

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES FLANDERS,

Defendant-Appellant.

UNPUBLISHED
November 6, 1998

No. 198859
Recorder's Court
LC No. 96-002713

Before: Saad, P.J., and Wahls and Gage, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of carrying a concealed weapon, MCL 750.227; MSA 28.424, delivery of less than fifty grams of heroin, MCL 333. 7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and possession with intent to deliver less than fifty grams of heroin, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). He was sentenced to 30 to 240 months' imprisonment for the delivery conviction, 30 to 240 months' imprisonment for the possession with intent to deliver conviction, and time served for the concealed weapon conviction. Defendant's sentences for delivery and possession with intent to deliver are to run consecutively. Defendant now appeals as of right. We affirm.

On appeal, defendant first argues that his conviction and sentence are void. Specifically, he contends that the trial court did not have jurisdiction due to a violation of the 180-day rule. However, defendant was an escapee at the time the instant offense was committed, and the 180-day rule is simply inapplicable. MCL 780.131(2)(b); MSA 28.969(1)(2)(b).

Defendant next argues that his right to be free from double jeopardy was violated when he was convicted of possession with intent to deliver heroin and delivery of heroin arising out of the same incident. We disagree. The guarantee against double jeopardy protects against multiple prosecutions and multiple punishments for the "same offense." Where multiple punishments for the "same offense" are at issue, the intent of the Legislature is the determining factor under the Double Jeopardy Clause of the United States and Michigan Constitutions. *People v Denio*, 454 Mich 691, 706; 564 NW2d 13 (1997).

In the instant case, defendant sold heroin to an undercover officer. After defendant's arrest, the police seized additional heroin from the same spot where the undercover officer had seen defendant take the heroin involved in the preceding sale. Defendant was subsequently found guilty of delivering certain drugs to the undercover officer, and of possessing with the intent to deliver the drugs seized after his arrest. Under these circumstances, defendant's convictions rested on different facts and he was clearly guilty of two separate offenses.¹ Thus, defendant was not subject to multiple punishments for the same offense and the Double Jeopardy clauses are simply inapplicable.

Defendant next argues that the evidence was not sufficient to support his convictions. We disagree. When reviewing a claim of insufficient evidence following a bench trial, we must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995).

The elements of delivery of heroin are, (1) the actual, constructive, or attempted transfer from one person to another, (2) of heroin. *People v Maleski*, 220 Mich App 518, 521; 560 NW2d 71 (1996). Here, a police officer testified that he was given \$10 of prerecorded secret service funds and instructions to attempt an undercover purchase. He went to the back of the suspected drug house and knocked on a window. He testified that defendant came to the window and "asked me what I need." The officer told defendant, "let me get two," meaning two packs of heroin. He then gave defendant the secret service funds, watched defendant walk over to a shelf in the kitchen and remove a plastic baggy. Defendant then returned with two tin foil packs of heroin. The officer then returned to his undercover vehicle and radioed the details of the transaction, including a description of defendant, to an arrest team. This evidence, when viewed in the light most favorable to the prosecution, was sufficient to show delivery of heroin.

Possession with intent to deliver less than fifty grams of heroin requires proof of four elements: (1) the substance in question must be shown to be heroin; (2) the heroin must be in a mixture less than fifty grams in weight; (3) it must be shown that defendant was not authorized to possess the substance; and (4) it must be shown that defendant knowingly possessed the heroin with intent to deliver. *People v Lewis* 178 Mich App 464, 468; 444 NW2d 194 (1989). Possession may be established by evidence that the defendant exercised control over the narcotic and knew that it was present. *People v Hellenthal*, 186 Mich App 484, 486; 465 NW2d 329 (1990).

Here, officers conducting a search of the kitchen pursuant to a previously obtained search warrant found a number of tin foil packs, each containing a white powdery substance. A test of the substance revealed that it contained heroin. There was testimony that defendant got the drugs that he sold the undercover officer from the same place where these additional foil packs were seized. This evidence, when viewed in the light most favorable to the prosecution, was sufficient to show defendant's guilt of possession with intent to deliver heroin as to those foil packs.

Defendant's final argument is that his sentence was disproportionately severe. We disagree. Defendant's minimum sentences for possession with intent to deliver heroin and delivery of heroin are within the sentencing guidelines range of twenty-four to ninety-six months and are therefore presumed

proportionate. *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). In determining the proportionality of an individual sentence, the cumulative length of consecutive sentences need not be considered. *People v Miles*, 454 Mich 90, 95; 559 NW2d 299 (1997) If each sentence is proportionate, the cumulative effect of the sentences is irrelevant. *People v Clark*, 207 Mich App 500, 502; 526 NW2d 357 (1994). Here, defendant failed to allege any unusual circumstances that would cause a sentence within the sentencing guidelines to be disproportionate. Under these circumstances, defendant's sentences do not constitute an abuse of discretion. *People v Sharp*, 192 Mich App 501, 505; 481 NW2d 773 (1992).

Affirmed.

/s/ Henry William Saad

/s/ Myron H. Wahls

/s/ Hilda R. Gage

¹ As another panel of this Court has observed, where the charged offenses involve delivery of certain drugs and possession with intent to deliver certain other drugs, the two crimes can be said to evolve from two separate transactions. *People v Jackson*, 153 Mich App 38, 50-51; 394 NW2d 480 (1986). This is true even where the drugs may have originally been part of the same cache. *Id.*