

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON HAROLD WHITE,

Defendant-Appellant.

UNPUBLISHED

September 30, 1997

Nos. 189018 & 196743

Jackson Circuit Court

LC No. 95-071948-FH

Before: Markey, P.J. and Neff and Smolenski, JJ.

PER CURIAM

In a jury trial, defendant was convicted of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(iv); MSA 14.15(7401(2)(iv). After being adjudicated a third habitual offender, he was initially sentenced to 13 years 4 months to 40 years' imprisonment. (Docket No. 189018). Subsequently, the trial court granted resentencing, imposing a punishment of eight to twenty years' imprisonment (Docket No. 196743). These appeals are being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that his trial counsel was ineffective in calling defendant to the witness stand, where defendant essentially admitted all the facts and elements of the crime charged, and then in compounding that error by failing to seek a conviction of the lesser included offense of possession of cocaine under 25 grams. To obtain appellate relief on a claim of ineffective assistance of counsel, defendant must first show that counsel's performance was so deficient as to fall below an objective standard of reasonableness for minimally competent criminal defense attorneys. Second, defendant must show that such derelictions in counsel's qualitative performance level prejudiced him in some cognizable way. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). Given the lack of any legally viable defense, defendant's trial counsel apparently sought to invoke the sympathy of the jury and obtain an acquittal based on nullification. Even assuming, arguendo, that such a strategy would not be regarded as reasonable by minimally competent criminal defense practitioners, defendant cannot show prejudice because the record fails to demonstrate a reasonable probability that, if he had not testified, the jury would not have convicted him of the crime charged. *Motley v Collins*, 18 F3d 1223, 1227 (CA 5, 1994). Given the overwhelming evidence against defendant, counsel's selection from the available but unpalatable options does not represent a gross deficiency in performance. *People v LaVearn*, 448 Mich 207, 214-215; 528 NW2d 721 (1995).

Defendant further contends that the prosecutor deprived him of a fair trial by cross-examining him concerning (1) “other crimes,” namely other occasions on which, to support his cocaine addiction, he acted as middleman to put buyers and sellers of cocaine together so as to obtain some cocaine for his own use, and (2) the power of addiction, its economic demands on the addict, and related aspects of his conduct. There was no objection to this line of inquiry or to argument based on the resulting evidence, undoubtedly because it represented the prosecutor playing directly into the hands of the defense, buttressing defendant’s claim that his addiction compelled him to do what he could to feed his habit. Defense counsel did not concede defendant’s guilt of the crime charged but sought acquittal, arguing that the only person guilty of actual delivery of cocaine was a third party, not defendant. Although the strategy was unsuccessful, defendant was not thereby deprived of a fair trial. *People v Krystopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988).

Defendant contends that his eight to twenty year sentence, after resentencing, is disproportionate to the offense and the offender. This Court is required to note at the outset a jurisdictional matter. The trial court was without authority to resentence defendant; resentencing was sought only because the trial court allegedly erred in scoring the sentence guidelines at the original sentencing and because the sentence imposed was disproportionate. Guideline scoring errors do not present a cognizable basis for trial or appellate courts to find a sentence invalid, which is a prerequisite to resentencing. *People v Mitchell*, 454 Mich 145, 176-178; 560 NW2d 600 (1997). Furthermore, the guidelines were completely irrelevant to defendant’s sentence because he was adjudicated a third habitual offender. *People v Edgett*, 220 Mich App 686; 560 NW2d 360 (1996). The trial court was also without authority to resentence defendant based on a perception that the sentence originally imposed was disproportionate; the trial court’s actions represent a usurpation of power exclusively confided to the Appellate Courts. *People v Wybrecht*, 222 Mich App 160, 168-170; 564 NW2d 903 (1997).

Accordingly, the trial court was without authority to resentence defendant, and this Court must correct this jurisdictional excess by reinstating defendant’s original sentence. Reviewing that sentence for proportionality, this Court notes that because of defendant’s third offender status, appellate review is limited to whether the trial court abused its sentencing discretion. *People v Hansford (After Remand)*, 454 Mich 320; 562 NW2d 460 (1997). Here, defendant’s prior criminal record consists of a conviction for forgery and one for conspiracy to deliver cocaine. While these charges were pending and defendant was free on bond, he perpetrated another delivery of cocaine, for which he was convicted. Defendant has thus established that he is not only incapable of adhering to the legal norms of society, but that he has no respect for the criminal justice system; indeed, this offense was committed while defendant was on parole. The fact that the sentence for this offense is consecutive to that for the subsequent delivery conviction is irrelevant to a proportionality analysis. *People v Miles*, 454 Mich 90; 559 NW2d 299 (1997). On this record there has been no abuse of the trial court’s sentencing discretion.

Enhanced conviction affirmed; sentence imposed after resentencing vacated and cause remanded to the Jackson Circuit Court for reinstatement of defendant’s original sentence. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ Janet T. Neff

/s/ Michael R. Smolenski