STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS VALENTINE,

Defendant-Appellant.

UNPUBLISHED
September 27, 1996

No. 177736
LC No. 93-004077

Before: Hoekstra, P.J., and Michael J. Kelly and J.M. Graves, Jr.,* J.J.

PER CURIAM.

Following a jury trial, defendant was convicted of one count 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), and one count of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v). Defendant was sentenced under the sentence augmentation provision of MCL 333.7413(2); MSA 14.15(7413)(2) to consecutive terms of three to forty years' imprisonment for the possession with intent to deliver conviction, and two to eight years' imprisonment for the simple possession conviction. Defendant now appeals as of right. We affirm.

The charges against defendant arise from an incident on November 30, 1993, when Berrien County Sheriff's Deputy John Hopkins initiated a traffic stop of defendant's vehicle. Deputy Hopkins noticed repeated movement by defendant toward the floor of the car prior to coming to a stop. Defendant consented to a search of the car which revealed one rock of crack cocaine under the driver's seat of the car, and 162 rocks packaged for individual sale on the ground under the car, directly beneath a rust hole in the floorboard on the passenger's side of the car. Defendant initially denied knowledge of any cocaine in the vehicle, but later admitted the rock under the driver's seat belonged to him. Defendant's passenger, Willie Lark, testified that defendant handed him the individually-packaged rocks and told him to push them out of the car through the hole in the floorboard.

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant first argues on appeal that the prosecutor impermissibly divided the evidence to create two separate crimes, and thereby consecutive sentences, from what should have been one charge of possession of cocaine under fifty grams. Defendant failed to challenge the charging information prior to trial with a motion to quash the information, and thus failed to preserve this issue for appellate review. *People v Eagen*, 136 Mich App 524, 528; 357 NW2d 710 (1984); *People v Miller*, 130 Mich App 116, 117-118; 342 NW2d 926 (1983). Defendant likewise failed to preserve his challenge based on double jeopardy protection against multiple punishments for the same offense. Issues raised for the first time on appeal, even those relating to constitutional claims, are not ordinarily subject to appellate review. *Michigan Up & Out of Poverty Now Coalition v State of Michigan*, 210 Mich App 162, 167; 533 NW2d 339 (1995). Barring exceptional circumstances, an appellate court need not review unpreserved constitutional claims. *Id*., at 168. Appellate courts may consider manifest and serious errors not properly preserved for appellate review in order to prevent fundamental injustice. *Miller, supra*, at 118. Here, fundamental injustice will not result from our failure to provide further review because we are not persuaded that defendant's claims in this regard have merit.

Defendant's second argument is that the prosecution failed to produce sufficient evidence to support a jury verdict of guilty of possession with intent to deliver less than fifty grams of cocaine. An appellate court, in determining whether the prosecution presented sufficient evidence to sustain a conviction, must view the evidence in the light most favorable to the prosecution and decide whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Here, the testimony of Lark, the movement of defendant while driving the vehicle, and the fact that the 162 rocks were packaged for individual sale provided sufficient evidence to justify a finding that defendant both possessed the cocaine and intended to deliver it. See *People v Catanzarite*, 211 Mich App 573, 577-578; 536 NW2d 570 (1995); *People v Ray*, 191 Mich App 706, 708-709; 479 NW2d 1 (1991).

Next, defendant argues that the trial court committed error warranting reversal when it instructed the jury that the same 9.437 grams of cocaine were the basis of both the possession with the intent to deliver and simple possession charges. We disagree. Defendant failed to object to the jury instructions, and therefore did not preserve the issue for appellate review absent a showing of manifest injustice. MCL 768.29; MSA 28.1052; *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Here, we find no manifest injustice. The amount of cocaine was not disputed, and defendant's assertion that the cocaine belonged to Lark was not affected by the erroneous instruction. Further, at the close of the instructions, the court informed the jury that the second count involved the "alleged one rock." The error did not affect the defendant's right to a fair trial. *Van Dorsten*, *supra*, at 545.

Lastly, defendant argues that his sentencing procedure was tainted by error warranting reversal. Defendant claims the trial court failed to consider established sentencing factors and standards and failed to articulate the reasons for imposing his sentences as required by *People v Triplett*, 432 Mich 568, 573; 442 NW2d 622 (1989). We have reviewed the sentencing record and conclude that the trial court adequately articulated its reasons for imposing defendant's sentences. The court looked to the

recommendations of the probation department, defendant's prior convictions, and the fact that defendant was already on probation at the time he was arrested in imposing defendant's sentences.

Defendant further argues that the trial court made an independent finding of guilt on other charges. We disagree. The comments with which defendant takes issue were made in response to statements by defendant and simply highlighted what the trial court considered to be controlling factors of the case. The court did not identify another charge it was considering in imposing the sentences.

Defendant also claims his sentences are disproportionate. Sentencing guidelines are not applicable to habitual offenders whose sentences are enhanced under MCL 333.7413(2); MSA 14.15(7413)(2), *People v Williams*, 205 Mich App 229, 231; 517 NW2d 315 (1994), or to habitual offenders convicted under MCL 769.10-769.12; MSA 28.1082-28.1084, *People v Cervantes*, 448 Mich 620; 532 NW2d 831 (1995). Appellate review of an habitual offender sentence is limited to a determination of whether the sentence violates the proportionality test of *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). *People v Gatewood*, 216 Mich App 559; 550 NW2d 265 (1996). After considering the circumstances of the offender and offenses in this case, we conclude that the sentences imposed were proportionate and that the trial court did not abuse its discretion.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Michael J. Kelly
/s/ James M. Graves, Jr.