SPECIAL PANEL

PRIORITY

#12

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

VERNON R. McCARTY,

Defendant-Appellant.

No. 59497
Application for
Delayed Appeal
Motion to Dismiss

/

TO: Judges Bashara, PJ, R. B. Burns and Brennan, JJ
FROM: John H. Stenger
DATE: October 9, 1981; for immediate submission.

COMMISSIONER'S REPORT

FACTS:

Defendant seeks a delayed appeal of a December 17, 1980 decision of Judge James S. Thorburn, Oakland County Circuit Court, which denied three constitutional challenges to the provisions of the public health code which proscribe possession of cocaine. MCL 333.7214(a)(iv); MSA 14.15(7214)(a)(iv) and MCL 333.7403(2)(a); MSA 14.15(7403)(2)(a). Prosecuting attorney moves to dismiss the application because defendant has not obtained a certified concise statement of facts, allegedly as required by GCR 1963, 806.3 and 806.4(1).

The case is assigned to this panel because you are scheduled to hear the prosecuting attorney's appeal as of right in the same case (People v McCarty, Docket No. 56170) on the Lansing case call October 13, 1981. In that case, the prosecutor has appealed as of right from Judge Thorburn's December 18, 1980 order quashing the information in the prosecution based on yet another of defendant's constitutional challenges to the statutes.

On June 26, 1980, defendant was arrested and charged with possession of cocaine, contrary to the statute cited above. The cocaine mixture defendant allegedly possessed was in an amount of 650 grams or more and, hence, the penalty under § 7403 of the Code is mandatory life imprisonment. MCL 333.7403(2)(a)(i); MSA 14.15(7403)(2)(a)(i). In circuit court, defendant moved to quash the information on four constitutional grounds: (1) mandatory

life sentence violates constitutional protection against cruel and/or unusual punishment, (2) the Code violates the title-object limitation of Const 1963, art 4, § 24, (3) the statute denies equal protection by classifying offenses according to the quantity of the mixture and (4) the statute denies equal protection by classifying cocaine as a narcotic drug.

At hearing December 17, 1980, Judge Thorburn rejected the last three constitutional challenges, but accepted the first, saying:

> "The Court is of the opinion that a mandatory life sentence without the possibility of parole--in other words, it makes it the equivalent of premeditated murder--is cruel and unusual punishment." Tr, pp 6, 7.

By order entered December 18, 1980, Judge Thorburn granted defendant's motion to quash the information and dismiss the prosecution.

The prosecutor appealed as of right by timely claim of appeal. People v McCarty, Docket No. 56170. In his brief on appeal, the prosecutor briefed only the cruel and unusual punishment issue. In his answer brief, defendant briefed that issue and his three other constitutional challenges to the Code. The Prosecutor moved to strike the latter arguments from defendant's brief on the grounds that defendant had not independently appealed to raise those issues. By order entered August 14, 1981, the panel of Judges Cavanagh, Kelly, and Beasley (dissenting) granted the prosecuting attorney's motion to strike, without prejudice to defendant's raising the issues by application for leave to appeal. The present application is defendant's response to that order.

ISSUES:

I. "WHETHER THE PENALTY OF MANDATORY LIFE IMPRISONMENT FOR POSSESSION OF OVER 650 grams OF COCAINE UNDER MCLA 333.7403 VIOLATES THE CRUEL AND/OR UNUSUAL PUNISHMENT PROVISIONS OF THE UNITED STATES CONSTITUTION AMENDMENT VIII OR THE MICIGAN CONSTITUTION 1963, ARTICLE I, SECTION 16.

II. "WHETHER 1978 PA 368, AND SPECIFICALLY MCLA 333.7401 ET SEQ, ARE UNCONSTITUTIONAL IN VIOLATION OF MICHIGAN CONSTITUTION 1963, ARTICLE IV, SECTION 24 IN THAT ITS OBJECT OF PROVIDING CRIMINAL SANCTIONS CONCERNING CONTROLLED SUBSTANCES IS NOT EXPRESSED IN ITS TITLE.

III. "WHETHER THE CLASSIFICATION OF CONTROLLED SUBSTANCES BASED UPON QUANTITY OF MIXTURE RATHER THAT QUANTITY OF CONTROLLED SUBSTANCE VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF MICHIGAN.

IV. "WHETHER THE CLASSIFICATION OF CONTROLLED SUBSTANCES UNDER WHICH COCAINE, A NON-NARCOTIC DRUG, IS PLACED IN THE SAME CLASSIFICATION AS NARCOTIC DRUGS VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF MICHIGAN."

