STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH RAYMOND ESPINOSA,

Defendant-Appellant.

UNPUBLISHED
March 4, 1997

No. 189934
Bay Circuit Court
LC No. 95-001111-FC;
95-001112-FH

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

PER CURIAM.

Defendant appeals as of right from his conviction by bench trial for armed robbery, MCL 750.529; MSA 28.797, possession of a firearm during the commission of a felony, second offense, MCL 750.227b; MSA 28.424(2), delivery of marijuana, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c), and his conviction pursuant to a guilty plea of habitual offender, second offense, MCL 769.10; MSA 28.1082. The trial court sentenced defendant to five years' imprisonment for the felony-firearm conviction, which is to be served consecutive to concurrent terms of five to twenty years' imprisonment for the armed robbery conviction and two to six years' imprisonment on the delivery conviction. In turn, these sentences are to be served consecutive to a sentence defendant was already serving. We affirm.

Defendant first argues that there was insufficient evidence to establish the element of intent to deliver marijuana, which is necessary for a conviction under § 333.7401(2)(c). Defendant admitted giving the complainant a small amount of marijuana, purportedly as a sample of a larger amount to be delivered later, but defendant did not actually have more marijuana to deliver. Defendant actually intended to trick the complainant into giving him money in exchange for a brown paper bag that contained several pounds of Girl Scout cookies. Defendant claims that he should therefore have been charged with the misdemeanor of distribution of marijuana, MCL 333.7410(7); MSA 14.15(7410)(7), which proscribes distributing marijuana "without remuneration and not to further commercial

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

distribution." We disagree. The trial court's findings of fact provide sufficient evidence to support a felony conviction of delivery of marijuana under MCL 333.7401(1); MSA 14.15(7401)(1). The fact that defendant views the evidence as supporting a misdemeanor distribution of marijuana conviction is irrelevant where defendant was not charged with the misdemeanor offense and where there is no evidence that the prosecutor abused his discretion in his charging decision. *People v Morrow*, 214 Mich App 158, 161; 542 NW2d 324 (1995). Such discretion is abused only when a charging decision is made for reasons that are "unconstitutional, illegal or ultra vires." *Id*. In the instant case, there is no evidence of any abuse of discretion on the part of the prosecutor in charging defendant with the felony rather than the misdemeanor.

Defendant next argues that he was denied due process in violation of federal and state constitutional guarantees. In the information, the prosecution misstated the penalty for the second offense felony-firearm charge, MCL 750.227b; MSA 28.424(2), as being two years instead of five years. The probation agent also stated in the presentence report that the penalty was two years. Defendant argues that he was affirmatively misled to believe that he was going to be charged as a felony-firearm first offender and that he did not receive reasonable notice and an opportunity to be heard on the second offender felony-firearm charge of which he was convicted. We disagree. We note that although the presentence report listed the felony-firearm charge as a two year offense, it expressly recommended a consecutive term of five years for felony-firearm, second offense. Also, the information of which defendant complains noted defendant's prior felony-firearm conviction, albeit in the context of notice of intent to seek an enhanced sentence under the habitual offender statute, MCL 769.10; MSA 28.1082, and not in the context of the felony-firearm count. The record shows that while the information as written initially caused some confusion for the sentencing court, it was defendant's counsel who clarified for the court that defendant was a felony-firearm second offender. Section 750.227b is a sentencing enhancement statute. This Court has held that due process does not require that the prosecution separately charge a defendant as a second offender where a statute is sentence enhancing. *People v Williams*, 215 Mich App 234, 236; 544 NW2d 480 (1996), citing *People v Eason*, 435 Mich 228, 250; 458 NW2d 17 (1990). Due process is satisfied as long as the sentence is based on accurate information and the defendant had a reasonable opportunity at sentencing to challenge the information. *Williams, supra* at 233. Here, defendant stated at sentencing that he had reviewed the presentence report and had no objection to it. Defendant's counsel went over the presentence report in great detail with the court and made several corrections of minor details such as dates. Defendant was placed on notice of the statutory sentence enhancement provision and did not contest the record of the prior felony-firearm conviction.

Defendant also argues that under the holding of *People v Young*, 206 Mich App 144; 521 NW2d 340 (1994), he will be required to serve the maximum of the three to twenty year sentence for which he was out on parole when he committed the instant offense before he starts serving his new sentence. However, the Supreme Court reversed *Young, supra*, holding that it was the Legislature's intent in enacting MCL 768.7a(2); MSA 28.1030(1) to require an offender "to serve at least the combined minimums of his sentences, plus whatever portion, between the minimum and the maximum, of the earlier sentence that the Parole Board may, because the parolee violated the terms of the parole, require him to serve." *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569, 584; 548

NW2d 900 (1996). There is nothing in the language of the judgments of sentence to indicate that the trial court intended to require that defendant serve anything longer than permitted by *Young*. Thus, this Court need not take or order any corrective measures on its part.

Affirmed.

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