

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN WESLEY HARVEY III,

Defendant-Appellant.

UNPUBLISHED

December 3, 1996

No. 172046

LC No. 93-002255-FH

Before: Fitzgerald, P.J., and Cavanagh and N.J. Lambros,* JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by jury of possession with intent to deliver less than fifty grams of a substance containing cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and of resisting an officer in the discharge of his duty, MCL 750.479; MSA 28.747, as well as his plea of guilty to habitual offender, second offense, MCL 769.10; MSA 28.1082. Defendant was sentenced to enhanced terms of four to thirty years' imprisonment for the possession conviction and one to three years for the resisting and obstructing conviction. We reverse.

A police officer received a tip from an informant that defendant was selling crack cocaine out of his car at a given location. Several officers, without securing a search warrant, went to the location and found defendant in his car. The officers asked defendant to exit his vehicle and upon his doing so began to search him, including checking in his underwear for the crack cocaine. During this search, defendant began to resist. He broke away and ran, punching an officer who tried to stop him, but he was wrestled to the ground. Eventually, the officers found some crack hidden in defendant's sock.

Defendant first argues that the trial court erred when it permitted a police officer to testify regarding the substance of a tip that he received from an informant, maintaining that this testimony was hearsay information with very little probative and high prejudicial value, and that it violated defendant's right to confront the police informant, a witness against him. Unlike the police officer's testimony regarding an informant's tip in *People v Wilkins*, 408 Mich 69; 288 NW2d 583 (1980), in the instant case the officers' reasons for acting as they did were relevant to defendant's resisting and obstructing charge. Therefore, the admission of this evidence was not more prejudicial than probative in violation of

MRE 403. *Id.*, 73-74. However, the testimony regarding the substance of the undisclosed and nontestifying informant's tip violated defendant's Sixth Amendment right of confrontation, *People v Buschard*, 109 Mich App 306, 311; 311 NW2d 759 (1981), vacated on other grounds 417 Mich 996 (1983), because defendant had a right to confront this witness against him.

This was not harmless error. *People v Cunningham*, 215 Mich App 652, 657; 546 NW2d 715 (1996); *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994). Regarding defendant's resisting and obstructing conviction, the jury was instructed that whether the officers' search of defendant was lawful -- an element that the jury would have to find in order to find defendant guilty of resisting and obstructing -- depended in part upon whether that search was based on probable cause. Because the only evidence regarding probable cause was the undisclosed informant's tip and police testimony regarding its reliability, we cannot determine beyond a reasonable doubt that the substance of the informant's tip did not contribute to defendant's conviction of resisting and obstructing. Regarding defendant's conviction of possession with intent to deliver, the testimony regarding the substance of the nontestifying informant's tip contributed to the finding of defendant's intent to deliver because it included the statement that defendant was dealing crack cocaine and the details of defendant's practice. While there was other evidence of defendant's intent to deliver, it consisted of inferences arising from the quantity of crack cocaine possessed by defendant and other testimony by a police deputy regarding inferences arising from defendant's possessions. However, this testimony was also improperly admitted as will be set forth below. In light of this low level of legitimate evidence supporting defendant's intent to deliver, we also cannot say beyond a reasonable doubt that the substance of the informant's tip did not contribute to defendant's conviction of possession with intent to deliver. Accordingly, we reverse both convictions.

Defendant next argues that the trial court erred in permitting a detective to testify as an expert regarding the inferences arising from defendant's possessions, specifically a cellular telephone, a pager, and an automobile. We agree. The detective permissibly testified as an expert regarding the significance of the amount of crack cocaine found on defendant. *People v Hubbard*, 209 Mich App 234, 240-241; 530 NW2d 130 (1995). However, the detective's testimony that defendant was more likely to be a drug dealer because he possessed a car, cellular telephone, or pager, and the prosecution's use of that logic in its closing argument constituted the classic use of impermissible "drug dealer" profile evidence to secure a conviction. *Hubbard, supra*, 209 Mich App 234, 240-242. Accordingly, we reverse on the alternative ground and instruct the prosecution to avoid this error upon retrial.

Defendant next claims that the trial court erred in deciding that the warrantless search of defendant was justified because it did not hold an evidentiary hearing on this issue as required by Michigan law. We agree. A trial court may not decide a motion to suppress evidence on the preliminary examination transcript alone but must instead hold a full evidentiary hearing on the issue before reaching its decision.. *People v Whittaker*, 187 Mich App 122, 129-130; 466 NW2d 364 (1991). This is an independent duty that arises when a motion to suppress is filed and does not require that the defendant request a hearing. *Id.* at 129-130. We accordingly instruct the trial court to hold a full evidentiary hearing on this issue if it is raised in a defense motion to suppress on retrial.

Defendant next argues that the trial court erred in denying defendant's motion for a directed verdict regarding his charges. We agree in part. With regard to defendant's possession with intent to deliver charge, viewing the evidence presented by the prosecution up to the time the motion was made in a light most favorable to the prosecution, a rational trier of fact could have found from police testimony regarding the significance of the amount of crack cocaine possessed by defendant that he was possessing the crack cocaine with intent to deliver. *People v Ray*, 191 Mich App 706; 479 NW2d 1 (1991). Regarding defendant's resisting and obstructing charge, the prosecution was required to prove that its search of defendant was lawful, and one element of a lawful search is probable cause. *People v Mayes (After Remand)*, 202 Mich App 181, 184; 508 NW2d 161 (1994). The only evidence produced at trial regarding probable cause was the impermissible police testimony regarding the substance of the nontestifying informant's tip, discussed above; the remaining evidence, that the officers acted on a tip from a trusted informant, is insufficient to establish probable cause. *Id.* at 185-186. Because this error is related to the sufficiency of the evidence, retrial on defendant's resisting and obstructing charge is barred. *People v Nix (After Remand)*, 208 Mich App 648, 469-650; 528 NW2d 208 (1995).

Defendant next argues that his subjection to both criminal convictions and civil forfeiture arising out of this case violate the constitutional prohibition against double jeopardy. However, in *United States v Ursery*, 1996 US Lexis 4256; 116 S Ct 2135; 135 L Ed 2d 549 (1996), the United States Supreme Court held that there was no double jeopardy violation on similar facts. In *People v Hellis*, 211 Mich App 634; 536 NW2d 587 (1995), this Court relied on United States Supreme Court decisions to address the double jeopardy-civil forfeiture question and accordingly, we find *Ursery* dispositive.

The remainder of defendant's arguments need not be addressed, as they have been rendered moot by our reversal of his convictions and bar of his retrial on his resisting and obstructing charge.

Reversed.

/s/ E. Thomas Fitzgerald

/s/ Mark J. Cavanagh

/s/ Nicholas J. Lambros