

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMAR WILLIAMSON,

Defendant-Appellant.

UNPUBLISHED

March 14, 1997

No. 186517

Muskegon Circuit Court

LC No. 95-37721-FH

Before: Wahls, P.J., and Young and J.H. Fisher,* JJ.

PER CURIAM.

Following a bench trial, defendant was convicted 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 of possession of a firearm during commission of a felony, MCL 750.227b; MSA 28.424(2). The court sentenced defendant to four to twenty years' imprisonment for the possession conviction and to a mandatory term of two years for the felony-firearm conviction. Defendant appeals as of right from his convictions and sentences. We affirm.

First, defendant challenges the probate court's decision to waive jurisdiction so that defendant could be tried as an adult. This Court will not rule on the propriety of a waiver of jurisdiction unless review is either first sought in the circuit court, *People v Jackson*, 171 Mich App 191, 195 429 NW2d 849 (1988), or is sought through this Court by application for leave to appeal, MCL 600.863; MSA 27A.863. Defendant raises this claim for the first time in his appeal of right to this Court. Therefore, we decline to rule on this issue.

Defendant next contends that the probate court lacked probable cause to bind him over for trial with regard to all charges against him. Defendant had also been charged with, but not convicted of, conspiracy to deliver cocaine, MCL 750.157a; MSA 28.354(1), and carrying a concealed weapon, MCL 750.227; MSA 28.424. A defendant may not challenge errors or irregularities relating to the preliminary examination for the first time on appeal. *People v Eagan*, 136 Mich App 524, 528; 357 NW2d 710 (1984); *People v Sparks*, 53 Mich App 452, 454; 220 NW2d 153 (1974). Although we

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

may review unpreserved, nonconstitutional claims for the first time on appeal to avoid manifest injustice, *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994), we have reviewed the record and determined that there was sufficient evidence for the probate court to find probable cause to bind defendant over on the crimes charged. Hence, failure to review this claim will not cause manifest injustice.

Defendant also contends that Offense Variable [OV] 8 was incorrectly scored. We disagree. We review a trial court's calculation of sentencing guidelines for an abuse of discretion. *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Our review is very limited, and scoring decisions for which there is any evidence in support will be upheld. *Id.* A score of an offense variable may be supported with uncontroverted evidence contained within the presentence report. *People v Randolph Warner*, 190 Mich App 26, 28; 475 NW2d 397 (1991).

Defendant was convicted of possession with intent to deliver less than fifty grams of cocaine and is challenging OV 8. OV 8 allows a score of ten points if [t]he offense is part of a pattern of criminal activities over a period of time from which the offender derives a substantial portion of his or her income and/or the offense is directly related to membership in an organized criminal group. [Michigan Sentencing Guidelines (2d ed), p 54.]

A trial court is justified in scoring OV 8 at ten points if either one or both of the following is found to be true: (1) “[t]he offense is part of a pattern of criminal activities over a period of time from which the offender derives a substantial portion of his or her income,” or (2) “the offense is directly related to membership in an organized criminal group.” See *People v McCracken*, 172 Mich App 94, 104; 431 NW2d 840 (1988) (quoting *People v Emma Johnson*, 144 Mich App 497, 501; 376 NW2d 122 (1985)). OV 8 for the crimes in *McCracken* and in *Emma Johnson* was similar to the version in defendant's case. The record indicates that the trial court justified the score on both prongs.

This first prong has two inquiries: (1) whether the offense in question is part of a pattern of criminal activities over a period of time and (2) whether the defendant derived a substantial portion of his income from the criminal activities involved. *People v Ayers*, 213 Mich App 708, 724; 540 NW2d 791 (1995) (citing *Emma Johnson*, *supra* at 501). The uncontested presentence report establishes that defendant began selling marijuana in 1993, that he pleaded guilty in Detroit on May 17, 1994 to possession with intent to deliver less than twenty-five grams of cocaine, and that he was “anxious to begin” doing his time, “so he could get out and resume his normal street-based, drug-based activities.” This information indicates that defendant’s involvement leading to the current conviction was part of a pattern of criminal activities over a period of time and that he relied on drug sales for his income. Hence, there is some evidence to support the scoring of OV 8 at ten points. Therefore, we need not address the other prong, which would allow a score of ten points for OV 8. We note, nonetheless, that there was some evidence that defendant was involved in a group to sell drugs, although this evidence was insufficient to prove his guilt of conspiracy beyond a reasonable doubt. Contrary to defendant’s contention, the record establishes that the trial court did not sentence him as though he had conspired to sell drugs, but scored OV 8 according to facts developed during trial and in the presentence report.

Last, defendant contends that his sentence violates the principle of proportionality, contrary to *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). We disagree. Defendant premises his claim on the fact that his sentence for his drug conviction was harsher than his codefendant's sentence. The sentencing guidelines were developed to provide uniformity between similarly situated defendants to keep with our constitutional concept of a unified judiciary. *People v Weathington*, 183 Mich App 360, 364-365; 454 NW2d 215 (1990) (citation omitted). Therefore, a trial court should consider the sentences of codefendants. *Id.* However, this Court has recognized that the disparity between codefendants' sentences may be explained when a codefendant cooperates with the government. *People v Page*, 83 Mich App 412, 420; 268 NW2d 666 (1978).

We find defendant's argument unpersuasive. First, the codefendant's conviction is different from defendant's: the codefendant pleaded guilty to possession of less than twenty-five grams of cocaine and apparently agreed to testify, while defendant was convicted of possession with intent to deliver less than fifty grams of cocaine and felony-firearm. Second, the codefendant cooperated with the government. Therefore, there are reasons for a disparity between the sentences. More important, defendant's sentence for possession of cocaine with intent to deliver was within the guidelines range and, therefore, is presumptively valid. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant has failed to overcome this presumption. Hence, we find that the trial court did not abuse its discretion when sentencing defendant.

Affirmed.

/s/ Myron P. Wahls
/s/ Robert P. Young, Jr.
/s/ James H. Fisher