STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 27, 2010
v	No. 289777 Jackson Circuit Court
WILLIAM DARNELL AMISON, Defendant-Appellant.	LC No. 08-004478-FH

Before: SAAD, P.J., and HOEKSTRA and MURRAY, JJ.

PER CURIAM.

A jury convicted defendant of possession with intent to deliver less than 50 grams of a controlled substance (crack cocaine) second or subsequent offense.[1] The trial court sentenced him to a prison term of three to 40 years. Defendant appeals, and we affirm.

I. FACTS AND PROCEEDINGS

Defendant sold a rock of crack cocaine ("first rock") to an undercover officer in a controlled "buy-bust" transaction coordinated by a confidential informant. Defendant was arrested approximately two minutes after the transaction. The prosecutor says defendant tried to evade arrest by pedaling his bicycle faster when the arresting officers' vehicle approached him. He was conveyed to the Jackson County Jail, where officers searched defendant's person and found another rock of crack cocaine ("second rock") concealed in a cigarette pack in defendant's pants pocket. The combined weight of both rocks was less than one gram. The officers also found $284 in cash in defendant's pocket. Officers did not find the "prerecorded buy money," but the two minutes between the transaction and the arrest could have given him sufficient opportunity to dispose of it.

On the first day of trial, the prosecutor advised the trial court that defendant was prepared to plead guilty to delivery of cocaine, habitual offender, second offense, subject to a 30-year maximum prison term. The prosecutor explained that defendant was currently paroled for a prior

[1] MCL 333.7401(2)(a)(iv); MCL 333.7413(2).

conviction, "so whatever sentence that he would get from the Court on the 30-year felony would be mandatorily consecutive to the time that he's currently serving." The prosecutor stated that the lead officer, Detective Gary Schuette, had no objection to the proposed plea arrangement. The trial court questioned why defendant waited until the morning of trial to accept a plea offer after previously refusing. The court commented to defense counsel, "there's a reason I have plea cutoff dates." Defense counsel replied that the prosecutor had not made the offer until the previous Thursday (four days before the trial began on Monday). He explained that defendant had just had the opportunity to consult his family. The trial court replied as follows:

> It's the day of trial. He's on parole. He's got two prior deliveries for cocaine. And, you know, we had plenty of time to have his family over to the county jail or in your office. He's going to either going [sic] to plea (inaudible) or he's going to trial. So that's my posture.

The prosecutor introduced both rocks of cocaine into evidence. Defendant objected to the introduction of the second rock on the ground that the prosecutor failed to establish a proper chain of custody. The trial court admitted the evidence over defendant's objection, and said that a deficiency in the chain of custody pertained to the evidence's weight, not its admissibility. The prosecutor requested that Officer Garcia be permitted to testify regarding chain of custody, and the trial court permitted the prosecutor to call Garcia, but stated that the case would continue whether he testified or not.

Near the end of trial, the prosecutor advised the trial court that Officer Garcia was not present in court because he had been unable to find a caregiver for his sick children. The trial court asked, "All Garcia is the chain, right?" The prosecutor replied, "Well, the evidence was turned over to him. He packaged it, put it in an evidence locker and then it was sent to the lab." The prosecutor further stated, "I might just not move it in evidence and ask the jury to disregard. I'll basically say I want to be fair, since there's a break in the chain." He added, "The rock that's important is the delivery rock, anyway. There's nothing wrong with that one." He suggested that the trial court instruct the jury that the prosecutor had withdrawn his motion to introduce the second rock of cocaine, and that the jurors should disregard all reference to the second rock and focus only on the rock that was delivered to the confidential informant.

The trial court advised defense counsel that if the second rock were withdrawn from evidence, and the jurors instructed to disregard it, the trial court would not instruct the jury on the lesser offense of simple possession (i.e., possession without intent to deliver). Defense counsel replied that he would "like [the jurors] to have as much evidence as they can" regarding the lesser charge of possession. The trial court offered defendant two options: the court could withdraw the second rock, but omit the instruction on the lesser included offense of simple possession; or allow the second rock in evidence and instruct the jury on the lesser offense of simple possession. After consulting with defendant, defense counsel informed the trial court that defendant "would like to have the lesser included offense of possession available to the jury."

The jury convicted defendant of possession with intent to deliver less than 50 grams of cocaine. The trial court sentenced him to a prison term of 3 to 40 years.

II. REJECTION OF PLEA AGREEMENT

Defendant argues that the trial court violated his due process rights by rejecting his pretrial plea agreement with the prosecutor. He acknowledges that he has no absolute right to acceptance of his guilty plea, but contends that the trial court: (1) rejected his plea without exercising sound judicial discretion, and (2) imposed an arbitrary deadline for accepting the prosecutor's plea offer.

