STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROYAL A. CHATMAN,

Defendant-Appellant.

UNPUBLISHED
December 30, 1996

No. 173844
Oakland County
LC No. 91-112263-FC

Before: Taylor, P.J., and Markman and P. J. Clulo,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivery of more than 650 grams of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), and was sentenced to a term of mandatory life imprisonment. He appeals as of right. We affirm.

Defendant was arrested after attempting to sell cocaine from his apartment to a confidential informant acting in cooperation with the West Michigan Enforcement Team (WEMET). The confidential informant was instructed by WEMET member Officer Gary Miles to bring a specified amount of cash to defendant's apartment in order to purchase the narcotics. After the informant arrived at defendant's apartment, defendant went to his storage locker located in the basement of the apartment complex and returned with a package containing the cocaine. The informant gave defendant the money in exchange for the drugs and then opened the apartment door. Miles, who was in possession of a search warrant, and other WEMET members then arrested defendant and subsequently searched his apartment and storage locker where additional cocaine was found.

On appeal, defendant first argues that the search warrant was "anticipatory" and that such warrants are not permitted by either the federal or state constitutions. He also argues that the warrant is not supported by probable cause. An anticipatory warrant is one that is issued before the events necessary for probable cause have occurred. *People v Brake,* 208 Mich App 233, 238-239; 527

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

NW2d 56 (1995). However, neither the Supreme Court nor this Court have decided that anticipatory search warrants are invalid per se. *Id*. at 239. Further, where probable cause exists at the time the warrant is issued, the warrant is not properly characterized as "anticipatory." *Id*.

When reviewing whether probable cause existed for issuance of a search warrant, the warrant and underlying affidavit are to be read in a common-sense and realistic manner. *People v Sloan*, 450 Mich 160, 168; 538 NW2d 380 (1995). Our task is to determine whether a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause. *Id*. at 168; *People v Dowdy*, 211 Mich App 562, 567; 536 NW2d 794 (1995). Probable cause must be shown in the form of an affidavit presented to a magistrate. *Sloan, supra* at 167. When a reviewing court applies the appropriate standard of review, it must specifically focus only on those facts presented to the magistrate. *Id*. at 168. Moreover, reviewing courts must ensure that the magistrate's decision is based upon actual facts, not merely conclusions of the affiant. *Id*. at 168-169.

The affidavit in this case reveals that Miles' basis for believing that cocaine would be found in defendant's apartment and/or his basement storage area was premised upon facts relayed to him by "WE 462," the unnamed confidential informant. The informant agreed to plead guilty to a lesser offense in exchange for his cooperation with WEMET's investigation of defendant's drug trafficking. The affidavit avers that the informant informed Miles that defendant had sold cocaine to him between twenty-five and thirty times within the past two years and that the cocaine was kept at either defendant's apartment or the basement storage area of the apartment marked with the number 705 on the door. Further, the informant told Miles that he had personally observed packaged cocaine in the basement storage area. The affidavit provides also that defendant had recently contacted the informant in an effort to sell more cocaine to him. Defendant and the informant discussed the informant's $3,500 drug debt owed to defendant as well as the availability of a "package." Finally, the affidavit provides that in a September 23, 1991, conversation, defendant and the informant discussed ounces and price ranges in a deal that was to take place at defendant's apartment on the afternoon of September 25, 1991.

In our judgment, the facts upon which the warrant is based provide a substantial basis for the finding of probable cause that defendant's apartment and storage area contained cocaine. Further, because there were sufficient facts in the affidavit in support of a finding of probable cause, the search warrant was not "anticipatory" despite Miles' awkward assertion in the affidavit that he "will have probable cause" to believe that defendant possesses cocaine.

Next, defendant contends that the reliability of the informant was not established, thereby invalidating the search warrant. In this regard, MCL 780.653; MSA 28.1259 provides:

> The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:
>
> * * *

(b) If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.

In general, the requirement that the informant have personal knowledge of the information asserted seeks to eliminate rumor and speculation as the basis for a search warrant. *People v Stumpf*, 196 Mich App 218, 223; 492 NW2d 795 (1992). However, the personal knowledge element can be derived from the nature or detail of the information provided, not merely through a recitation of the informant's having personal knowledge. *Id*.

In this case, the affidavit provides that an unnamed informant trafficked in drugs twenty-five to thirty times with defendant and was providing information to the police as part of a plea bargain. The affidavit provides further that the informant engaged in the drug transactions with defendant at his apartment at an address that the informant specifically provided. Moreover, the informant told Miles that he had personally observed cocaine in a basement storage locker marked with the number 705 on the door. Finally, the affidavit provides that the informant and defendant had a recent conversation regarding a past drug debt and a future drug sale. In our judgment, the affidavit provides facts and details sufficiently specific and trustworthy to justify the warrant.

