

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN JOSEPH SELLORS,

Defendant-Appellant.

UNPUBLISHED

November 21, 1997

No. 190927

Macomb Circuit Court

LC No. 94-001439 FC

Before: Jansen, P.J., and Fitzgerald and Young, JJ.

MEMORANDUM.

Defendant pleaded guilty to conspiring to deliver 50 grams or more, but less than 225 grams of cocaine, MCL 333.7401(1) and (2)(a)(iii); MSA 14.15(7401)(1) and (2)(a)(iii), and was sentenced to six to twenty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant pleaded guilty to participating in a conspiracy to deliver cocaine from "1988 to 1994." At the time defendant entered into the conspiracy, the mandatory minimum sentence for delivery of more than 50 grams or more but less than 225 grams of cocaine was five years. 1987 PA 275. During the course of defendant's participation in the conspiracy, the Legislature increased the mandated minimum penalty to ten years. 1989 PA 143. Defendant asserts that the trial court's reliance on the ten-year minimum sentence when fashioning defendant's sentence violated the Ex Post Facto Clause of US Const, art I, §9 and Const 1963, art 1, § 10. We disagree.

Once formed, a conspiracy continues to exist until consummated, abandoned, or otherwise terminated by some affirmative act. *People v Thomas Hintz*, 69 Mich App 207, 221; 244 NW2d 414 (1976). Because of the ongoing nature of the instant offense, and because defendant participated in the conspiracy after the effective date of the statutory amendment, the amendment cannot be said to have rendered defendant's participation in the conspiracy punishable in a manner in which it was not punishable when committed. *People v Moon*, 125 Mich App 773; 337 NW2d 293 (1983)¹; *Braverman v United States*, 317 US 49; 63 S Ct 99; 87 L Ed 23 (1942).

For the same reason, we reject defendant's claim that the trial court was laboring under a misconception of law when it indicated that the mandatory minimum sentence for the instant offense was

ten years, *People v Whalen*, 412 Mich 166, 170; 312 NW2d 638 (1981), and that counsel rendered ineffective assistance, *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

Defendant may not challenge the proportionality of his sentence where the record indicates that the trial court informed him of the sentence it intended to impose and then afforded defendant the opportunity to withdraw his plea and defendant reaffirmed his guilty plea with knowledge of the sentence to be imposed. *People v Ward*, 206 Mich App 38, 44; 520 NW2d 363 (1994).

Affirmed.

/s/ Kathleen Jansen

/s/ E. Thomas Fitzgerald

/s/ Robert P. Young, Jr.

¹ The alternative would be to charge defendant with two conspiracies, one from 1988 to September 27, 1989 and one from September 28, 1989 to the time of arrest, the former punishable by a mandatory minimum of five years' imprisonment, the latter by ten years' imprisonment. See *United States v McKnight*, 253 F2d 817 (CA 2, 1958).