

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANK NAHSHON BADGETT,

Defendant-Appellant.

UNPUBLISHED
November 8, 1996

No. 187558
LC No. 95-026537

Before: Wahls, P.J., and Fitzgerald and L.P. Borrello,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of possession with intent to deliver marijuana, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c). Defendant was sentenced to four to eight years in prison under the controlled substances act's subsequent offender provision, MCL 333.7413(2); MSA 14.15 (7413)(2). We affirm.

Defendant's first claim on appeal is that the prosecution failed to present sufficient evidence that he intended to deliver marijuana to support his conviction. We disagree.

To support a conviction for possession with intent to deliver a controlled substance, the prosecution must prove: (1) that the recovered substance is a controlled substance; (2) that the defendant was not authorized to possess the substance; and (3) that the defendant knowingly possessed the substance with the intent to deliver. *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748 (1992). Intent to deliver has been inferred from the quantity of narcotics in a defendant's possession, from the way in which those narcotics are packaged, and from other circumstances surrounding the arrest. *Id.*, p 524.

Defendant's intent to deliver the marijuana can be inferred from the circumstances surrounding his arrest. Defendant went to the meeting with the police informant with the informant expecting the sale of three pounds of marijuana. The informant told defendant that he intended to use the proceeds from selling the three pounds of marijuana to pay off a six hundred dollar debt the informant owed to

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

defendant. When the informant's negotiations with defendant stalled, the informant offered to let defendant negotiate with the undercover officer. Defendant showed a one-pound bag of marijuana to the officer. Defendant and the officer discussed making future drug deals in addition to the present one. The main obstacle to a drug sale the day of the incident appears to be defendant's dissatisfaction with the money the officer had on hand. Defendant, the informant and the officer agreed to meet the following Friday, with defendant indicating that a deal might be consummated then.

Defendant's intent to deliver may also be inferred from the amount of marijuana in his possession, and from its packaging. Defendant carried one pound of marijuana compressed into a brick. Two drug surveillance officers testified that this packaging is typical of marijuana sold by large-volume drug dealers. Defendant also fled when police approached him, and threw the bag of marijuana away. Viewing this evidence in a light most favorable to the prosecution, *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995), we find that the prosecution presented sufficient evidence of intent to support defendant's conviction.

Defendant's second claim on appeal is that his four to eight year prison sentence is disproportionate. We disagree. Defendant was subject to a four year maximum prison term under MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c). However, the trial court had the discretion to enhance that to up to an eight year maximum term under the subsequent-offender provision of the controlled substances act, MCL 333.7413(2); MSA 14.15 (7413)(2). *People v White*, 208 Mich App 126, 135; 527 NW2d 34 (1994); *People v Green*, 205 Mich App 342, 345; 517 NW2d 782 (1994).

As with habitual offender sentences, the sentencing guidelines are not applicable to a defendant sentenced under the subsequent-offender provision. *White, supra*, p 135. In that case, this Court used the guidelines as a "starting point" in reviewing the proportionality of a defendant sentenced under the subsequent-offender provision of the controlled substances act. *Id.* However, in *People v Gatewood*, 450 Mich 1021; 546 NW2d 252 (1996), the Supreme Court held that appellate review of habitual offender sentences using the sentencing guidelines is inappropriate. Thus, it is questionable whether this Court should continue to use the sentencing guidelines in any fashion to review a sentence under the subsequent-offender provision. See *People v Gatewood*, 216 Mich App 559, 560; ___ NW2d ___ (1996).

Here, defendant has a prior history of dealing drugs. Indeed, defendant had been discharged from his parole in the prior case less than four months before being arrested in this case. Both this case and the prior offense involved large amounts of drugs. Defendant had drug paraphernalia in his car, and fled from the scene in order to avoid arrest. After reviewing the record, we believe that defendant's sentence was proportionate to the seriousness of the matter for which punishment is imposed. *People v Milbourn*, 435 Mich 630, 635; 461 NW2d 1 (1990).

Defendant's final claim on appeal is that the trial court incorrectly assessed ten points for Offense Variable (OV) Nine, casting defendant as the leader in a multiple offender situation. Assuming arguendo that defendant has standing to argue this issue, we disagree.

A trial court's scoring of the sentencing guidelines will be upheld if there is evidence to support the score. *People v Ayers*, 213 Mich App 708, 723; 540 NW2d 791 (1995). The guidelines state that in scoring OV Nine, the entire criminal episode should be taken into account in determining whether the offender is a leader. *People v Gatewood*, 214 Mich App 211, 213; 542 NW2d 605 (1995), vacated on other grounds 450 Mich 1021; 546 NW2d 252 (1996).

Here there was substantial evidence to support the trial court's scoring. Defendant's companion took part in the episode by providing the marijuana and by threatening the police informant. Defendant took an even more active role. He pushed both the informant and the undercover officer for return of his six hundred dollars; he carried the marijuana; and he made the offer to the undercover officer. This evidence shows that defendant was the leader in a multiple offender situation.

Affirmed.

/s/ Myron H. Wahls

/s/ E. Thomas Fitzgerald

/s/ Leopold P. Borrello