STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS COLEMAN,

Defendant-Appellant.

UNPUBLISHED
February 18, 1997

No. 174228
Berrien Circuit Court
LC No. 90-000442-FH

Before: Sawyer, P.J., and Markman and H. A. Koselka,* JJ.

PER CURIAM.

Defendant was charged with delivery of cocaine, less than 50 grams, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and moved to dismiss on the ground that he was entrapped. The trial court conducted an evidentiary hearing at the conclusion of which the court denied defendant's motion. Thereafter, defendant pleaded guilty to the charge, but the trial court agreed to postpone sentencing until after ruling on defendant's motion for reconsideration on the entrapment claim. Subsequently, the court denied defendant's motion for reconsideration. The trial court then sentenced defendant to five to twenty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant claims that the drugs (cocaine and marijuana) that he sold to the undercover police officer were furnished to defendant by a police informant who was able to do so because of the police's failure to adequately supervise the informant. Defendant contends that the police's failure to regulate the informant was reprehensible conduct that constituted entrapment.

This Court reviews a trial court's finding regarding entrapment under the clearly erroneous standard. *People v Fabiano*, 192 Mich App 523, 525; 482 NW2d 467 (1992). Michigan has adopted the objective test of entrapment. *Fabiano, supra* at 526*; People v Juillet*, 439 Mich 34, 53; 475 NW2d 786 (1991) (Brickley, J). The *Fabiano* Court held at 526 that entrapment occurs when either:

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

(1) the police engaged in impermissible conduct that would have induced a person similarly situated as the defendant, though otherwise law-abiding, to commit the crime, *or* (2) the police engaged in conduct so reprehensible that it cannot be tolerated by the Court.

Entrapment is established under the first criterion when the police conduct would "induce a person not ready and willing to commit an offense to commit the offense." *Fabiano*, at 531. The willingness of the defendant to commit the crime must be weighed against how "an otherwise law-abiding citizen in similar circumstances as defendant" would act. *Id*. Factors relevant to whether police conduct induced the criminal activity include "whether there existed any appeals to the defendant's sympathy as a friend, whether the defendant had been known to commit the crime with which he was charged, and whether there were any long time lapses between the investigation and the arrest." *Juillet, supra* at 56-57 (Brickley, J).

Under the second criterion, entrapment is established when "the police conduct is so reprehensible that we cannot tolerate the conduct and will bar prosecution on the basis of that conduct alone." *Fabiano*, at 532. Sufficiently reprehensible conduct includes the use "by design" of "continued pressure, appeals to friendship or sympathy, threats of arrest, an informant's vulnerability, sexual favors, or procedures which escalate criminal culpability." *People v Jamieson*, 436 Mich 61, 89; 461 NW2d 884 (1990) (Brickley, J). The absence of police control or supervision over the informant also weighs in favor of a finding of entrapment. *Juillet*, at 79-80 (Cavanaugh, C.J.). Neither the furnishing of contraband, *Jamieson, supra* at 88 (Brickley, J.), nor the use of undercover agents, *People v Nixten*, 160 Mich App 203, 208; 408 NW2d 77 (1987) constitute entrapment per se.

Here, defendant's argument that he was entrapped is based only on the second criterion; namely, that the police engaged in conduct so reprehensible that it cannot be tolerated by the court. Defendant argues that the officer either knew that the informant was supplying drugs to defendant or that the officer should have known this in light of the officer's lack of supervision over the informant. However, the testimony simply does not support defendant's claim.

There is absolutely no evidence that the officer knew that the informant was allegedly supplying drugs to defendant. The officer denied any such knowledge. The informant denied that he supplied defendant with the drugs, much less that the officer knew about his alleged supplying activity. A police informant's actions may be attributed to the police under certain circumstances, including lack of police control over the informant. See *Juillet*, at 66 (Brickley, J). However, even assuming that the informant supplied the drugs to defendant, his actions cannot be attributed to the police here because the record clearly demonstrates that the officer adequately supervised the informant. The officer had expressly mandated that the informant was not to use, possess, or deliver drugs. The officer testified that he monitored the informant by speaking with him on the phone at least two to three times per week over the course of the six-month period that he worked with the informant. The informant confirmed that he was in touch with the officer every other day by phone. In addition, the officer had personal contact with the informant but never detected any signs that he was using drugs. Nor did the officer take an approach of conscious ignorance to the defendant's sources for the drugs. He specifically questioned

defendant as to his sources and defendant indicated a number of sources, none of which included the informant.

In sum, there is no evidence which demonstrates that the officer either knew or should have known that the informant was supplying drugs to defendant. Accordingly, the trial court did not clearly err in finding that defendant was not entrapped under the second criterion and denying the motion to dismiss.

Defendant also argues that he was denied his constitutional right to effective assistance of appellate counsel, principally in that his first court-appointed appellate attorney failed to file an appellate brief. In order to justify reversal of an otherwise valid conviction on the basis of ineffective assistance of counsel, "a defendant must show that a counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303: 521 NW2d 797 (1994). The standards applicable to an ineffective assistance of counsel claim also apply to a claim of ineffective assistance of appellate counsel. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). Defendant was not denied effective assistance of appellate counsel here because he can demonstrate no prejudice. Despite the fact that his first appellate counsel failed to file an appellate brief on his behalf, this Court nevertheless reviewed and considered defendant's claim that he was entrapped.

Affirmed.

/s/ David H. Sawyer
/s/ Stephen J. Markman
/s/ Harvey A. Koselka