Next, defendant argues that the prosecutor sought to establish his guilt by showing that defendant fit the profile of a drug dealer through the use of "expert" testimony. *People v Hubbard*, 209 Mich App 234, 239-40; 530 NW2d 130 (1995). The record reveals that, during his opening statement, the prosecutor told the jury that the police found numerous items in defendant's apartment including pagers, a cellular phone, guns, pictures of the defendant with money, gold jewelry and a ledger. The prosecutor then told the jury "[t]he officers are going to tell you that, based upon their training and experience and based upon all the evidence that was found there, the defendant was involved, and heavily involved, in the distribution of cocaine." During the direct examination of one of the officers, Lieutenant Winters, the prosecutor elicited testimony that the witness had significant experience in narcotics investigations that the items found in defendant's apartment suggested that the cocaine seized "was held for the distribution to others." Finally, during closing argument, the prosecutor stated the evidence seized pointed to only one conclusion, that defendant was a drug dealer. We do not find that the purpose of this evidence was to create a "drug dealer profile" as that term has been understood, *People v Hubbard, supra*, citing *United States v McDonald*, 933 F 2d 1519, 1521 (CA 10 1991). Rather, such evidence involves nothing more than the permissible use of "expert testimony explaining the significance of seized contraband or other items of personal property." *Id*. See also, *People v Ray*, 191 Mich App 706, 707-708; 479 NW2d 1 (1991).

Next, defendant argues that he was denied his right to a fair and impartial trial by the trial court's failure to sua sponte instruct the jury that they should view the informant's testimony with special caution since the informant was an accomplice. At trial, the prosecution called the informant who testified that in cooperation with WEMET he and defendant arranged a deal whereby defendant would sell the informant cocaine from defendant's apartment on September 25, 1991. The informant stated that his cooperation with WEMET was precipitated by his own arrest for drug trafficking, which resulted in his

pleading guilty to a lesser offense. Citing *People v McCoy*, 392 Mich 231; 220 NW2d 456 (1974), defendant contends that since the informant was an "accomplice," the trial court should have instructed the jury that they were to view the informant's testimony with special caution as provided for in CJI2d 5.6.

However, the rule that under some circumstances the trial court has an obligation to instruct the jury that they are to view the testimony of an accomplice witness with caution is limited to "accomplices." *McCoy, supra* at 240; *People v Buck*, 197 Mich App 404, 415; 496 NW2d 321 (1992). Defendant has provided no authority for the proposition that an informant working with the police such as the informant fits within such a description. Rather, an accomplice is one who knowingly and willingly helps or cooperates with someone else in committing a crime. *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993). This Court has held that when persons who are not law-enforcement officials act with official encouragement or assistance, such as the informant, they should be treated as government agents. *People v Jones*, 165 Mich App 670, 674; 419 NW2d 47 (1988). Since the informant was working with the police, he could not have knowingly cooperated in the commission of a crime and, thus, was not an "accomplice." The trial court did not err in failing to instruct the jury to view the informant's testimony with special caution.

Next, defendant argues that his double jeopardy rights were violated since his property was judicially forfeited before criminal proceedings were instituted. US Const, Am V; Const 1963, art 1, § 15. The United States Supreme Court recently held that "*in rem* civil forfeitures are neither 'punishment' nor criminal for purposes of the double jeopardy clause." *United States v Ursery*, ___ US ___; 116 S Ct 2135; 135 L Ed 2d 549, 571 (1996). Accordingly, the forfeiture here did not violate the double jeopardy clause. See also *People v Hellis*, 211 Mich App 634; 536 NW2d 587 (1995).

Finally, defendant argues that the penalty of life without parole constitutes cruel and unusual punishment, both facially and as applied to him. However, this argument has already been uniformly rejected. A mandatory life sentence for the crime of delivery of more than 650 grams of a mixture containing cocaine is not constitutionally infirm as cruel or unusual punishment. *People v Fluker*, 442 Mich 891-892; 498 NW2d 431 (1993); *People v Cadle*, 204 Mich App 646, 658; 516 NW2d 520, remanded on other grounds, 447 Mich 1009 (1994). Accordingly, this argument has no merit.

Affirmed.

/s/ Clifford W. Taylor
/s/ Stephen J. Markman
/s/ Paul J. Clulo