STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLIFFORD ONEAL HARVEY,

Defendant-Appellant.

UNPUBLISHED
September 12, 1997

No. 190525
Genesee Circuit Court
LC No. 94-051437

Before: Corrigan, C.J., and Markey and Markman, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of possession with intent to deliver more than 50, but less than 250, grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). Defendant pleaded guilty to being an habitual offender, second offense, MCL 769.10; MSA 28.1082. The court sentenced defendant to a term of imprisonment of twelve to thirty years. We affirm.

Defendant first argues that the trial court clearly erred in denying his motion to dismiss on the basis that he was entrapped. This Court reviews a trial court's finding that defendant was not entrapped under the clearly erroneous standard. *People v Fabiano*, 192 Mich App 523, 525; 482 NW2d 467 (1992). Defendant must prove entrapment by a preponderance of the evidence. *People v Butler*, 199 Mich App 474, 479; 502 NW2d 333 (1993), rev'd and remanded on other grounds 444 Mich 965 (1994). Entrapment occurs when: (1) the police engage 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 engage in conduct so reprehensible that it cannot be tolerated by the Court. *Fabiano*, *supra* at 526. Entrapment does not exist if the conduct would induce only those persons who are ready and willing to commit the offense to do so. *Butler*, *supra* at 480-481. To determine whether the government activity would induce criminal conduct in an otherwise law-abiding person, courts analyze twelve factors, five of which apply here: (1) whether any appeals were made to the defendant's sympathy as a friend; (2) whether the defendant had been known to commit the crime with which he was charged; (3) whether, and to what extent, any government pressure existed; (4) whether police had control over any informant; and (5) whether the investigation was targeted.[1] *People v James Williams*, 196 Mich App 656, 661-662; 493 NW2d 507 (1992).

Defendant has not established that he was entrapped. First, defendant claims that police informant Robert Schaffer appealed to his sympathy as a friend to help Schaffer financially by providing cocaine. Schaffer testified that he asked defendant to provide cocaine twice and defendant readily agreed. Defendant countered that Schaffer called him ten times and visited his apartment two or three times, continually urging him to supply cocaine despite defendant's reluctance. Defendant testified that Schaffer had been his friend for ten years. Schaffer, however, testified that he had known defendant only five or six years "through drugs" and denied the alleged friendship. The trial court resolved the credibility contest against defendant. Even accepting defendant's testimony as true, defendant never told Schaffer that he was unwilling or unable to supply cocaine.

Moreover, defendant denied receiving money from the drug transaction. Schaffer testified that the usual price for two ounces of cocaine was $2,400 or $2,500, but defendant told him it would cost $3,200. The police furnished Schaffer with $3,200. Schaffer was under police surveillance during the entire transaction with defendant, was searched before and after it was completed, and did not have the $3,200 after the transaction. The police never recovered the money. Defendant well could have retained any or all of the money that Schaffer gave him for the cocaine.[2]

The second relevant factor is whether defendant had been known to commit the crime with which he was charged. Schaffer had known defendant for five or six years "through drugs" and previously had purchased drugs from him. The third factor, whether and to what extent any government pressure existed, does not advance defendant's claim. When Schaffer was arrested, the officer in charge told him that he could help himself if he helped the police apprehend the person from whom he had purchased the cocaine. Schaffer testified that the police had not promised anything in return for his assistance and had told him to tell the truth.

Regarding the next factor, we conclude that the police exerted sufficient control over the informant. Schaffer contacted defendant on June 8, 1994, from the police department and was under surveillance until the conclusion of the drug transaction. The final factor at issue is whether the investigation was targeted. Entrapment may exist when an informant has no reason to believe that the defendant has any contact with illegal drugs. *People v Juillet*, 439 Mich 34, 57; 475 NW2d 786 (1991) (Brickley, J.). Schaffer and Sergeant Petrella both stated that Schaffer alone identified defendant as the person who supplied him with drugs and the person whom to target.

Weighing the five relevant factors, the trial court did not clearly err. Defendant did not establish by a preponderance of the evidence that he was entrapped. Entrapment does not exist if the conduct would induce only those persons who are ready and willing to commit the offense to do so. *Butler, supra* at 481. Defendant also failed to prove that the conduct of the police was reprehensible. The police merely furnished an opportunity to commit a crime; they did nothing improper. *Williams, supra* at 663.

Defendant next argues that the jury instruction regarding punishment allowed the jury to convict on a lesser standard of proof. Because defendant did not object, this Court will not

review the issue unless relief is necessary to avoid manifest injustice. *People v Perry*, 218 Mich App 520, 530; 554 NW2d 362 (1996). A miscarriage of justice occurs when an erroneous or omitted instruction pertains to a basic and controlling issue in the case. *Id.*

Generally, the court should not inform the jury of possible punishment because the jury then may compromise its integrity and render a verdict on factors other than the evidence. *People v Mumford*, 183 Mich App 149, 151; 455 NW2d 51 (1990). The instruction did not produce manifest injustice. The court did not inform the jury about possible punishment; instead, it specifically told the jury not to consider punishment in deciding defendant's guilt. The court properly told the jury that, in the event that it convicted defendant, the court would fashion an appropriate sentence based on factors not before the jury. Moreover, defendant cannot support his contention that the instruction was especially harmful—he faced a mandatory minimum sentence if convicted and the trial court had limited discretion in sentencing him.

