

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROGER THAYER,

Defendant-Appellant.

UNPUBLISHED

September 24, 1999

No. 215041

Ingham Circuit Court

LC No. 98-073120 FH

Before: Talbot, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Following a one-day jury trial, defendant was convicted of possessing less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12(1)(b); MSA 28.1084(1)(b), to ~~2½~~ 15 years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that the jury verdict was against the great weight of the evidence. However, defendant failed to preserve this issue for appeal by timely moving for a new trial. MCR 2.611(A)(1)(e); *People v Patterson*, 428 Mich 502, 514-515; 410 NW2d 733 (1987); *People v Winters*, 225 Mich App 718, 729; 571 NW2d 746 (1997). In any event, we have reviewed the lower court record and conclude that the verdict was not against the great weight of the evidence.

Defendant also contends that he is entitled to resentencing because the trial court erroneously believed that it had to impose a fifteen-year maximum sentence under the habitual offender statute. We disagree.

After a contextual review of the sentencing proceedings, we are not convinced that the trial court's comment that, "[i] can no more change the 15-year maximum than I can make the sun rise in the west. It's just not possible," establishes that it incorrectly believed it had to impose a fifteen-year maximum term. Viewed in context, the court was merely responding to defendant's plea that he not be sentenced as an habitual offender by explaining that the applicable statute, which permitted a maximum

fifteen-year sentence, required that defendant be sentenced as an habitual offender. The trial court's comment does not indicate that it believed it was bound to sentence defendant to the fifteen-year maximum term or that it lacked discretion to set the maximum term. See *People v Beneson*, 192 Mich App 469, 471; 481 NW2d 799 (1992). To the contrary, the fact that the court subsequently focused on defendant's pattern of recidivism while on probation and his inability to assimilate to the requirements of community supervision before it actually imposed the sentence, supports the position that the trial court recognized its discretion and exercised it by sentencing defendant to the statutory maximum. See *People v Gomer*, 206 Mich App 55, 59; 520 NW2d 360 (1994); *People v Worrell*, 111 Mich App 27, 39; 314 NW2d 516 (1981), rev'd on other grounds 417 Mich 617; 340 NW2d 612 (1983). Because there is "no clear evidence that the sentencing court believed it lacked discretion, the presumption that a trial court knows the law must prevail." *People v Alexander*, 234 Mich App 665, 675; ___ NW2d ___ (1999), citing *People v Garfield*, 166 Mich App 66, 79; 420 NW2d 124 (1988).

Affirmed.

/s/ Michael J. Talbot

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey