STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL MAURICE GARRETT,

Defendant-Appellant.

UNPUBLISHED
June 18, 1996

No. 147103
LC No. 90-004337-FH

Before: Neff, P.J., and Jansen and G.C. Steeh III,* JJ.

PER CURIAM.

Following a jury trial in the Saginaw Circuit Court, defendant was convicted of conspiracy to deliver more than 50 grams, but less than 225 grams of cocaine, MCL 750.157a; MSA 28.354(1); MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). He was subsequently sentenced to 13-1/2 to 20 years' imprisonment. Defendant appeals as of right. We affirm his conviction, but correct his minimum sentence to comport with the two-thirds rule of *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972).

Defendant raises five issues on appeal. He first claims that the magistrate erred in issuing the search warrant because the affidavit supporting the warrant lacked a time frame during which the informant observed the cocaine being stored, and that the affiant deliberately misrepresented the date of the controlled drug purchases. He also claims that the trial court erred in allowing the prosecutor to amend the information during the trial, that the trial court erred in failing to suppress his police statement, that the prosecutor engaged in misconduct at trial, and that his minimum sentence violates the two-thirds rule of *Tanner*. We agree that defendant's minimum sentence must be corrected, but we do not find any other issue to require reversal.

I

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

First, defendant claims that the magistrate erred in issuing the search warrant because the affidavit lacked a time frame during which the informant observed cocaine being stored at defendant's Dwyer Street address in Detroit. Defendant also claims that the affiant deliberately misrepresented the date of the controlled drug buys.

There is no dispute in this case that the informant, Courtney Barber, did not allege a specific date on which he had seen cocaine stored and packaged at defendant's wife's house on Dwyer Street. Staleness is a valid consideration in deciding whether probable cause exists, but it is only one aspect of the Fourth Amendment inquiry regarding whether probable cause exists to issue a warrant. *People v Russo*, 439 Mich 584, 605; 487 NW2d 698 (1992). The Supreme Court has stated that:

> Time as a factor in the determination of probable cause to search is weighed and balanced in light of other variables in the equation, such as whether the crime is a single instance or an ongoing pattern of protracted violations, whether the inherent nature of a scheme suggests that it is probably continuing, and the nature of the property sought, that is, whether it is likely to be promptly disposed of or retained by the person committing the offense. . . . The matter must be determined by the circumstances of each case. [*Id.*, pp 605-606.]

The trial court specifically found that the facts of this case disclosed an ongoing criminal investigation with the perpetrators coming from the Detroit area. The affidavit set forth that the perpetrators were bringing cocaine into the Saginaw area from Detroit and storing it at Barber's apartment.

Because the facts did indicate an ongoing criminal enterprise, the affidavit did not require a specific date. Accordingly, in reading the search warrant and affidavit in a common-sense manner, we find that there is a substantial basis for the magistrate's conclusion that there was a fair probability that the cocaine would be found at the Dwyer Street address. *Id.*, p 604.

Defendant also claims that the affiant deliberately misrepresented the date of the controlled purchase from a crack house. This issue is waived for appellate review because defendant failed to challenge the search warrant on this basis below. Specifically, defendant failed to request a hearing pursuant to *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978), in order to make a record for appellate review on the misrepresentation claim. Therefore, this issue is not preserved. *Russo, supra*, p 608 n 38.

II

Defendant next argues that the trial court abused its discretion in allowing the prosecutor to amend the information during trial to include items found at the September 23, 1990, search of defendant's residences to be introduced as evidence. Defendant moved for a mistrial on this basis, arguing that the information charged that he possessed cocaine with the intent to deliver "on or about the 21st of September, 1990." Defendant argued that the prosecutor should be limited in his proofs to events occurring on or before September 21. The trial court denied defendant's motion for a mistrial.

MCR 6.112(G) permits a trial court to amend the information before, during, or after trial unless the proposed amendment would unfairly surprise or prejudice the defendant. See also MCL 767.76; MSA 28.1016. Defendant now contends that the amendment of the information prejudiced him because it greatly expanded the scope of the conspiracy, thus changing his defense, and allowed evidence of prior bad acts with no testimony that these acts related to the delivery of cocaine to Saginaw. We find no abuse of discretion on the part of the trial court. The information charged that defendant possessed with intent to deliver cocaine on *or about* September 21, 1990. The prosecutor did not add any charge, and the search of the residences on September 23 is certainly "about" September 21. Further, the original information informed defendant of the charges against him, and defendant had notice of the expanded dates based on the testimony at the preliminary examination. Accordingly, the amended information did not prejudice or unfairly surprise defendant. *People v Weathersby,* 204 Mich App 98, 104; 514 NW2d 493 (1994); *People v Newson,* 173 Mich App 160, 164; 433 NW2d 386 (1988).

III

Defendant next argues that the trial court erred in failing to suppress his police statement. He contends that his initial arrest was illegal, that any consent to search his apartment gained pursuant to the illegal arrest was ineffective, and that any statements he made to the police were obtained in violation of his right to counsel and his right to not incriminate himself.

