

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL BAILEY,

Defendant-Appellant.

UNPUBLISHED

March 8, 2005

No. 251405

Wayne Circuit Court

LC No. 03-006741-01

Before: Fort Hood, P.J., and Griffin and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and his sentence of six years, four months to twenty years, imposed after a jury trial. We affirm.

Police officers observed defendant, who was sitting in the driver's seat of a vehicle, conduct a transaction in which he handed a small object to a person in exchange for currency. The police found eighteen rocks of crack cocaine under the driver's seat. The person with whom defendant conducted the transaction was found to have dropped a bag containing four rocks of crack cocaine. Defendant's passenger testified that neither he nor defendant sold narcotics to the person who came to the vehicle window, and that the narcotics belonged to him.

The trial court sentenced defendant as a fourth habitual offender to six years, four months to twenty years in prison, with credit for 103 days. Defendant's minimum term was within the statutory sentencing guidelines range of nineteen to seventy-six months.

Defendant argues that the trial court denied him a fair trial by failing to instruct the jury on the lesser included offense of possession of less than fifty grams of cocaine, MCL 333.7403(2)(a)(iv), and that trial counsel rendered ineffective assistance by failing to request the instruction. We disagree and affirm defendant's conviction.

A party who forfeits a right might still obtain appellate review, but a party who waives a known right cannot seek appellate review of a claimed deprivation of the right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). A party waives review of the propriety of the jury instructions when he approves the instructions at trial. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Defendant approved the jury instructions as read by the trial court, and thus waived this issue on appeal. *Carter, supra; Lueth, supra*. Moreover, the decision to forego

the instruction of any lesser offense may have been trial strategy, and we do not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Accordingly, the challenge to the instruction based on ineffective assistance of counsel is without merit.

Defendant argues that he is entitled to resentencing because the trial court incorrectly scored Offense Variable (OV) 13, MCL 777.43, continuing pattern of criminal behavior, at ten points, and OV 15, MCL 777.45, aggravated controlled substance offenses, at five points. We disagree and affirm defendant's sentence.¹

Under the sentencing guidelines act, if a minimum sentence is within the appropriate guidelines range, we must affirm the sentence and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied upon in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). A party may not raise on appeal an issue challenging the scoring of the guidelines unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand. MCL 769.34(10); *Kimble, supra*.²

In calculating the sentencing guidelines the trial court has discretion to determine the number of points to be scored, provided that evidence in the record supports a particular score. A scoring decision for which there is any evidence in the record will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Defendant has several prior convictions; however, a criminal offense need not have resulted in a conviction in order for it to be counted in the scoring of OV 13. MCL 777.43(2)(a). Similarly, defendant denies that his conduct constituted trafficking as that term is defined by MCL 777.45(2)(c), but does not make specific references to evidence in the record to support his argument. He has not shown that the trial court's scoring of OVs 13 and 15 was not supported by some evidence in the record. *Hornsby, supra*.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Richard Allen Griffin
/s/ Pat M. Donofrio

¹ Defendant has not furnished a copy of the presentence report to support his challenge to his sentence, as required by MCR 7.212(C)(7).

² Defendant filed a motion to remand for resentencing, which we denied.