STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERTO MARCHELO DUPREE,

Defendant-Appellant.

UNPUBLISHED
August 1, 1997

No. 186515
Muskegon Circuit Court
LC No. 92-034600 FH

Before: Young, P.J., and Gribbs and S. J. Latreille*, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction and sentence for possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15 (7401)(2)(a)(iv). Defendant pleaded guilty to being an habitual offender, second offense, and was sentenced to twelve to twenty years' imprisonment. MCL 769.10; MSA 28.1082. We affirm.

I

Defendant argues that the trial court erred by allowing him to waive his constitutional right to counsel and to proceed in pro per. During direct examination of the prosecution's first witness, the trial court granted defendant's request to represent himself and dismissed defendant's attorney. A criminal defendant has the right to represent himself. *People v Adkins*, 452 Mich 702, 720; 551 NW2d 108 (1996). However, in order for there to be a valid waiver of the right to counsel, three requirements must be met: (1) the defendant's request must be unequivocal; (2) the defendant's request must be made knowingly, intelligently, and voluntarily; and (3) the trial court must establish that the defendant's acting as his own counsel will not unduly disrupt or inconvenience the court. *Id.*; see also *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976). The trial court must also substantially comply with MCR 6.005(D) by offering the assistance of an attorney, and by advising the defendant about the possible punishment for the charged offense and the risk involved in self-representation. *Id*. at 720, 726-727.

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

Defendant first claims that his request was not unequivocal, as evidenced by his request for standby counsel. We disagree. The record in this case indicates defendant's unequivocal waiver of counsel. While defendant briefly inquired during voir dire whether defense counsel could aid him *if* he chose to represent himself, he never expressed hesitation. Moreover, defendant later stated his desire to proceed on his own without equivocation. *Adkins*, *supra* at 732-733.

Defendant also maintains that the trial court did not comply with MCR 6.005(D). We disagree. Strict compliance with the court rule is not required. In *Adkins*, *supra*, the Supreme Court explained:

> Application of the waiver of counsel procedures is the duty of the court. The trial judge is in the best position to determine whether the defendant has made the waiver knowingly and voluntarily. *United States v Berkowitz*, 927 F2d 1376, 1383 (CA 7, 1991). Further, the effectiveness of an attempted waiver does not depend on what the court says, but rather, what the defendant understands. Consequently, other facts, such as evidence of a defendant's intentional manipulation or delay of the court proceedings as a tactical decision may favor a judicial finding of a knowing and intelligent waiver. *United States v Sandles*, 23 F3d 1121, 1129 (CA 7, 1994). [*Adkins*, *supra* at 723-724.]

Similarly, the existence of a knowing and intelligent waiver depends upon the particular facts and circumstances of the case, including the defendant's background and experience. *Anderson*, *supra* at 370.

We conclude that defendant's waiver of counsel was knowing, intelligent, and voluntary. While the trial court did not explicitly inform defendant of the dangers and disadvantages of self-representation, in light of defendant's previous conviction on the charged offense,[1] he was clearly aware of the seriousness of the case, including the nature of the charge and possible punishment. Defendant was clearly aware that he had the right to have counsel represent him. Furthermore, defendant had a history of personal involvement with the criminal justice system. That defendant expressed knowledge that inconvenience to the court was a factor to consider in permitting defendant to proceed on his own clearly indicates "that he knew what he was doing and made his choice with eyes open." *Anderson*, *supra* at 371.

We find our comments in *People v Morton*, 175 Mich App 1, 8; 437 NW2d 284 (1989), to be particularly appropriate here:

> We believe that the record in this case unmistakably shows that defendant understood exactly what he was doing and chose to represent himself while fully aware of his alternatives. To permit a defendant in a criminal case to indulge in the charade of insisting on a right to act as his own attorney and then on appeal to use the very permission to defend himself in pro per as a basis for reversal of a conviction and a grant of another trial is to make a mockery of the criminal justice system and the constitutional rights sought to be protected. We would not permit it.

II

Defendant next argues that the trial court erred in admitting the cocaine evidence because it was the fruit of an unlawful detainment. However, defendant failed to preserve this issue for appeal by moving to suppress the cocaine at the retrial. *People v Carroll*, 396 Mich 408, 411-412; 240 NW2d 722 (1976); *Up & Out of Poverty Now Coalition v Michigan*, 210 Mich App 162, 167; 533 NW2d 339 (1995). A party must object to the admission of evidence at trial, and may not raise the issue for the first time on appeal absent extraordinary circumstances. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). That defendant moved to suppress the cocaine at the first trial is without consequence. The declaration of a mistrial or the granting of a new trial "'renders nugatory all trial proceedings with the same result as if there had been no trial at all.'" *People v Cheatham*, 135 Mich App 620, 623; 354 NW2d 282 (1984) (citations omitted). In any event, we find no error because the cocaine was voluntarily abandoned by defendant during a brief investigative stop and detention. *People v Chambers*, 195 Mich App 118, 121-124; 489 NW2d 168 (1992).

III

Defendant next argues that the trial court erred in overruling his objection to Officer Stout's expert testimony that the amount of cocaine possessed by defendant was consistent with an intent to deliver rather than personal use. Defendant's argument has been steadfastly rejected by this Court. See, e.g., *People v Stimage*, 202 Mich App 28, 29-30; 507 NW2d 778 (1993); *People v Williams (After Remand)*, 198 Mich App 537, 541-542; 499 NW2d 404 (1993); *People v Ray*, 191 Mich App 706, 707-708; 479 NW2d 1 (1991). We decline defendant's invitation to hold otherwise.

IV

Next, defendant argues that he was denied his due process rights by the prosecution's failure to produce a confidential informant at trial. Defendant failed to preserve this issue for appeal by raising it at the retrial in a motion for a post-trial *Robinson*[2] hearing or in a motion for a new trial. *People v Pearson*, 404 Mich 698, 722-723; 273 NW2d 856 (1979); *People v Jackson*, 178 Mich App 62, 66; 443 NW2d 423 (1989). Defendant's objection following the first trial was insufficient. See *Cheatham*, *supra* at 620. We therefore decline to address this issue. In any event, we note that defendant did not request the prosecution at either trial to produce the informant or otherwise indicate any dissatisfaction with the informant's absence.

Defendant's alternative claim is that he was denied effective assistance of counsel because his attorney failed to demand identification and production of the confidential informant before trial. We agree with the prosecution that defendant has not shown that the contents of the informant's communications would have been helpful to the defense. Therefore, defendant was not denied effective assistance of counsel on this basis. See *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

V

Defendant also claims that the trial court erred in sentencing him because his habitual offender sentence improperly punishes him for his status as an habitual criminal and because that sentence is disproportionate. We disagree. Defendant's first argument is without merit. As this Court stated in *People v Curry*, 142 Mich App 724; 371 NW2d 854 (1985):

> The Legislature did not intend to make a substantive crime out of being an habitual offender, but for deterrent purposes intended to augment the punishment for the second or subsequent offenders. The habitual offender legislation merely provides a procedure after conviction for the determination of a fact which the court is required to consider in imposing sentence. It requires the courts to take into consideration the persistence of the defendant in his criminal course. [*Id*. at 732.]

We likewise reject defendant's claim that his habitual offender sentence is disproportionate. According to his presentence report, defendant's criminal history began in 1986 when he was 19 years old. Defendant has been convicted of four felonies. In addition to drug trafficking, defendant has engaged in violent crime, namely assault with a dangerous weapon. His continued pattern of offenses demonstrates disregard for the seriousness of criminal behavior. In fact, defendant "walked away from [the Detroit Metro Furlough Unit] on 4/29/92 and involved himself in the instant offense the following day." Finally, as the trial court noted, defendant committed two major misconducts while he was incarcerated awaiting retrial on the instant offense. Defendant's twelve year minimum sentence is proportionate considering the circumstances surrounding this offense and this offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). We find no abuse of discretion in the trial court's sentencing decision.

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Roman S. Gribbs
/s/ Stanley J. Latreille

[1] Defendant was originally convicted of the charged offense on July 28, 1992. However, the trial court granted defendant's request for a new trial based on the erroneous introduction of statements made by defendant during plea negotiations. The record indicates that defendant was not pleased with his court-appointed attorney in that case either.

[2] *People v Robinson*, 390 Mich 629; 213 NW2d 106 (1973).