STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

XAVIER TAYLOR,

Defendant-Appellant.

UNPUBLISHED
December 19, 1997

No. 191253
Recorder's Court
LC No. 95-001195-FH

Before: Michael J. Kelly, P.J., and Cavanagh and N. J. Lambros*, JJ.

PER CURIAM.

Defendant was charged with one count of delivery of less than fifty grams of a mixture containing cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and one count of possession with intent to deliver less than fifty grams of a mixture containing cocaine, *id*. A jury convicted defendant of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(2)(a)(v). The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11; MSA 28.1083, to four to eight years' imprisonment. Defendant appeals as of right.

Defendant first argues that the trial court erred in failing to dismiss the charges on the basis that he was entrapped. A trial court's findings regarding entrapment will not be reversed unless they are clearly erroneous. *People v Fabiano*, 192 Mich App 523, 525; 482 NW2d 467 (1992).

The purpose of the entrapment defense is to deter law enforcement efforts that have as their effect the instigation or manufacture of a new crime by one who would not otherwise have been so disposed. *People v Juillet*, 439 Mich 34, 52; 475 NW2d 786 (1991). A finding of entrapment is appropriate where (1) the police engaged in impermissible conduct that would have induced a person similarly situated as the defendant, though otherwise law-abiding, to commit the crime, or (2) the police engaged in conduct so reprehensible that it cannot be tolerated. *Fabiano, supra* at 526.

At the evidentiary hearing, the trial court found the testimony of Officer Sumbry more credible than that of defendant. Officer Sumbry testified that he approached defendant, who was standing on a

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

street corner, and inquired whether defendant had any drugs. Defendant asked Officer Sumbry what he needed, and Officer Sumbry responded, "[L]et me get one." Defendant then reached into his pocket, pulled out a bag containing cocaine, and gave it to Officer Sumbry in exchange for twenty dollars.

On the basis of this testimony, we find that the police neither engaged in impermissible conduct that would have induced a law-abiding person similarly situated as defendant to commit the crime nor engaged in conduct so reprehensible that it cannot be tolerated. See *id*. The use of undercover agents does not constitute entrapment. *People v Juarez*, 158 Mich App 66, 74; 404 NW2d 222 (1987). Furthermore, the mere furnishing of an opportunity to commit a crime is not entrapment. *People v Williams*, 196 Mich App 656, 663; 493 NW2d 507 (1992). We conclude that the trial court did not clearly err in finding that defendant was not entrapped.

Defendant further asserts that Officer Sumbry entrapped him by offering twenty dollars for a rock of cocaine that was only worth five dollars. However, because there was no evidence presented at the hearing regarding the value of the cocaine purchased by Officer Sumbry, defendant has not established that the trial court clearly erred. Moreover, Officer Sumbry's testimony indicates that defendant was ready and willing to make the sale before any price was mentioned.

Defendant next claims that the sentence imposed violated the principle of proportionality. In arguing that his sentence was disproportionate, defendant relies on the sentencing guidelines range of twelve to thirty-two months. However, appellate review of habitual offender sentences using the sentencing guidelines in any fashion is inappropriate. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). Defendant's sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Defendant also contends that the trial court's statement that he was "a seller and a con" indicates that the court believed defendant was guilty of delivery of less than fifty grams of cocaine and improperly considered that belief when sentencing defendant. However, where there is record support that a greater offense has been committed by a defendant, it may constitute an aggravating factor to be considered by the trial court at sentencing. *People v Shavers*, 448 Mich 389, 393; 531 NW2d 165 (1995). Thus, because there was record support that defendant was guilty of possession with intent to deliver cocaine, the trial court could properly take into account that evidence as an aggravating factor in sentencing defendant.

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Nicholas J. Lambros