Defendant next argues that the prosecutor improperly vouched for Schaffer's credibility by eliciting testimony that Schaffer agreed to testify truthfully and knew that he could be charged with perjury if he did not. Defendant claims that the prosecutor implied that the police and prosecutor knew that Schaffer was telling the truth. We reject defendant's claim. Because defendant did not object, appellate review is precluded unless failure to review the issue would result in a miscarriage of justice or a cautionary instruction could not have cured the prejudicial effect. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). A prosecutor cannot vouch for the credibility of witnesses by arguing some special knowledge concerning a witness' truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Plea agreements containing a promise of truthfulness should be admitted with great caution. *Id.* Admissibility of such an agreement, however, is not necessarily error unless the prosecution suggests that it has some special knowledge, not known to the jury, that the witness is testifying truthfully. *Id*.

On this record, the prosecution never suggested that it had special knowledge, not known to the jury, that Schaffer was testifying truthfully. The reference to the requirement that Schaffer testify truthfully in the plea agreement did not suggest that the prosecution had special knowledge. The prosecutor did not express her personal opinion of Schaffer's veracity. Finally, even if the comments were improper, a curative instruction could have eliminated any risk of prejudice. *Id.* at 281. Accordingly, our failure to review this issue will not result in a miscarriage of justice.

Defendant's next argument, that the trial court abused its discretion in sentencing because substantial and compelling reasons justified a downward departure from the ten year statutorily-mandated minimum term, lacks merit. MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), under which defendant was convicted, provides for a minimum sentence of ten years and a maximum of twenty. A legislatively-mandated sentence is presumptively proportionate and valid. *People v Northrop*, 213 Mich App 494, 499; 541 NW2d 275 (1995).

A court may depart from the mandatory minimum sentence for substantial and compelling reasons that are objective and verifiable. MCL 333.7401(4); MSA 14.15(7401)(4); *People v Perry*,

216 Mich App 277, 279-280; 549 NW2d 42 (1996). Substantial and compelling reasons can include: (1) any mitigating circumstances surrounding the offense; (2) the defendant's prior record; (3) the defendant's age; and (4) the defendant's work history. *Id.* at 281. Further, a sentencing court should consider factors arising after the defendant's arrest, especially whether the defendant cooperated with law enforcement officials. *Id*.

On this record, no substantial and compelling reasons existed to justify a downward departure. Defendant, unemployed since 1978, had sold a significant quantity of cocaine to Schaffer. He also had a previous drug conviction. The trial court did not articulate whether it increased defendant's sentence because he was an habitual offender. The increase certainly was proper, however, and the twelve year minimum sentence was proportionate to the offense and the offender.

Defendant next argues that the trial court erroneously granted the arrest warrant application because the application was deficient and no probable cause existed. We cannot review defendant's claim because the record does not contain the facts upon which the magistrate relied in issuing the arrest warrant. Even if this Court found that the arrest warrant was invalid and the resulting arrest illegal, defendant is not entitled to relief. The sole remedy for an illegal arrest is suppression of any incriminating evidence arising from the arrest. *People v Burrill*, 391 Mich 124, 133; 214 NW2d 823 (1974); *Lansing v Hartsuff*, 213 Mich App 338, 352; 539 NW2d 781 (1995).

Defendant also argues that the circuit court erroneously denied his motion to quash the information because it lacked jurisdiction since the alleged crime occurred in Pontiac and not in Genesee County. In reviewing a circuit court's decision regarding a motion to quash an information, this Court determines whether the district court abused its discretion in binding over the defendant. *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996).

MCL 764.2a; MSA 28.861(1) provides:

> A peace officer of a county, city, village, or township of this state may exercise authority and powers outside his own county, city, village, or township, when he is enforcing the laws of this state in conjunction with the Michigan state police, or in conjunction with a peace officer of the county, city, village, or township in which he may be, the same as if he were in his own county, city, village, or township.

The circuit court properly denied defendant's motion to quash the information. Although defendant argues that MCL 764.2a; MSA 28.861(1) justified the dismissal of charges, the statute is designed not to protect the rights of criminal defendants, but to protect the rights and autonomy of local governments. *People v Clark*, 181 Mich App 577, 581; 450 NW2d 75 (1989). The illegal drug sale was a continuing transaction that occurred in both Flint and Pontiac. Indeed, in *Clark*, *supra*, this Court ruled that it could not justify the exclusion of narcotics evidence where Livonia police arrested the defendant, presumably in Livonia, for a drug transaction that began in Livonia but ended in Wixom. *Id.* at 581. Under *Clark*, the Genesee Circuit Court had jurisdiction to issue an arrest warrant against defendant.

Defendant next contends that he was denied the effective assistance of both trial and appellate counsel because they did not challenge the veracity and authenticity of the complaint, as well as the other "constitutional and jurisdictional bars to [his] prosecution." Defendant has failed to argue the merits of this allegation of error; the record does not indicate how trial or appellate counsel handled this issue. Therefore, this issue is not properly presented. *People v Sean Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993).

Finally, defendant argues that the trial judge should have disqualified himself. Defendant waived this issue because he did not seek review de novo by the chief judge of the circuit court. *People v Samuel Williams (After Remand)*, 198 Mich App 537, 544; 499 NW2d 404 (1993).

Affirmed.

/s/ Maura D. Corrigan
/s/ Jane E. Markey
/s/ Stephen J. Markman

[1] The remaining factors include: (1) whether a long time elapsed between the investigation and the arrest; (2) whether any inducements existed that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen; (3) whether the defendant was offered excessive consideration or other enticement; (4) whether the defendant was guaranteed that the acts alleged as crimes were not illegal; (5) whether sexual favors were involved; (6) whether any threats of arrest were made; (7) whether any government procedures tended to escalate the criminal culpability of the defendant. *Williams, supra* at 661-662.

[2] The record does not reflect the circumstances of defendant's arrest; specifically, whether any money was found on his person or in his home.