612 NW2d 144 (2000).

Affirmed.

/s/ Richard A. Bandstra
/s/ Kurtis T. Wilder
/s/ Jeffrey G. Collins