STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 29, 2001
v	No. 219581 Oakland Circuit Court
CRAIG MICHAEL WILLETT, Defendant-Appellant.	LC No. 96-144870-FH; 96-144976-FH; 96-144977-FH; 96-144978-FH; 96-144979-FH

Before: Neff, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant appeals by of right his bench trial convictions for two counts of delivering less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), two counts of delivering between 50 and 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and one count of delivering between 225 and 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). Defendant was sentenced to one to twenty years in prison for each conviction for delivering less than fifty grams of cocaine, seven to twenty years in prison for each conviction for delivering between 50 and 225 grams of cocaine, and nine to thirty years in prison for the conviction for delivering between 225 and 650 grams of cocaine. All sentences are to be served consecutively. We affirm.

Defendant was arrested and charged with selling cocaine to an undercover police officer several times over a lengthy investigation. Defendant contends that the confidential informant who put the police in touch with defendant was also defendant's cocaine supplier. Defendant first argues that the trial court erred when it refused to dismiss defendant's case for sentence entrapment. We review a trial court's findings related to an entrapment claim under the clearly erroneous standard. *People v Woods*, 241 Mich App 545, 555; 616 NW2d 211 (2000), quoting *People v Connolly*, 232 Mich App 425, 429; 591 NW2d 340 (1998). A trial court's findings are clearly erroneous if this Court is left with a definite and firm conviction that a mistake was made. *Connolly*, *supra*. "[S]entencing entrapment occurs when 'a defendant, although predisposed to commit a minor or lesser offense, is entrapped in committing a greater offense subject to greater punishment.'" *People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997), quoting *United States v Staufer*, 38 F3d 1103, 1106 (CA 9, 1994). In *Ealy*, *supra* at 509, a case strikingly similar

to the instant case, the defendant made a series of five cocaine sales to an undercover police officer. Because the officer testified that he purchased greater amounts of cocaine "to determine how much [the] defendant could deliver," and to identify the defendant's source, and because the defendant "did not hesitate in selling the officer increasing amounts," this Court held that the trial court did not clearly err when it determined that there was no sentencing entrapment. *Id.* at 509, 511-512.

In the instant case, there was no evidence before the trial court at the entrapment hearing that defendant was hesitant to sell progressively larger amounts of cocaine. The undercover officer testified that he continued to arrange cocaine purchases with defendant to identify defendant's source and to determine the magnitude of defendant's cocaine enterprise. The trial court denied defendant's motion, finding that the continued investigation was justified by the need to conduct ongoing police investigations to uncover "the depth and extent" of defendant's criminal activity. Based on the foregoing, we are not left with a definite and firm conviction that the trial court erred when it denied defendant's motion to dismiss.

Defendant also seems to argue that the trial court erred when it refused to allow him to argue an entrapment defense at his trial. Defendant's argument has no merit. A claim of entrapment is a question of law, not an issue of fact for a jury. *Woods, supra* at 554. Defendant had already argued the issue of entrapment at an entrapment hearing, and the trial court had already denied his motion to dismiss. Therefore, the trial court did not err when it refused to allow defendant to argue the issue of entrapment again at his trial.

Defendant next contends that the trial court abused its discretion when it denied defendant the opportunity to question the undercover officer regarding the identity of the confidential informant. To preserve the review of a trial court's decision to exclude evidence, the party seeking its admission must make an offer of proof to provide an adequate basis for the trial court's ruling and this Court's review. MRE 103(a)(2); *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994). In this case, defendant failed to make an offer of proof. Therefore, this issue is not properly preserved for our review. Moreover, the identity of the informant was neither relevant nor helpful to defendant's defense, as the entrapment issue was not before the trial court at defendant's trial. Under such circumstances, an informant's identity remains privileged. *People v Underwood*, 447 Mich 695, 703-707; 526 NW2d 903 (1994); see, also, *Woods*, *supra*.

Defendant next argues that he was denied the effective assistance of counsel. Our review is limited to the existing record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Snider*, 239 Mich App 393, 423; 608 Mich 502 (2000); *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999). We presume effective assistance of counsel, and a "defendant bears a heavy burden of proving otherwise." *Noble*, *supra* at 661-662. Defendant must not only demonstrate that counsel's performance was deficient, but also that defendant was prejudiced by the deficiency. *Id.* at 662. Accordingly, he must show that, but for his counsel's mistake, the factfinder would not have convicted him. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994); *Snider*, *supra* at 424. After reviewing the lower court record, we find no evidence of ineffective assistance of counsel.

Finally, defendant contends that Judge Meyer Warshawsky was not qualified to preside over his trial because he was over seventy years of age at the time and appointed to an open-ended term. Whether a trial court judge is qualified to preside over a trial is a question of law, that we review de novo on appeal. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). It is well-established that, although a judge must be under seventy years of age when elected or appointed to the bench, the age limitation does not apply to individuals assigned as visiting judges. *People v Sardy*, 216 Mich App 111, 116-117; 549 NW2d 23 (1996); *People v Booker, (After Remand)* 208 Mich App 163, 175-179; 527 NW2d 42 (1994). Furthermore, this Court has upheld the Supreme Court's assignment of visiting judges to open-ended terms. *People v Fleming*, 185 Mich App 270, 274-276; 460 NW2d 602 (1990). Accordingly, defendant's argument that his conviction must be reversed has no merit.

We affirm.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey