STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MELVINA SMITH,

Defendant-Appellant.

UNPUBLISHED
August 6, 1996

No. 172337
LC No. 93-000204-FC

Before: Sawyer, P.J., and Neff and R.D. Gotham,* JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of possession with intent to deliver 650 or more grams of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), conspiracy to deliver 650 or more grams of cocaine, MCL 750.157(a); MSA 28.354(1), possession with intent to deliver marijuana, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c), and conspiracy to deliver marijuana, MCL 750.157a; MSA 28.354(1). She was sentenced to two consecutive mandatory life terms for the cocaine related convictions and to two terms of two to four years in prison for the marijuana related convictions. She now appeals and we affirm.

Defendant first argues that there was insufficient evidence to convict her of conspiracy because there was no evidence of an agreement. We disagree. We review a sufficiency of the evidence argument by viewing the evidence in the light most favorable to the prosecutor and determining whether a rational trier of fact could find each element of the offense proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287; 519 NW2d 108 (1994). In the case at bar, defendant made statements to the police that she had had conversations with the co-conspirator, Fullwood, that the two would bring drugs back from Florida and that defendant would assist Fullwood in finding a distributor in Michigan. Indeed, even in her brief, defendant admits that her statements could establish that defendant told Fullwood that defendant would "try to find someone who might be interested in buying the drugs Louisa Fullwood carried." That establishes a conspiracy. Defendant tries to dismiss the importance of this statement by claiming that the agreement had to precede the substantive offense. While this is true,

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

the statement *did* precede the substantive offense. Defendant was convicted of conspiracy to deliver, not conspiracy to purchase. Thus, the substantive offense was to occur after defendant and Fullwood returned to Michigan, it was not Fullwood's obtaining of the drugs in Florida. Therefore, even if there were no statements or agreement until defendant and Fullwood were en route from Florida to Michigan, as defendant contends in her brief, the conspiracy occurred before the substantive offense of delivery was to happen.

Defendant further argues that there was insufficient evidence because it "has long been the law that a conspiracy charge may not be sustained by the statements or confessions of a conspirator." Defendant makes this statement without any reference to a Michigan case so holding. We are aware of no Michigan case with such a holding. Cf. *People v Cotton*, 191 Mich App 377; 478 NW2d 681 (1991) (the defendant's statements could be used to establish the identity and intent of the conspirators). Defendant additionally makes the claim in this argument that she cannot be guilty of a conspiracy because there was no ultimate recipient to have conspired with. Defendant's guilt, however, is not premised on a conspiracy with the ultimate recipient, but with Fullwood. The conspiracy was not to sell drugs on the street once back in Michigan, but to deliver them to a person in Michigan who would sell them on the streets. As noted above, defendant's own statements place her role in that conspiracy to assist in finding such a street vendor to deliver the drugs to. There is certainly no requirement that the recipient of the drugs be known.

In further support of her position, defendant cites MRE 801(d)(2)(E) for the proposition that there must be independent proof of a conspiracy. That rule only deals with the admission of otherwise hearsay statements of a co-conspirator. It has nothing to do with the substantive proof of a conspiracy.

For the above reasons, we conclude that there was sufficient evidence to convict defendant of conspiracy.

Defendant next argues that the trial court erred in allowing the late endorsement of a witness. We disagree. Officer Edwards interviewed defendant the day before trial began, the interview having been initiated by defendant's complaint that she was receiving threats. The following day, the first day of trial, the prosecutor informed defense counsel that he may have a statement from defendant. After the trial recessed that day, the prosecutor received a facsimile from Edwards. A copy of that facsimile was given to defense counsel and the prosecutor moved the following day (two days after the statement was made) to endorse Edwards. Under these circumstances, the trial court did not abuse its discretion in allowing the late endorsement of Edwards. *People v Kulick*, 209 Mich App 258, 265; 530 NW2d 163 (1995).

Next, defendant argues that the trial court erred in allowing Edwards to testify as to the statements made by defendant in violation of her right to counsel. We disagree. Edwards did not approach defendant to interrogate her about the instant offense. Rather, he came to defendant's cell at the request of the jail matron, who had previously observed defendant weeping in her cell. Defendant had told the matron that her life was being threatened and that she wanted to talk to someone about the

threats. The matron suggested that defendant speak with her attorney, but defendant indicated that she did not wish to speak with her attorney because she did not trust him. The matron then contacted Edwards. At the hearing on the admissibility of defendant's statements to Edwards, defendant testified that Edwards had specifically asked her if she wished to speak with her attorney, to which she replied that she did not, and that Edwards read her *Miranda* rights.

Once the right to counsel has been asserted, there can be no further interrogation until counsel has been made available *unless the accused initiates the communication*. *People v Anderson (After Remand)*, 446 Mich 392, 402; 521 NW2d 538 (1994). Here, not only was counsel made available (it being the day before trial commenced), defendant initiated the communication and on two occasions (to Edwards immediately before the statement and to the matron before Edwards was summoned) affirmatively stated that she did not wish to speak with her attorney. Furthermore, Edwards advised defendant of her constitutional rights. We are satisfied that the trial court correctly concluded that the statements were admissible.

Defendant next argues that the trial court erred in allowing evidence of prior bad acts. We disagree. Specifically, defendant objects to admission of evidence of her prior trip to Florida. MRE 404(b) allows introduction of evidence of prior bad acts to show plan or scheme. The prior bad acts evidence in this case tended to show precisely this. Indeed, the heart of defendant's defense was that she was merely driving Fullwood back from Florida and had no idea that Fullwood possessed drugs until they were part-way home. The evidence of the prior trip would directly contradict defendant's contention that she was unaware that Fullwood was transporting drugs. We are satisfied that the prior bad acts evidence was admissible. See *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993).

Finally, defendant argues that the trial court erred in sentencing her to two consecutive terms of life without parole, noting that such a sentence is impossible to serve. The argument presented by defendant is wrong, being premised on a case, *People v Moore*, 432 Mich 311; 439 NW2d 684 (1989), that has since been overruled, see *People v Kelly*, 213 Mich App 8, 13; 539 NW2d 538 (1995). Furthermore, we note that *Moore* was not applicable to either consecutive sentencing situations or to mandatory sentences. Accordingly, defendant's argument is without merit.[1]

Affirmed.

/s/ David H. Sawyer
/s/ Janet T. Neff
/s/ Roy D. Gotham

[1] We also note that defendant's argument is ultimately moot. That is, even if defendant is correct that she should have received concurrent nonparolable life terms rather than consecutive terms, there is no meaningful change to defendant's situation. In either case, she will leave prison only if she receives clemency from the Governor.