

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

J.D. ROPER,

Defendant-Appellant.

UNPUBLISHED

December 6, 1996

No. 161932

LC No. 92-047076 FH

Before: J.H. Gillis, P.J., and G.S. Allen and J.B. Sullivan, JJ.*

MEMORANDUM.

Defendant pleaded guilty to delivery of 225 grams or more but less than 650 grams of a mixture containing cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), and was sentenced to twenty to thirty years' imprisonment. Defendant appeals as of right. We affirm. This case has been decided without oral argument pursuant to MCR 7.214(A).

Defendant argues that he was denied the effective assistance of counsel when his trial counsel failed to raise an entrapment defense. We disagree. Defendant has waived the right to raise an entrapment defense because it was not raised before sentencing. *People v Crall*, 444 Mich 463; 510 NW2d 182 (1993). However, defendant preserved the issue of ineffective assistance of counsel by filing a motion to remand in this Court. On remand, the trial court did not err in finding that an entrapment defense was not warranted. *People v James Williams*, 196 Mich App 656; 493 NW2d 507 (1992); *People v Kent*, 194 Mich App 206; 486 NW2d 110 (1992); *People v Fabiano*, 192 Mich App 523; 482 NW2d 467 (1992). Defendant did not have a close relationship with the informant, the informant did not take advantage of any weakness in defendant and, considering that defendant set the price and offered to sell more drugs to the informant, the informant did not coerce defendant into selling him the cocaine. As a result, counsel's advice with regard to an entrapment

*Former Court of Appeals judges, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.

hearing was within the range of competence demanded of attorneys in criminal cases. *People v Mayes (Aft Rem)*, 202 Mich App 181; 508 NW2d 161 (1993).

Defendant next argues that he is entitled to resentencing because counsel failed to advise the trial court of its discretion to depart from the statutory minimum and maximum sentences and because the trial court failed to recognize this discretion. We disagree. The lower court record reveals that the trial court did not recognize its discretion to depart from the statutorily prescribed sentences. Remand for resentencing is therefore required. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994); *People v L W Smith*, 437 Mich 1047; 471 NW2d 620 (1991); *People v Perez*, 417 Mich 1100.21 (1983). Given our decision to remand for resentencing, we decline to address defendant's remaining sentencing issues at this time.

Defendant's conviction is affirmed, but the matter is remanded for resentencing. We do not retain jurisdiction.

/s/ John H. Gillis
/s/ Glenn S. Allen, Jr.
/s/ Joseph B. Sullivan