We review a trial court's decision to reject a guilty plea for abuse of discretion.[2] A trial court has discretion to reject a plea agreement based on considerations of public interest and the proper administration of justice.[3] A defendant has "no absolute right to have a guilty plea accepted," and a "court may reject a plea in exercise of sound judicial discretion.[4]" A trial court abuses its discretion when it selects an outcome that is not within the range of reasonable and principled outcomes.[5]

Here, we find no abuse of discretion. The trial court denied the plea bargain because defendant waited until after the cut-off date and until the first day of trial. This was not an arbitrary, unreasoned decision, but a proper consideration of the interests of judicial economy after resources had been expended to begin the trial.

III. ADMISSION OF SECOND ROCK OF CRACK COCAINE

Defendant contends that the trial court abused its discretion in admitting the second rock of crack cocaine into evidence although the prosecutor failed to provide testimony to establish the chain of custody of the second rock.

Defendant waived this issue by approving the admission of the evidence so that he could pursue the strategy of allowing the jury the option of convicting defendant of the lesser offense of simple possession. In *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000), our Supreme Court distinguished between forfeited error and waived error. A party who merely forfeits an error by failing to preserve the issue for appellate review may obtain appellate relief for plain error. However, a party who waives a known right cannot seek appellate review of a claimed deprivation of the right. *Id.* Consequently, defendant's decision to keep the second rock in evidence precludes review of this alleged error. In any event, a deficiency in the chain of custody of the evidence bears on the weight of the evidence, not its admissibility, and the admission of evidence does not require a perfect chain of custody.[6]

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[2] See *People v Grove*, 455 Mich 439, 444; 566 NW2d 547 (1997).

[3] *People v Wright*, 99 Mich App 801, 822-823; 298 NW2d 857 (1980).

[4] *Santobello v New York*, 404 US 257, 262; 92 S Ct 495; 30 L Ed 2d 427 (1971).

[5] *People v Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009).

[6] *People v White*, 208 Mich App 126, 130-132; 527 NW2d 34 (1994).

IV. GUIDELINES SCORING

Defendant contends that his sentence was based on the erroneous scoring of two offense variables, OV 12 and OV 19. Defendant preserved this error with a timely objection at the sentencing hearing.[7] We review a trial court's scoring decisions to determine whether the sentencing court exercised its discretion and whether the evidence adequately supported its scoring decisions.[8] We will uphold a scoring decision if there is any evidence in its support.[9]

The trial court scored OV 12, contemporaneous felonious criminal acts, one point, the proper score where one contemporaneous criminal act involving any other crime was committed. A felonious criminal act is contemporaneous if the act occurred within 24 hours of the sentencing offense and the act has not and will not result in a separate conviction.[10] Here, the trial court determined that defendant committed a contemporaneous felony in attempting to obstruct and elude arrest.[11] This finding was based on the testimony of Officer Brett Stiles, who observed defendant ride a bicycle away from the alley where the controlled buy took place. Officer Stiles testified that he observed defendant pedal the bicycle much faster when the arresting officers' vehicle pulled up to him. Although this testimony might not be sufficient to satisfy the reasonable doubt standard necessary to convict defendant under MCL 750.81d, it is sufficient to support the trial court's scoring decision.

The trial court scored OV 19, interference with the administration of justice, 10 points, the appropriate score where the offender "otherwise interfered with or attempted to interfere with the administration of justice.[12]" Defendant's attempt to elude arrest constituted an interference with the administration of justice in support of this score. Accordingly, there was no scoring error.

Defendant also argues that the guidelines scoring violates the Sixth Amendment, US Const Am, VI, by increasing his sentence based on factual findings not made by a jury. The United States Supreme Court held in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), that the Sixth Amendment is violated when a trial court increases a defendant's sentence beyond the maximum sentence permitted by law on the basis of facts found by the court rather than by the jury. However, Michigan's sentencing scheme is unaffected by *Blakely* because Michigan uses an indeterminate sentencing scheme in which the trial court sets the minimum sentence but can never exceed the statutory maximum sentence. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). Thus, "[a]s long as the defendant receives a

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[7] MCR 6.429(c).

[8] *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

[9] *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

[10] MCL 777.42(2)(a)(i) and (ii).

[11] MCL 750.81d.

[12] MCL 777.49(c).

sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *Id.* at 164. Here defendant's sentence was within the statutory maximum. MCL 333.7401(2)(a)(iv) provides a maximum sentence of 20 years. MCL 333.7413(2) provides that an individual convicted of a second or subsequent offense is subject to a term "not more than twice the term otherwise authorized." Thus, defendant was subject to a maximum term of 40 years. The trial court did not exceed that maximum: there is no Sixth Amendment violation.

V. SENTENCING ISSUES

Defendant raises additional sentencing issues regarding the trial court's exercise of its statutory authority to double the sentence authorized by law and the court's alleged failure to consider all relevant mitigating circumstances. These issues are without merit.

