STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, UNPUBLISHED
May 3, 1996

Plaintiff-Appellee,

v No. 169513
LC No. 92464407 FC

DAVID ALAN WALTERS,

Defendant-Appellant.

Before: Fitzgerald, P.J., and Corrigan and C.C. Schmucker,* JJ.

PER CURIAM.

Defendant appeals of right his conviction by jury of conspiracy to deliver over 650 grams of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), and MCL 750.157a; MSA 28.354(1), and delivery of over 650 grams of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i). Defendant also appeals his sentence to two consecutive mandatory terms of life imprisonment. We affirm.

On July 10, 1991, defendant David Walters negotiated the sale of a kilogram of cocaine with DEA informant Karl Stewart. In exchange for a reduced sentence on criminal charges, including conspiracy to deliver heroin, Stewart agreed to help authorities catch drug traffickers.

In early July, 1991, defendant told Stewart that he could sell Stewart between two and five kilograms of cocaine. At a meeting on July 10, 1991, defendant introduced Stewart to two other men, David Osborn and Ernesto Galarza. Defendant said that he could obtain one kilogram of cocaine in a few days, and that he would then arrange for Osborn to complete the sale to Stewart.

While under police surveillance, Stewart met Osborn on July 15, 1991, in a parking lot. Osborn said that he would arrange a later meeting, and left the lot. Authorities followed Osborn to defendant's house. Osborn testified that Alejo Gonzalez arrived at defendant's house, and defendant assured them that they should consummate the deal. Osborn later picked up Stewart in another parking

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* Former Circuit judge, sitting on the Court of Appeals by assignment.

lot, then picked up Galarza and Gonzalez. Stewart gave $27,000 to Osborn; Osborn testified that defendant was to receive $500. As the men returned to Stewart's car, the police arrested Osborn, Stewart, Galarza, and Gonzalez. Authorities later arrested defendant.

Defendant first argues that the authorities entrapped him. Because defendant failed to raise the entrapment issue prior to sentencing, he has waived this issue. *People v Crall*, 444 Mich 463, 464; 510 NW2d 182 (1993), *People v Bailey No 1*, 439 Mich 897; 478 NW2d 475 (1991).

Defendant next asserts that his sentence of mandatory life in prison constitutes cruel and unusual punishment, relying on *People v Bullock*, 440 Mich 15; 485 NW2d 866 (1992). Our Supreme Court has already determined that *Bullock* does not apply to the offenses of delivery and conspiracy to deliver. *People v Fluker*, 442 Mich 891; 498 NW2d 431 (1993), *People v Lopez*, 442 Mich 889; 498 NW2d 251 (1993). Further, the mandatory minimum sentence of life in prison without parole for possessing over 650 grams of cocaine with the intent to deliver is not cruel or unusual punishment. *People v Bahoda*, 202 Mich App 214, 220; 508 NW2d 170 (1993), rev'd on other grounds 448 Mich 261 (1995).

Defendant next contends that the circuit court abused its discretion by allowing testimony from informant Stewart that defendant had recently engaged in several large cocaine sales. We review a trial court's admission of evidence under an abuse of discretion standard. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

Defendant argues that Stewart's testimony violated MRE 404(b). MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan or system in doing an act, knowledge, identity or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), our Supreme Court set forth a clarified standard for the admissibility of prior acts evidence. Generally, evidence of relevant other acts violates MRE 404(b) only when the evidence is offered exclusively to show the defendant's criminal propensity and to establish that he acted in conformity therewith. *Id.* at 65. To be admissible, evidence of other acts must: (1) be relevant to an issue other than propensity; (2) be relevant to an issue or fact of consequence at trial; and (3) not present a danger of undue prejudice that substantially outweighs the probative value of the evidence in view of the availability of other means of proof and other appropriate facts. *Id.* at 74-75.

The testimony was not admitted to show defendant's propensity to commit this crime. Because the prosecutor offer the testimony to show that defendant was capable of completing the proposed drug

transaction, and that he was part of the conspiracy, the evidence was admissible under the first *VanderVliet* prong.

The second prong involves relevancy under MRE 402, as subject to MRE 104(b). Evidence is relevant if it has any tendency to make the existence of a fact in issue more probable or less probable than it would be without the evidence. The evidence was relevant to show that defendant was capable of completing the proposed drug transaction and that defendant participated in the conspiracy. The evidence thus satisfies the second prong of *VanderVliet*.

The third prong requires a balancing test under MRE 403, which holds, in pertinent part, that relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." MRE 403. The *VanderVliet* Court found that MRE 403 determinations are best left to a "contemporaneous assessment of the presentation, credibility, and effect of testimony." *VanderVliet*, 444 Mich at 81. The circuit court had the opportunity to assess the testimony. The court determined that the evidence was not overly prejudicial. The court's ruling was not unjustified. Consequently, the evidence was admissible under the *VanderVliet* test.

Additionally, the circuit court properly admitted the evidence because the conversation was inextricably interwoven with the details of the drug transaction. Defendant was discussing his current ability to deliver drugs. He was not referring to unrelated sales made at some distant point in time. The testimony was relevant and related to the instant offense. See *People v Delgado,* 404 Mich 76, 83-84; 273 NW2d 395 (1978). The prosecutor in this case did not seek to admit the evidence to show defendant's intent or knowledge. Cf. *People v Rustin*, 406 Mich 527, 530-531; 280 NW2d 448 (1979), *People v Rosen*, 136 Mich App 745, 754; 358 NW2d 584 (1984).

Next, defendant argues that the circuit court should not have admitted testimony that he paid attorney fees for Osborn, another conspiracy participant. We initially note that both defense counsel and defendant referred to this information. Further, this issue is not preserved for review because defendant failed to timely object. *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992), MRE 103(a)(1). Moreover, defendant has provided this Court with no legal authority to support his argument that this testimony was not admissible; defendant has therefore abandoned this issue. *People v Simpson*, 207 Mich App 560, 561; 526 NW2d 33 (1994).

Finally, defendant's sentencing issues do not survive recent rulings from our Supreme Court and from this Court. First, defendant argues that his two consecutive sentences violate the principle of double jeopardy. MCL 333.7401(3); MSA 14.15(7401)(3), mandates consecutive sentencing where a defendant has been convicted to two drug-related felonies, *People v Morris*, 450 Mich 316, 337; 537 NW2d 842 (1995); defendant's argument is thus without basis. Second, defendant asserts that his sentences violate the proportionality principle of *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Defendant has waived this issue on appeal because he neglected to submit the presentence investigation report for review. *People v Oswald*, 208 Mich App 444, 446; 528 NW2d 782 (1995).

Even so, that a defendant's sentence is cumulative in nature is not relevant to the determination of whether his sentences are disproportionate. *People v Hadley*, 199 Mich App 96, 106; 501 NW2d 219 (1993)[1]

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Maura D. Corrigan
/s/ Chad C. Scmucker

[1] The *Hadley* Court noted that it was bound by the precedential effect of *People v Warner*, 190 Mich App 734, 736; 427 NW2d 660 (1991), under Administrative Order 1990-6. *Warner* remains controlling under Administrative Order 1994-4.