

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRENCE M. JOHNSON a/k/a TERANCE
JOHNSON,

Defendant-Appellant.

UNPUBLISHED

February 10, 1998

No. 197485

Oakland Circuit Court

LC No. 95-140444 FH

Before: Hood, P.J., and McDonald and White, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant was sentenced to five to forty years' imprisonment. His sentence was enhanced as a second offense under the controlled substances act, MCL 333.7413(2); MSA 14.15(7413)(2). Defendant appeals as of right. We affirm.

Defendant argues that the trial court erred in refusing to suppress statements he made without having been read his rights under *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Because defendant failed to raise this particular issue below it is not preserved. *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). Assuming the issue was preserved, any error was harmless because the statements were not admitted into evidence. *People v Belanger*, 454 Mich 571, 576; 563 NW2d 665 (1997), quoting *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994).

Defendant next argues that the trial court clearly erred in admitting the cocaine evidence at trial because Officer William Wells lacked probable cause to search the car. We disagree.

Probable cause exists when the facts and circumstances warrant a reasonably prudent person to believe that a crime has been or is being committed and that the evidence sought will be found in a stated place. *People v Williams*, 160 Mich App 656, 660; 408 NW2d 415 (1987). A totality of the circumstances test is used to analyze whether probable cause exists. *People v Taylor*, 454 Mich 580,

593; 564 NW2d 24 (1997). An automobile may be searched without a warrant under the automobile exception if the search is based on probable cause to believe that the vehicle contains evidence of a crime. *Id.* at 590. The automobile exception applies to readily mobile vehicles, regardless of whether the vehicle was actually moving at the time it was seized. *Id.* at 588.

Officer Wells testified at the evidentiary hearing that he was on routine patrol in an area where he knew there was a high level of illegal drug sales. Upon approaching the area, he saw defendant standing near a pay phone on the corner of Chamberlain and Saginaw Streets. After further observation, Officer Wells saw defendant use hand motions to flag vehicles. Officer Wells testified that based on his experience working with narcotics, he had seen this hand motion used by drug salesmen on the streets to indicate that they have drugs for sale. He continued to watch this activity for approximately five minutes until he was called away from the area on another police call.

Officer Wells returned to the area approximately forty-five minutes later to conduct surveillance again. When he returned, defendant was sitting across the street on the trunk of a vehicle that was illegally parked in the front lawn of a home. On three separate occasions, Wells observed someone walk up and, as the person got close, defendant walk out and meet him at the edge of the sidewalk. It appeared as if the two were examining something between them, in that their hands rose up to waist level. After the third such interaction, Officer Wells had to leave to pursue another radio call. At that time, he drove by and observed defendant and the other individual quickly make motions into their pockets. Defendant then walked toward the porch and the other individual walked away quickly.

Officer Wells returned for the third time approximately fifteen minutes later. He observed defendant from a different location this time. He observed defendant walk over to the illegally parked vehicle and reach in the vehicle. Several times he saw defendant look down to observe something in his hand after he backed out of the car. Each time defendant met with people on the sidewalk, he would walk to the vehicle, reach in, pull something out and wait for the next person to walk by. Wells observed this on three separate occasions. Officer Wells also testified that defendant was sitting with another individual, who was known to him as a seller of crack cocaine. At this point, Officer Wells had confirmed in his mind that defendant was selling drugs. He also ran the license plate on the illegally parked vehicle and learned the car was rented from Snappy Rental. He testified that based on his experience, it was common for drug dealers to use rental cars in order to avoid forfeiture laws.

Based on a totality of the circumstances, we agree with the trial court that Officer Wells had probable cause to believe drugs were in the vehicle. *Taylor, supra* at 593. The search of the automobile was justified without a warrant because Officer Wells had probable cause to believe that the vehicle contained evidence of a crime, coupled with the exigency arising out of the mobility of the vehicle. *Id.* at 588. That Officer Wells had not seen defendant driving the vehicle at the time it was seized is irrelevant in determining whether the automobile exception applies. *Id.* We conclude that the trial court did not clearly err in failing to suppress the evidence obtained from the automobile.

Finally, defendant argues that his sentence of five to forty years' imprisonment is disproportionate. We disagree. Legislatively mandated sentences, such as the one in this case, are

presumptively proportionate. *People v Ealy*, 222 Mich App 508, 512; 564 NW2d 168 (1997). The presumption can be overcome in unusual circumstances. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). No such circumstance existed in defendant's case. Defendant had two prior convictions for the same offense and had been released from parole approximately four months prior to the instant offense. The trial court also noted that irrespective of the street value, defendant possessed a substantial number of packages of cocaine. Under these circumstances, we find that defendant's sentence is proportionate and that the trial court did not abuse its discretion in sentencing defendant.¹

Affirmed.

/s/ Harold Hood

/s/ Gary R. McDonald

/s/ Helene N. White

¹ Defendant argues in his appellate brief's introduction that there was insufficient evidence to convict him. As defendant did not brief or otherwise address this issue further, it is not properly presented for review. *People v Sean Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). In any event, the evidence was clearly sufficient.