Defendant's sentencing guidelines set a minimum sentence range of 19 to 38 months.[13] The statutory maximum sentence for defendant's offense was 20 years.[14] Defendant's prior convictions subjected him to sentence enhancement procedures that authorized the trial court to double the authorized sentence. See MCL 333.7413(2), which provides "Except as otherwise provided in subsections (1) and (3) [involving quantities of 50 grams or more], an individual convicted of a second or subsequent offense under this article may be imprisoned for a term not more than twice the term otherwise authorized or fined an amount not more than twice that otherwise authorized, or both." Consequently, the trial court had the authority to double the minimum sentence range to a range of 38 to 76 months, and to double the maximum statutory sentence to 40 years.[15] Although the trial court stated that defendant's extensive criminal history warranted sentencing at the high end of the range, the trial court ordered a minimum sentence of 3 years, which is at the high end of the unenhanced guidelines range, and below the doubled range. The trial court thus doubled the maximum sentence only, and not the minimum sentence range, although it had the authority to increase both. In view of defendant's extensive criminal history, mostly involving drug trafficking, the trial court did not abuse its discretion in partially exercising its authority to enhance defendant's sentence.

Defendant also contends that the trial court failed to take into consideration all mitigating circumstances, which, he asserts, would have resulted in a shorter sentence. He argues that if all of these circumstances were properly considered, the trial court would not have exercised its authority to issue a doubled maximum sentence. He also argues that his sentence constitutes

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[13] MCL 777.13m provides that a violation of MCL 333.7401(2)(a)(iv) is a Class F offense. MCL 777.65 provides the guideline ranges for Class D offenses. Defendant's guidelines scores place him at the PRV Level F/OV Level II point on the grid, for a minimum sentence of 19 to 38 months, without sentence enhancement under MCL 333.7413(2).

[14] MCL 333.7401(2)(a)(iv).

[15] *People v Lowe*, 484 Mich 718, 724-725; 773 NW2d 1 (2009).

cruel and unusual punishment[16] because it is excessive in view of his specific circumstances. A sentence within the sentencing guidelines range is presumptively proportionate, and a proportionate sentence does not amount to cruel or unusual punishment.[17] Defendant's sentence is within the guideline range, and is therefore presumptively proportionate. Defendant raises no unique or compelling mitigating circumstances to rebut this presumption. Defendant's claims that he is afflicted with drug addiction, that he is remorseful for his crime, and that he enjoys family support are ordinary circumstances that do not detract from his culpability. Defendant fails to assert any viable legal premise for his claim of unlawful sentencing.

VI. SENTENCE CREDIT

Defendant argues that he was entitled to credit toward his sentence because he was jailed while awaiting trial. We hold that the trial court properly denied credit.

Generally, a defendant who has served time in jail prior to sentencing "because of being denied or unable to furnish bond for the offense of which he is convicted" is entitled to credit against his sentence for the time served in jail prior to sentencing. MCL 769.11b. However, a paroled prisoner who violates the terms of his parole must "serve out the unexpired portion of his or her maximum imprisonment." MCL 791.238(2). Additionally, if a paroled prisoner is convicted of a new felony and sentenced to a term of imprisonment for that felony while he is on parole for a sentence for a previous offense, "the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense." MCL 768.7a.

In *People v Idziak*, 484 Mich 549, 566-569; 773 NW2d 616 (2009), the Supreme Court ruled that a paroled prisoner who is arrested for a new felony, detained in jail prior to trial for the new felony, and subsequently convicted of and sentenced the new felony, cannot receive credit for time served in jail before the date that his maximum sentence for the parole offense was completed. The Court held that MCL 769.11b does not apply in these circumstances because the defendant is incarcerated pursuant to the parole statutes, rather than incarcerated for the reasons stated in MCL 769.11b, being denied or unable to furnish bond. *Id.* The Court summarized its holding as follows:

> We hold that, under MCL 791.238(2), the parolee resumes serving his earlier sentence on the date he is arrested for the new criminal offense. As long as time

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[16] US Cons, Am VIII; Const 1963, art 1, § 16.

[17] *Drohan, supra* at 91-92; see also *People v Powell*, 278 Mich App 318, 323-324; 750 NW2d 607 (2008). We acknowledge that although MCL 769.34(10) requires this Court affirm a sentence within the appropriate guidelines range "absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence," our Court has recognized, in *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006), that this restriction does not apply to claims of constitutional error. Nonetheless, defendant has failed to overcome the presumption that his sentence is proportionate.

> remains on the parolee's earlier sentence, he remains incarcerated, regardless of his eligibility for bond or his ability to furnish it. Since the parolee is not being held in jail "because of being denied or unable to furnish bond," the jail credit statute does not apply. [*Id.* at 552.]

Here, defendant does not dispute that he had not completed the sentence for his prior offense before his sentencing date for the instant felony. Accordingly, the trial court did not err in denying him credit for time served in jail while awaiting trial.

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray