STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CHARLIE FRANCIS FENECH,

Defendant-Appellee.

UNPUBLISHED
October 11. 1996

No. 186713
LC No. 92-118723-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLIE FRANCIS FENECH,

Defendant-Appellant.

No. 186795
LC No. 92-118723-FH

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

PER CURIAM.

Defendant pleaded guilty to delivery of 50 grams or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and was sentenced to five to twenty years' imprisonment. Both defendant and the prosecution have filed appeals as of right. We affirm. This case has been decided without oral argument pursuant to MCR 7.214(E)(1)(b).

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*Former Court of Appeals judges, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-3.

Defendant first argues that his counsel was ineffective when he failed to call four witnesses at defendant's entrapment hearing, including the undercover officer involved in this case. Defendant contends that he is entitled to an evidentiary hearing to support his claim. We disagree. Defendant was required to move for an evidentiary hearing in the trial court. *People v Ginther,* 390 Mich 436, 443; 212 NW2d 922 (1973). Moreover, his failure to do so limits appellate review of his claim to the existing record. *People v Harris,* 201 Mich App 147, 154; 505 NW2d 889 (1993).

When a defendant claims ineffective assistance of counsel arising out of a guilty plea, the issue is whether the plea was tendered voluntarily and understandingly. *People v Corteway,* 212 Mich App 442, 445; 538 NW2d 60 (1995). Here, defendant does not allege that his plea was not made voluntarily or understandingly. Moreover, there is no indication that the undercover officer would have testified as defendant said he would and defendant fails to indicate what the other three witnesses would have testified to or how they would have helped his claim of entrapment. Accordingly, this claim is without merit.

Defendant also argues that his plea was less than voluntary given the actions of the judge. However, defendant has waived appellate review of this issue by failing to move to set aside his plea on this basis. MCR 6.311(C).

Defendant also argues that his plea was involuntary because he was entrapped. Because a guilty plea does not waive a claim of entrapment, *People v LaClear,* 196 Mich App 537; 539; 494 NW2d 11 (1992), rev'd on other grounds, 442 Mich 867; 497 NW2d 490 (1993), defendant need not argue this claim on the basis that his plea was involuntary. Nevertheless, we find that the trial court did not clearly err in finding that defendant was not entrapped. *People v Juillet,* 439 Mich 34, 69; 475 NW2d 786 (1991) (opinion of Brickley, J.). Although defendant testified at the entrapment hearing that the informant appealed to his sympathy as a friend, telling defendant that he was going to get beat up if defendant did not help him and called defendant incessantly, the informant denied these accusations and said that he was not even friends with defendant. Therefore, the issue was one of credibility and, as such, we defer to the trial judge who was in a better position to evaluate the demeanor and credibility of the witnesses. MCR 2.613(C).

The prosecution argues that the court erred in departing from the statutory minimum sentence where substantial and compelling reasons did not exist to justify a departure. MCL 333.7401(4); MSA 14.15(7401)(4). We disagree. The court noted defendant's lack of criminal involvement, the conduct of the police and the fact that defendant had family support. These factors were all proper. *People v Fields*, 448 Mich 58, 76-79; 528 NW2d 176 (1995). In addition, we note that defendant, who was thirty-seven years old at the time of sentencing, had no prior record and maintained the same job since 1976. *Id.,* 77. Our Supreme Court has approved a departure under very similar circumstances. See *People v Fields,* 448 Mich 58, 78-79; 528 NW2d 176 (1995), citing with approval *People v Shinholster,* 196 Mich App 531; 493 NW2d 502 (1992). Accordingly, we find that the court did not abuse its discretion by finding that substantial and compelling reasons existed to depart from the statutory minimum sentence. *Fields, supra,* 78.

The prosecution next argues that defendant's sentence is disproportionately lenient. *People v Catanzarite,* 211 Mich App 573, 585; 536 NW2d 570 (1995). Defendant, on the other hand, counters that the sentence is disproportionately harsh and that the one-year sentence he originally requested would be justified. We hold that defendant's five-year minimum sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender in light of his clean criminal record, his steady employment and his degree of culpability in the instant offense. *People v Milbourn,* 435 Mich 630, 636; 461 NW2d 1 (1990).

Affirmed.

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