

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

ANDRE DEWITT ARDISTER,

Defendant-Appellant

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UNPUBLISHED  
February 14, 1997

No. 186113  
Ingham Circuit Court  
LC No. 94-67715-FH; 94-  
68225-FH; 94-68226-FH

Before: O'Connell, P.J., and Markman and M. J. Talbot,\* JJ.

PER CURIAM.

Defendant appeals by right his guilty plea convictions of delivering an imitation controlled substance (cocaine), MCL 333.7341(3); MSA 14.15(7341)(3), possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), and delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). The court sentenced him to prison terms of twelve to forty months, eighteen to forty-eight months, and forty-two to two-hundred twenty-two months, respectively.<sup>1</sup> We affirm.

Defendant challenges the sentencing court's scoring of two sentencing guideline factors. He objected below to the scoring of these factors in a motion for resentencing. See *People v Walker*, 428 Mich 261, 266; 407 NW2d 367 (1987). In *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991), this Court stated:

Our review of sentencing guidelines calculations is very limited. A sentencing judge has discretion in determining the number of points to be scored, provided that there is evidence on the record which adequately supports a particular score. Where effectively challenged, a sentencing factor need be proved only by a preponderance of the evidence. [Citations omitted.]

Defendant first claims that the court wrongly scored ten points for offense variable 8 (OV-8) -- continuing pattern of criminal behavior. The guidelines instruct that ten points are to be scored when the

offense “is a part of criminal activities over a period of time from which the offender derives a substantial portion of his or her income . . . .” Here, in support of its scoring decision, the sentencing court stated:

He was unemployed. The only means of income that [defendant] had at that time was to sell cocaine to obtain more cocaine. That sounds like a derivation of substantial portion of income, if not all of it.

Information provided by defendant and his attorneys in the Presentence Investigation Report (PSIR) and at sentencing and the motion for resentencing support this statement. The PSIR also indicates that defendant has been charged with numerous drug-related offenses. Accordingly, there was sufficient evidence, in our judgment, to support the scoring of OV-8.

Defendant next argues that the court wrongly scored fifteen points for OV-16 -- aggravated controlled substance offense. The guidelines instruct that fifteen points are to be scored “under such circumstances as to indicate trafficking” and define trafficking as “selling drugs on a continuous basis to the ultimate consumer . . . .” Here, the sentencing court stated, “We have . . . three counts of delivery of cocaine, one count of possession of cocaine, and one count of delivery of imitation cocaine. I think that certainly indicates trafficking.” Information in the PSIR supports this statement. Accordingly, there was sufficient evidence, in our judgment, to support the scoring of OV-16.

Finally, defendant contends that his counsel’s failure to raise these scoring issues at sentencing constituted ineffective assistance of counsel. Because we find no error in the scoring of the guidelines, defendant’s counsel’s failure to challenge the scoring at the sentencing could not constitute ineffective assistance of counsel. See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Affirmed.

/s/ Peter D. O’Connell  
/s/ Stephen J. Markman  
/s/ Michael J. Talbot

<sup>1</sup> The sentences in 94-67715-FH and 94-68225-FH run concurrently to each other and consecutively to the sentence in 94-68226-FH.