

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MARC ALAN D'ONOFRIO,

Defendant-Appellee.

UNPUBLISHED

December 12, 1997

No. 199595

Macomb Circuit Court

LC No. 94-002284-FC

Before: Bandstra, P.J., and Cavanagh and Markman, JJ.

PER CURIAM.

Plaintiff appeals as of right a trial court order that granted defendant's motion to dismiss the charges against him for conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1) and MCL 750.529; MSA 28.797. We vacate and remand.

The armed robbery at issue occurred on August, 17, 1988. On May 12, 1994, defendant was indicted by a grand jury of two counts of conspiracy to commit that robbery. An information was subsequently issued that alleged that defendant, along with two named co-conspirators, agreed to assault and rob the victims. At the subsequent preliminary examination of the three named defendants, the district court found that there was insufficient evidence with respect to one and refused to bind him over for trial. Then, on June 17, 1996, the circuit court entered an order of nolle prosequi with respect to the other named defendant. The order stated:

This cause having been regularly noticed for motion for dismissal and the People asserting that further investigation has raised substantial doubts as to [this co-conspirator's] role, if any, in the charged crime; now, therefore, it is ordered that this cause is dismissed [without] prejudice.

Following the dismissal of the two named co-conspirators, plaintiff moved to amend the information to add "unnamed co-conspirators"; defendant moved to dismiss pursuant to MCR 6.110(F) and (H), contending that there can be no "one-man" conspiracy in Michigan. The circuit court initially granted plaintiff's motion and denied defendant's motion. But defendant moved for

reconsideration. The circuit court granted reconsideration, granted plaintiff's motion to dismiss and denied plaintiff's motion to amend.¹

The applicability of the "no one-man conspiracy" rule to the present case is a legal question. This Court reviews questions of law de novo. *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995). In *People v Anderson*, 418 Mich 31; 340 NW2d 634 (1983), the Court reiterated that Michigan does not recognize "one-man" conspiracies and clarified the application of the "no one-man conspiracy" rule. Specifically, the Court held, at 38:

[T]he common-law "no one-man conspiracy" rule applies to the typical common-law situation, the joint trial of alleged co-conspirators resulting in inconsistent and therefore inherently defective verdicts. It does not apply where alleged co-conspirators are separately tried because there is no inherent defect when the separate juries return different verdicts in the separate trials. . . . [D]ifferent verdicts in different conspiracy trials do not impeach one another since the verdict of acquittal may be based on many factors other than a failure to establish an agreement. Similarly, the fact that a trial judge makes a finding that the prosecuting attorney produced insufficient evidence to support a finding of conspiracy in a separate case against one conspirator does not preclude a jury in a subsequent trial from concluding that the evidence of conspiracy in that case was sufficient to warrant a verdict of guilty.

Here, there was no joint trial of alleged co-conspirators; accordingly, the "no one-man conspiracy" rule is inapplicable here. Under *Anderson*, the fact that there may have been insufficient evidence to support a finding of conspiracy in a separate case against either or both of the two named co-conspirators would not preclude a jury from finding sufficient evidence in the present case to warrant a guilty verdict. The guilt or innocence of the two alleged co-conspirators has not been adjudicated. The trial court erred in invoking the "no one-man conspiracy" rule in this context.

In its opinion and order granting defendant's motion for rehearing, the trial court set forth its rationale for granting defendant's motion to dismiss in terms of "probable cause." MCR 6.110(H) requires a trial court to dismiss the information or remand the case for further district court proceedings if it finds a violation of subrules (C), (D), (E), or (F). Subrule (F) requires the district court to discharge the defendant if "after considering the evidence, the court determines that probable cause does not exist to believe either that an offense has been committed or that the defendant committed it." Probable cause that defendant has committed the charged crime is established by "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person in the belief that the accused is guilty of the offense charged." *People v Tower*, 215 Mich App 318, 320; 544 NW2d 752 (1996). There must be "some evidence" from which each element of the crime may be inferred. *Id.* A conspiracy requires an unlawful agreement between two or more persons. *People v Blume*, 443 Mich 476, 480; 505 NW2d 843 (1993). This Court reviews de novo the circuit court's analysis of the bindover process; we determine if the magistrate abused his discretion in determining whether there was probable cause to believe that defendant committed the offense charged. *Tower*, *supra* at 20. However, here, the circuit court's conclusion regarding the lack of probable cause is inextricably tied to its misapplication of the "no one-man conspiracy" rule. We accordingly vacate the

circuit court order granting defendant's motion to dismiss and remand this matter to the circuit court for reconsideration of its dismissal of the charges against defendant in accordance with *Anderson, supra*.

Vacated and remanded. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Mark J. Cavanagh

/s/ Stephen J. Markman

¹ Plaintiff has chosen to abandon any claim regarding the denial of the motion to amend by failing to present any argument regarding this issue in its brief on appeal. *People v McClain*, 218 Mich App 613, 615; 554 NW2d 608 (1996).