

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MOHAMED A. MUSLEH,

Defendant-Appellant.

UNPUBLISHED

December 29, 1998

No. 196329

Oakland Circuit Court

LC No. 95-142973 FH

95-142974 FH

95-142975 FH

95-142982 FH

Before: Smolenski, P.J., and McDonald and Saad, JJ.

PER CURIAM.

Defendant was convicted by a jury of four counts of delivery of over 50 grams but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and one count of conspiracy to deliver over 50 grams but less than 225 grams of cocaine, MCL 750.157a; MSA 28.354(1). The trial court sentenced defendant to five consecutive terms of six to twenty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant was originally represented by appointed appellate counsel, who filed a brief raising two issues. Subsequently, this Court granted defendant's motion for substitution of counsel and allowed defendant to file a supplemental brief. We address the issues raised in both briefs, beginning with those raised in the original brief.

Defendant initially argues that his constitutional right to appeal has been impeded because portions of the lower court record are missing. During trial, the courtroom's primary and backup video taping equipment malfunctioned, leaving numerous gaps in the trial transcript. Defendant argues the missing portions of the trial transcript are so significant that a new trial must be ordered. We disagree.

Defendant stipulated that the assistant prosecutor who tried the case would supplement the record with her best recollection of what had transpired at trial. He raised no objections to the supplement, and the trial court entered an order settling the record based on the parties' agreement and the supplement. On appeal, defendant has disregarded the stipulation and has argued as though no settlement of the facts was ever reached. Nevertheless, he has prepared his brief on appeal, including a concise statement of facts, based on the available transcript. Moreover, we find the record, including

the supplement, is sufficient to review defendant's claims on appeal; therefore, defendant's constitutional right to appeal is satisfied. *People v Federico*, 146 Mich App 776, 799-800; 381 NW2d 819 (1985); *People v Audison*, 126 Mich App 829, 834-835; 338 NW2d 235 (1983).

Next, defendant argues that, despite the sentencing judge's downward departure from the statutory minimum of ten years, his sentence is disproportionate under the principles set forth in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). We disagree.

Contrary to defendant's assertion, this Court is not required to consider the cumulative length of consecutive sentences when reviewing the proportionality of a sentence. *People v Miles*, 454 Mich 90, 95; 559 NW2d 299 (1997). As long as each sentence is proportionate, the cumulative effect of consecutive sentences does not render the sentence disproportionate. *People v Clark*, 207 Mich App 500, 502; 526 NW2d 357 (1994). Legislatively mandated sentences, such as the ones in this case, are presumed proportionate. *People v Ealy*, 222 Mich App 508, 512; 564 NW2d 168 (1997). Moreover, in this case, the trial court departed downward from the statutorily mandated minimum. Although a departure resulting in a disproportionately lenient sentence may warrant remand for resentencing, the prosecution has not so argued. *People v Perry*, 216 Mich App 277, 280; 549 NW2d 42 (1996). Consequently, the cumulative sentence is deemed to be proportionate and will not be vacated.

We are not convinced that the trial court failed to consider mitigating factors warranting an even further downward departure from the statutory minimum. The Legislature intended that minimum sentences for drug offenses would be followed in all but the most unusual cases. *Dean v Dep't of Corrections*, 453 Mich 448, 462-463; 556 NW2d 458 (1996). Other than his age, lack of a prior criminal record, and work history, defendant was unable to prove any substantial and compelling mitigating circumstances from independent and reliable sources. *People v Fields*, 448 Mich 58, 76-77 n 11; 528 NW2d 176 (1995). The record clearly shows that the sentencing court reviewed the factors presented by defendant and properly considered only those factors which were objective and verifiable. *Id.* at 68. Accordingly, the trial court did not abuse its discretion in sentencing defendant.

In a supplemental brief, defendant argues he was denied the effective assistance of counsel at trial. Because there was no *Ginther*¹ hearing, our review of this issue is limited to the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). After reviewing the record, we find insufficient evidence to support defendant's claim. Many of the issues raised by defendant relate to matters of trial strategy, which this Court will not second guess. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). Additionally, defendant claims counsel was ineffective because he failed to request disclosure of the confidential informant's identity. However, throughout his brief defendant refers to the confidential informant by name and claims he was somehow working with the police to help his friend, the confidential informant. In light of the fact that defendant knew the identity of the confidential informant, we fail to see how defendant was prejudiced by counsel's failure to move for a hearing to discover the identity of the informant. Regarding defendant's claim that counsel should have moved for a hearing on the issue of entrapment, the record contains insufficient evidence to verify defendant's allegations. *Williams, supra* at 414.

Defendant also argues in his supplemental brief that the cumulative effect of errors at his trial denied him a fair trial. Defendant's argument merely repeats his allegations that counsel was ineffective and that portions of the lower court record are missing. We have found that defendant did not receive ineffective assistance of counsel and that the lower court record is sufficient to allow complete review of defendant's claims. Accordingly, there are no errors to create a cumulative effect and deny defendant a fair trial.

Finally, defendant argues he received ineffective assistance of appellate counsel because his first appellate attorney did not raise the issue whether defendant was denied ineffective assistance of counsel at trial. Defendant raised the issue whether trial counsel was ineffective in his supplemental brief, and we have determined it to be without merit. Accordingly, defendant is not entitled to relief. See *People v Hurst*, 205 Mich App 634, 642; 517 NW2d 858 (1994).

Affirmed.

/s/ Michael R. Smolenski

/s/ Gary R. McDonald

/s/ Henry William Saad

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).