S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,	UNPUBLISHED June 28, 1996
Plaintiff-Appellee,	
v	No. 164333 LC No. 92-000845-FH
RENE FLORENCIO FERNANDEZ,	
Defendant-Appellant.	

Before: Doctoroff, C.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of possession with intent to deliver more than 225 grams, but less than 650 grams of heroin, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). The trial court sentenced defendant to twenty to thirty years' imprisonment. Defendant appeals his conviction and sentence as of right. We affirm.

On the afternoon of May 26, 1992, Kalamazoo Department of Public Safety Officer Gary Kirtley conducted a traffic stop of a 1979 Cadillac for tailgating. The automobile was traveling eastbound on I-94, and bore Pennsylvania license plates. Neither Joe Willie Walker, the driver, nor defendant, the passenger, was able to produce a valid driver's license: Walker produced a United States passport and defendant displayed a photocopy of an expired California driver's license. After issuing a citation for following too closely, Kirtley asked Walker for permission to search the vehicle for contraband. Walker consented to the search.

During a consensual patdown search of defendant, Kirtley discovered a large lock-blade knife and two plastic vials: one containing a brown leafy substance and the other a white chunk-like material. Defendant advised Kirtley that both substances were used for religious purposes, and defendant was permitted to retain the vials.

Defendant and Walker were invited to sit in Kirtley's patrol car during the search of the Cadillac. The men later moved to the patrol car of the assisting officer, Donald Benthin, which had

more leg room. Kirtley repeatedly advised Walker and defendant that they were not under arrest and that they were to knock on the window if they desired anything. While in Benthin's vehicle, defendant informed Walker that the "stuff" was in the trunk and that they should tell the officers that the trunk key was lost. That conversation was tape recorded by a recorder in the police car.

When Kirtley's search of the Cadillac's interior revealed the presence of drug paraphernalia, Kirtley immediately retrieved the plastic vials from defendant, which were now empty. Kirtley searched the rear of Benthin's patrol car and discovered a third plastic vial, which contained a substance that field-tested positive for the presence of cocaine. A canine unit subsequently "hit" on the Cadillac's locked trunk, indicating the presence of drugs. Defendant and Walker were then arrested.

Although defendant attempted to discard the key to the trunk during the booking process, police officers had already forcibly opened the Cadillac's trunk and begun a search of its contents. The search revealed the presence of 238 grams of heroin. This heroin, which was sixty-three percent pure, had an estimated street value of $238,000.

I

Defendant first argues that the trial court should have granted his motion to suppress all evidence seized from the Cadillac, insisting that he did not consent to the search of his person or the vehicle. We will not disturb the trial court's resolution of witness credibility. *People v Burrell*, 417 Mich 439, 448-449; 339 NW2d 403 (1983). The search of the Cadillac, which was registered to a third person in Pennsylvania, was valid because Walker, the driver, consented to the search. *People v Jordan*, 187 Mich App 582, 587; 468 NW2d 294 (1991). Defendant's consent to the search was unnecessary. *Id*.

The warrantless search of the Cadillac was also appropriate because Kirtley had probable cause to believe that there was contraband somewhere in the automobile. Specifically, Kirtley knew the following facts: two men, who were unable to provide valid driver's licenses, were driving an automobile which belonged to neither man; both men appeared very nervous and did not make direct eye contact with Kirtley; defendant lied about having any weapons concealed on his person; a consensual search of the vehicle revealed the presence of drug paraphernalia, money, and other items associated with the drug trade; defendant had in his possession two plastic vials, each containing a suspicious but unidentified substance; defendant and Walker discussed the "stash" that was in the Cadillac's trunk; cocaine residue was discovered in a third vial near where defendant and Walker were seated; and the canine unit produced a "hit" on the trunk of the Cadillac, suggesting the presence of a controlled substance.

This evidence amply supports the belief that a crime was committed and that evidence of the crime would be found in the trunk of the Cadillac. See *People v Sinistaj*, 184 Mich App 191, 199-200; 457 NW2d 36 (1990), citing *United States v Ross,* 456 US 798; 102 S Ct 2157; 72 L Ed 2d 572 (1982). The mere fact that that the trunk was not opened and searched until it was at police

headquarters does not remove the search from the automobile exception to the warrant requirement. *People v Romano*, 181 Mich App 204, 217; 448 NW2d 795 (1989). Accordingly, the trial court's denial of defendant's motion to suppress was not clearly erroneous.

II

Defendant next argues that the prosecutor should have been required to produce Walker as a witness. We disagree. Defendant did not comply with the statutory requirements of requesting assistance locating a witness. See MCL 767.40a; MSA 28.980(1). Furthermore, an exception to this statute exists where, as here, the witness sought is an accomplice. *People v Lawton*, 196 Mich App 341, 346; 492 NW2d 810 (1992). Defendant's suggestion that this exception should not apply because Walker's testimony was crucial to defendant's challenge to the search of the Cadillac is not persuasive. Regardless of the content of his anticipated testimony, the fact remains that Walker was facing drug charges stemming from the events of May 26, 1992. The prosecutor was therefore under no duty to assist defendant in locating Walker. *Id*.

III

Michigan's sentencing scheme mandates that a defendant convicted of possession with intent to deliver 225 grams or more, but less than 650 grams of a controlled substance will be imprisoned for twenty to thirty years. MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). An individual convicted of possession with intent to deliver more than 50 grams, but less than 225 grams must serve ten to twenty years. Defendant argues that this punishment scheme violates his federal and state constitutional right to equal protection under the law, pursuant to US Const, Am XIV; Const 1963, art 1, § 2. We disagree. Defendant has failed to demonstrate that the classifications contained in the statute have no rational basis. *People v Campbell*, 115 Mich App 369, 372-373; 320 NW2d 381 (1983). Contrary to defendant's argument on appeal, we find the increase in penalty is both graduated and rationally related to the policies discussed in *Campbell*, *supra*.

Defendant also contends that the mandatory sentencing scheme at issue here precludes consideration of his role as "but a footsoldier or low level peddler" (Brief of Appellant, 23). In light of the purity and quantity of the of the heroin possessed by defendant, which had an estimated street value of $238,000, we strongly disagree with defendant's self-characterization of his role in the illegal drug trade. In any event, a defendant's role as a principal or an aider or abetter to a controlled substance offense is irrelevant for purposes of the mandatory sentencing scheme. *People v Matthews*, 143 Mich App 45, 64; 371 NW2d 887 (1985). Therefore, defendant's equal protection challenge to the mandatory sentencing scheme contained in MCL 333.7401; MSA 14.15(7401) is without merit.

IV

Finally, defendant contends that his twenty-year minimum sentence constitutes cruel and unusual punishment. We disagree. Similar challenges have repeatedly been rejected both by this Court, *People v DiVietri*, 206 Mich App 61, 63-65; 520 NW2d 643 (1994); *People v Hahn*, 183 Mich App 465,

471; 455 NW2d 310 (1989), and the United States Supreme Court, *Harmelin v Michigan*, 501 US 957; 111 S Ct 2680; 115 L Ed 2d 836 (1991). Accordingly, we find that defendant's sentence does not constitute cruel and unusual punishment.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald