

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICANOR JAMES MURRAY,

Defendant-Appellant.

UNPUBLISHED

March 16, 2004

No. 245667

Saginaw Circuit Court

LC No. 96-011772-FC

Before: Jansen, P.J. and Markey and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from an amended judgment of sentence entered by the trial court. Defendant was sentenced to consecutive terms of two to twenty years' imprisonment for each of his five counts of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and was sentenced to one year in jail for each of his two marijuana-related convictions, delivery of marijuana and possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii).¹ We affirm.

¹ Defendant was tried in a joint trial with Miguel Zarate. The jury convicted defendant of conspiracy to deliver or possess with intent to deliver 650 or more grams of cocaine, MCL 750.157a, delivery of at least fifty but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii), delivery of marijuana, MCL 333.7401(2)(d)(iii), possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and four counts of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). On March 15, 1999, defendant was sentenced to life imprisonment for the conspiracy conviction, ten to twenty years' imprisonment for delivery of fifty or more but less than 225 grams of cocaine, two to four years' imprisonment for each of the marijuana-related convictions, and five to twenty years' imprisonment for each conviction involving delivery of less than fifty grams of cocaine. On November 16, 2001, this Court vacated defendant's convictions for conspiracy to deliver or possess with intent to deliver 650 or more grams of cocaine and delivery of at least fifty but less than 225 grams of cocaine, and with regard to the delivery of at least fifty but less than 225 grams of cocaine conviction, remanded for entry of conviction on the lesser offense of delivery of less than fifty grams of cocaine. *People v Zarate*, unpublished opinion per curiam of the Court of Appeals, issued November 16, 2001 (Docket Nos. 218477 and 218478). On January 28, 2002, pursuant to the remand, the trial court resentenced defendant on four delivery of cocaine convictions to concurrent terms of eight to

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Defendant's only issue on appeal is that the sentencing court's failure to depart downward from the guidelines resulted in a disproportionate sentence. We disagree.

The underlying offenses for defendant's convictions were committed in 1995, offenses committed before January 1, 1999, are subject to the judicial sentencing guidelines. *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). We review sentencing issues, arising under the judicial guidelines, for an abuse of discretion by the sentencing court. *People v Sabin (On Second Remand)*, 242 Mich App 656, 661; 620 NW2d 19 (2000). A sentencing court abuses its discretion when it violates the principle of proportionality, i.e., the sentence is not proportional to the seriousness of the circumstances surrounding the offense and the defendant's prior record. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990).

Defendant does not challenge that he was sentenced within the guidelines, nor does he challenge the accuracy of the presentence report or the guidelines scoring.² A sentence imposed within the applicable judicial sentencing guidelines range is presumptively neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). Nevertheless, a sentence within a guidelines range can conceivably violate proportionality in unusual circumstances. *Milbourn*, *supra* at 661; *People v Hadley*, 199 Mich App 96, 105; 501 NW2d 219 (1993). A defendant's employment, lack of criminal history and minimum culpability are not unusual circumstances that overcome the presumption. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994).

Defendant has failed to argue how his sentence is disproportionate, a defendant who fails to argue how his sentence is disproportionate waives the issue of proportionality for appellate review. *People v Hill*, 221 Mich App 391, 397; 561 NW2d 862 (1997). Regardless, defendant has presented no unusual circumstances to overcome the presumption that his sentence was proportionate. Defendant only contends that the fact that he has five consecutive sentences, for the cocaine delivery convictions, exposes him to arbitrary and capricious administrative actions by the Department of Corrections. However, in determining the proportionality of an individual sentence, the cumulative length of consecutive sentences need not be considered. *People v Miles*, 454 Mich 90; 559 NW2d 299 (1997). "In situations where the defendant is sentenced to consecutive terms of incarceration, we evaluate the proportionality of the individual sentences in the abstract and not the cumulative effect of the sentences." *Kennebrew*, *supra* at 609.

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twenty years' imprisonment and sentenced defendant to one year of jail for each of the marijuana-related convictions. Subsequently, the prosecution motioned that the sentence was improper because the trial court failed to sentence defendant for the delivery of less than fifty grams of cocaine conviction that this Court directed it to enter conviction on as a reduced charge and for failing to make the delivery of cocaine conviction sentences run consecutively. Then, the trial court entered an opinion and order finding that the sentences entered on January 28, 2002, were invalid and ordered resentencing, which led to the amended judgment of sentence defendant appeals from.

² We note that a defendant must object to inaccurate information before the trial court to preserve the issue for appellate review. *People v Maxson*, 163 Mich App 467, 471; 415 NW2d 247 (1987).

Examining each sentence in the abstract, defendant's sentences are proportionate and, thus, the sentencing court did not abuse its discretion.

Affirmed.

/s/ Kathleen Jansen

/s/ Jane E. Markey

/s/ Hilda R. Gage