

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GORDON DOUGLAS ERCKMAN,

Defendant-Appellant.

---

UNPUBLISHED

April 4, 1997

No. 185601

Oakland Circuit Court

LC No. 94-132695

Before: McDonald, P.J., and Griffin and Bandstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unlawful possession with intent to deliver 650 grams or more of a mixture containing cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i). He was sentenced to life imprisonment without parole. Defendant now appeals as of right. We affirm.

Defendant was arrested by state authorities after purchasing one kilogram of cocaine from an undercover police officer. He initially offered to cooperate in an attempt to obtain prosecution in federal court rather than state court. An Assistant United States Attorney made two different plea offers to defendant, both of which he refused. The Assistant United States Attorney then declined to prosecute the case, and charges were subsequently filed in state court.

Defendant argues that the trial court erred when it failed to find vindictiveness on the part of the federal prosecutor for declining to prosecute in federal court. We disagree.

“It is a violation of due process to punish a person for asserting a protected statutory or constitutional right. To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.” *People v Ryan*, 451 Mich 30, 36; 545 NW2d 612 (1996) (citations and internal quotation marks omitted). Thus, a prosecutor may not punish a defendant for exercising his right to trial. However, to prevail on such a due process claim, the burden is on defendant to establish actual vindictiveness on the part of the prosecutor. *Id.* In addition, “the mere fact that a defendant refuses to plead guilty and forces the government to prove its case is not sufficient to warrant presuming that subsequent changes in the charging decision are vindictive.” *People v*

*Goeddeke*, 174 Mich App 534, 536; 436 NW2d 407 (1988). We find that defendant has failed to show any actual vindictiveness on the part of the federal prosecutor.

Defendant's argument also fails because two different sovereigns were involved in his prosecution. The state and federal governments are separate sovereigns, and each may pursue independent prosecutions of the same individual for crimes arising out of the same conduct. *Ryan, supra* at 38. "[T]he vindictiveness of one sovereign is not normally chargeable to the independent decision to prosecute by a separate sovereign because the likelihood of prosecutorial abuse is minimized." *Id.* The only exception to this rule is where there is some "untoward collusion" between the two sovereigns. *Id.* Here, defendant has not presented evidence of any such collusion.

Finally, defendant argues that the state prosecutor should be equitably estopped from proceeding against him. This argument is without merit. While promises made during plea-bargaining are generally enforceable, two conditions must be met. First, the person making the promise must be authorized to make the promise, and second, the defendant must rely on the promise to his detriment. *Ryan, supra* at 41. Neither of these conditions has been met in this case. Thus, the trial court properly refused to dismiss defendant's case on the ground of prosecutorial vindictiveness.

Affirmed.

/s/ Gary R. McDonald  
/s/ Richard Allen Griffin  
/s/ Richard A. Bandstra