FINDINGS:

The prosecutor's motion to dismiss will be considered first. The prosecutor contends that, since Judge Thorburn dismissed the prosecution, defendant is not an "aggrieved party" entitled to appeal as of right under GCR 1963, 806.1. His only avenue of appeal is by application for leave to appeal, the prosecutor says, and such an application requires a certified concise statement of facts under subrules 806.3 and 806.4(1). Since defendant has not obtained a certified concise statement of facts, the prosecutor concludes, his application should be dismissed.

The objection is a technical one and ought to be disregarded. First of all, whether or not defendant is an aggrieved party entitled to appeal at all is a moot question in light of this Court's order in the companion case which struck portions of defendant's brief without prejudice to his raising the issues by application. That ruling establishes for this case, as the law of the case, defendant's right to appeal by application. Second, the requirement of a certified concise statement under 806.3 for applications for leave to appeal is imposed because most applications for leave to appeal are from interlocutory orders where no transcript or complete record has been made below. The certified concise statement substitutes for the missing transcript or record. Where, however, as here, the case has gone to final judgment and there is a complete record, including a transcript of the court's ruling, the requirement of a certified concise statement may be waived and usually is by the Clerk's office simply because a better record than a certified concise statement is available.

That should be the view the Court takes in the present case. Accordingly, it is recommended that the prosecutor's motion to dismiss be denied.

I. In his first issue, defendant contends that the automatic life sentence for possession of more than 650 grams of cocaine under § 7403(2)(a)(i) of the Code constitutes cruel and unusual punishment because it is out of proportion to the public harm and greatly in excess of the punishment imposed for that offense by any other state.

Recall that this is the constitutional ground which Judge Thorburn sustained in granting defendant's motion to quash. The cruel and unusual punishment issue is the only issue in the companion appeal and the Court will deal with it there. Accordingly, no discussion of the issue is undertaken in this report.

II. Defendant contends that the controlled substance provisions of the Public Health Code violate the title-object clause of Const 1963, art 4, § 24. The issue is without merit, having been rejected by this Court in People v Trupiano, 97 Mich App 416 (1980) and in subsequent cases. People v O'Brien, 106 Mich App 44 (1981); People v Tanksley, 103 Mich App 268 (1981); People v Lemble, 103 Mich App 220 (1981).

III. Defendant contends that the classification of controlled substance offenses, based on the quantity of the mixture rather than the quantity of the controlled substance contained in the mixture, is a violation of the due process and equal protection guarantees. The issue is without merit. It was rejected by this Court in People v Lemble, 103 Mich App 220 (1981). There, the Court said:

> "The statutory scheme of the controlled substances portion of the health code punishes those found to be in possession of greater amounts of mixtures containing controlled substances with more severe penalties. We find that the legislative policies underlying criminal penalties--rehabilitation of the offender, society's need to deter the behavior of others, the prevention of the offender from causing injury to others--are achieved by this statute's graduated punishment. People v Lorentzen, 387 Mich 167; 194 NW2d 827 (1972). The penalties that may be imposed under this statute do not shock the judicial conscience in light of the gravity of the offenses.

"Nor was this defendant denied equal protection of the laws. It is reasonable for the Legislature to impose more severe punishment for those possessing greater amounts of a mixture containing a controlled substance due to the potential for wider dissemination with an increased potential harm to society. The wording of MCL 333.7403; MSA 14.15(7403) indicates to this Court that the Legislature intended to punish defendants more severely for possession of greater amounts of 'any mixture' containing a controlled substance with the recognition that purchasers of such mixtures often have little or no idea of what percentage of the mixture is filler and what percentage is 'pure' drug. The greater the quantity of the mixture, regardless of the degree of purity, the greater the potential harm to society. Therefore, the different treatment for persons in different situations under the code is proper because it is based on the object of the legislation, deterrence of the distribution of the drug. People v Chapman, 301 Mich 584; 4 NW2d 18 (1942)." 103 Mich App 222, 223.

IV. Finally, defendant argues that cocaine is a non-narcotic drug and its classification as a schedule 2 drug with narcotics violates equal protection and due process.

The argument is not meritorious. Although no Michigan decision has been found on point, federal and national authorities uniformly reject the contention. See, for example, US v Delagarza, 650 F2d 1166 (CA 10, 1981); US v Stieren, 608 F2d 1135 (CA 8, 1979); US v Marshall, 532 F2d 1279 (CA 9, 1976); US v Smaldone, 484 F2d 311 (CA 10, 1973); Wolkind v Selph, 495 F Supp 507 (ED Va, 1980); US v Hobbs, 392 F Supp 444 (Mass, 1975); State v Bonanno, 384 So2d 355 (La Sup Ct, 1980); State v Erickson, 574 P2d 1 (Ala, 1978). The rationale usually employed by the courts is that the classification of a drug is a legislative prerogative, having a reasonable relationship to the object of limiting trafficking in a substance having a high potential for abuse. Thus, for example, United States v Stieren, supra, explains:

"It is within the legislative prerogative to classify cocaine, which is a non-narcotic central nervous system stimulant, as a narcotic for penalty and regulatory purposes. [Citation omitted.] The use of cocaine poses serious problems for the community and has a high potential for abuse. Congress' choice of penalty reflects a societal policy which must be adhered to by the courts. Congress has the power to reclassify cocaine. This power has been delegated to the Attorney General. [Citation omitted.] If cocaine is to be reclassified, defendant's argument should be made to the legislative branch, not the courts."

Defendant's argument is without merit even on the authorities he cites. He relies on two cases, but State v Erickson, supra, rejected the equal protection claim. The other

case relied on, People v McCarty, 93 Ill App 3d 898; 418 NE2d 26 (Ill App, 1981), similarly rejected the contention that the classification of cocaine as a controlled substance is unconstitutional. There, the court said:

"We reject, however, defendant's claim that the classification of cocaine as a schedule II controlled substance is unconstitutional. Although Dr. Siegal testified that cocaine is the least dangerous of those substances contained in schedule II, there is no evidence from which the effects of cocaine can be compared with schedule III or IV controlled substances. We agree with the State that cocaine's potential for abuse may be greater than schedule III substances, even though it is the least dangerous drug contained in schedule II. Defendant has not met his burden with respect to cocaine's classification as a schedule II controlled substance." 418 NE2d 29.

People v McCarty, supra, makes an important distinction which this Court might want to keep in mind in its consideration of the cruel and unusual punishment argument in the companion appeal. As noted, People v McCarty rejects the claim that the classification of cocaine as a controlled substance is unconstitutional. However, the court agreed that the classification of cocaine as a "narcotic drug" is an improper classification which denies equal protection because it subjects defendant to a higher penalty than for dealings in similar non-narcotic drugs. In view of that holding, the Illinois court simply reduced defendant's conviction from a class 2 felony to a class 3 felony and remanded for resentencing.

In conclusion, there is no merit in defendant's argument that inclusion of cocaine as a schedule II controlled substance is unconstitutional as a denial of equal protection. Note especially that Michigan, unlike Illinois apparently, does not classify cocaine as a narcotic, but does classify it as a non-narcotic substance within schedule II which includes otherwise only narcotic drugs.

If defendant's argument on this point has any force, it is directed to the cruel and unusual punishment argument, not to the equal protection classification argument. As noted, the federal courts uniformly uphold the classification of cocaine as

a schedule II substance under the Comprehensive Drug Abuse Prevention and Control Act, 21 USC § 801 et seq. However, the maximum penalty under the federal law for possession of cocaine (a non-narcotic, schedule II non-narcotic drug) is not more than 5 years, a fine of not more than $15,000, or both. 21 USC § 841(b)(1)(B). Contrast that with Michigan's law which punishes possession of large amounts of cocaine with mandatory life imprisonment.

In summary, it appears that cocaine may be classified along with narcotic drugs as a schedule II controlled substance without offending equal protection guarantees, but that classification might result in cruel and unusual punishment because it results in a punishment way out of proportion to the punishment imposed by other states and the federal law for similar offenses.

RECOMMENDATION:

It is recommended that application for delayed appeal be denied for lack of merit in the grounds presented. None of the three constitutional issues considered in this application is meritorious.

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AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of , on the day of in the year of our Lord one thousand nine hundred and eighty

Present the Honorable

Presiding Judge

Judges

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

-v-

VERNON R. McCARTHY,

Defendant-Appellant.

Docket No. 59497
L.C. No. 80 45811 FY

In this cause an application for delayed appeal is filed by defendant-appellant, and a motion to dismiss having been filed by plaintiff-appellee, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application for delayed appeal be, and the same is hereby DENIED for lack of merit in the grounds presented.

IT IS FURTHER ORDERED that the motion to dismiss be, and the same is hereby DENIED.

STATE OF MICHIGAN--ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this day of in the year of our Lord one thousand nine hundred and eighty

Clerk