First, we do not agree that the arrest was illegal. The search warrant was valid (see issue I, *supra*) and the police officers were, therefore, lawfully on the premises. The police officers could arrest defendant without a warrant if there was reasonable cause to believe that he committed or was committing a violation of the controlled substances law. MCL 333.7501; MSA 14.15(7501). Probable cause to arrest exists if the facts available to the police officer at the moment of the arrest would justify a fair-minded person of average intelligence to believe that the suspect has committed a felony. *People v Richardson,* 204 Mich App 71, 79; 514 NW2d 503 (1994).

The police officers had probable cause to arrest defendant because the officers had facts available to justify a belief that defendant was taking part in an ongoing conspiracy. The informant stated in the affidavit to the search warrant that he observed cocaine being stored at the Dwyer Street address. Upon entry to the house with the search warrant, the officers located defendant, his wife, their children, and defendant's father-in-law. Defendant was secured, handcuffed, and moved into a common area of the house before the search began. After defendant was secured, he was asked by the officers if his name was Darryl Garrett, and defendant replied that it was. Further, there was testimony that the police had searched a motel room and found crack cocaine and had reason to believe, based on information from the informant, that defendant supplied it. There was ample evidence that defendant was taking part in an ongoing conspiracy to move drugs from Detroit to Saginaw. Accordingly, the police had probable cause that defendant was involved in a violation of the controlled substances act such that his arrest was valid.

Because defendant's arrest was valid, his consent to the police to search his apartment on Outer Drive was also valid. Here, the record indicates that the consent to search was unequivocal and specific, and freely and intelligently given. *People v Jordan*, 187 Mich App 582, 587; 468 NW2d 294 (1991).

With respect to the statement made by defendant, the police did not violate defendant's constitutional rights. After defendant was arrested, he was advised of his rights pursuant to *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Defendant waived his rights and made a brief statement to the officers. Following the statement, defendant asserted his right to counsel and the police ceased all questioning. Defendant was then moved from a bedroom to the living room, where he remained until the officers completed the search of the residence. Defendant's first statement to the police was clearly valid since his arrest was legal and he had been advised of his rights pursuant to *Miranda*.

Detective McMahan then took booking information from defendant after defendant's first statement ceased, however, this type of general information does not constitute a custodial interrogation for purposes of *Miranda*. *Pennsylvania v Muniz*, 496 US 582, 601; 110 S Ct 2638; 110 L Ed 2d 528 (1990). The testimony then indicates that defendant initiated further communication with the police. See *Edwards v Arizona*, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981). Defendant made spontaneous comments to the police regarding the evidence being gathered by the officers. These comments were clearly initiated by defendant, and were thus properly admissible. *Id.* Defendant was then again advised of his *Miranda* rights, and he again waived them. Defendant requested that he be allowed to accompany the police to his residence on Outer Drive, and he signed a consent form. Under these circumstances, defendant's police statements were voluntary and properly admissible.

IV

Next, defendant argues that certain prosecutorial misconduct denied him of a fair trial. Specifically, defendant argues that the prosecutor impermissibly raised the issue of defendant's ownership of expensive automobiles, which was irrelevant evidence and constituted misconduct.

The prosecutor introduced evidence of defendant's ownership of two automobiles: a 1977 Porsche and a 1988 BMW. Contrary to defendant's assertion, the evidence was relevant because the Porsche was impounded at the home of a codefendant. The police had gone to that home after finding cocaine in a motel room rented in the codefendant's name. The Porsche showed a connection between defendant and the other conspirators. The title to the BMW was introduced and was relevant because it was found at the Dwyer Street address and showed the connection of defendant to that address.

At closing argument, the prosecutor argued, "Who buys a $32,000 BMW with $495 a month car payments on top of a 490 odd dollar rent payment?" The prosecutor sought to introduce evidence of defendant's earnings because defendant denied making a statement to a police officer that he made $500 per week on the drug sale operation.

We find that the prosecutor's arguments were permissible. The prosecutor's arguments related to the evidence admitted at trial, and the arguments were relevant to refute defendant's claim concerning his statement to the officer. Defendant was not denied a fair trial on this basis. *People v Bahoda,* 448 Mich 261; 531 NW2d 659 (1995).

V

Last, defendant argues that his minimum sentence of 13-1/2 years violates the two-thirds rule of *Tanner*. The prosecutor concedes error on this issue. The proper minimum sentence should be 13-1/3 years (13 years and four months). The correct remedy is for the court to reduce the minimum sentence to comply with the two-thirds rule of *Tanner*. *People v Thomas,* 447 Mich 390, 393-394; 523 NW2d 215 (1994). Defendant is not entitled to a resentencing. Accordingly, we remand this case to the trial court for the limited purpose of correcting the judgment of sentence to reflect a minimum term of 13-1/3 years' imprisonment.

Defendant's conviction is affirmed. His minimum sentence is modified to comply with *Tanner* and we remand for the limited purpose of correcting the judgment of sentence in accordance with this opinion. No further jurisdiction is retained.

/s/ Janet T. Neff
/s/ Kathleen Jansen
/s/ George C. Steeh III