

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROGER ANTHONY-SCOTT JORAH,

Defendant-Appellant.

UNPUBLISHED
February 17, 2009

No. 282214
Kent Circuit Court
LC No. 06-009052-FH

Before: Before: Markey, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Defendant Roger Anthony-Scott Jorah appeals as of right his convictions of attempted resisting and obstructing a police officer, MCL 750.81(1), and possession of ecstasy, MCL 333.7403(2)(b)(i). We affirm.

Defendant first argues that the admission of the confidential informant's statements via the testimony of Detective Peter Gerkin violated his right to confront the witnesses against him under the Confrontation Clause of the Sixth Amendment. US Const, Am VI. Defendant objected to the informant's statements on hearsay grounds, but not on Confrontation Clause grounds. Therefore, this issue is unpreserved and reviewed for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

Under the plain error rule, three requirements must be met: (1) error must have occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights, i.e. the error was outcome determinative. *Id.* at 763. Once a defendant establishes these three requirements, this Court may reverse only when the plain error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence. *Id.*

Under the Confrontation Clause, testimonial, out-of-court statements offered against the accused to prove the truth of the matter asserted may only be admitted if the declarant is unavailable and the defendant had an opportunity to cross-examine the declarant. *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). We find it unnecessary to resolve whether there was a Confrontation Clause violation because, assuming a violation, it was not outcome determinative, nor was defendant actually innocent or the proceedings compromised. The evidence certainly could have been considered damaging had the jury found defendant guilty of possession with intent to deliver as the informant's statements squarely

supported a conclusion that delivery was intended. Instead, the jury convicted defendant of the lesser-included offense of simple possession. Even without the informant's statements defendant would still have been convicted of possession of ecstasy and attempted resisting and obstructing of a police officer. Other untainted evidence overwhelmingly proved that defendant possessed ecstasy and attempted to resist and obstruct a police officer. Thus, we affirm defendant's convictions.

Next, defendant argues that he is entitled to resentencing because the trial court failed to recognize its discretion to sentence defendant pursuant to MCL 333.7411(1), and defense counsel was ineffective for failing to raise the issue. Under the statute, the trial court has the discretion to place an individual who has not been previously convicted of a controlled substance offense on probation without adjudication of guilt. Once a defendant successfully completes probation, the charge is discharged and dismissed. MCL 333.7411(1). We conclude that there is no basis to remand for resentencing, given that the requisite prejudice has not been established. See MCL 769.26; *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). The issue of MCL 333.7411(1) was brought to the attention of the trial court in defendant's motion to amend the order of probation. Indeed, a review of the motion reveals that MCL 333.7411(1) was quoted at length, followed by a fairly extensive argument with respect to why defendant should be granted the leniency set forth in the statute. Defendant requested that the court "amend the order of probation previously entered in this case such as to sentence him to probation without adjudication pursuant to MCL 333.7411, deleting the convictions, or to suspend the remainder of the conditions of his probation." A hearing was held on the matter, and the trial court denied defendant's motion. Thus, the court was clearly aware of MCL 333.7411(1) but declined to invoke the statute, thereby exercising its discretion to reject defendant's request as permitted by the statute. Possibly the trial court chose not to exercise its discretion in a manner favorable to defendant in light of the fact that, although defendant may not have been convicted of a prior controlled substance offense, he was previously convicted of a felony for malicious destruction of property. Accordingly, any failure to consider or to interject MCL 333.7411(1) at the sentencing hearing was harmless, given the court's subsequent refusal to apply the statute for defendant's benefit.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Stephen L. Borrello