# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACK ANANIAS GRIFFITH,

Defendant-Appellant.

UNPUBLISHED
January 30, 1998

No. 197726
Oakland Circuit Court
LC No. 96-14494 FC

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Before: Fitzgerald, P.J., and O'Connell and Whitbeck, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of conspiracy to deliver more than 650 grams of cocaine, MCL 750.15(a); MSA 28.354(1), and possession with intent to deliver more than 650 grams of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i). Defendant was sentenced to two statutorily-mandated terms of life without parole. The terms are consecutive. MCL 333.7401(3); MSA 14.15(7401)(3). Defendant appeals as of right. We affirm.

Defendant's convictions arose from a drug transaction which defendant brokered while he was incarcerated on federal charges in North Carolina. The transaction involved Willie Causey and Enrique Vargas, a government informant. Henry Guzman, another government informant, and Tim Smith, a special agent with the Drug Enforcement Administration, were also involved. While in prison, defendant approached Guzman, asking if they could make some money. Defendant indicated that he knew some people to whom he could sell cocaine. Guzman introduced defendant to Vargas, and defendant provided Vargas with Causey's pager number. The men then began negotiating the drug transaction.

Defendant first argues that the trial court erred in determining that the circumstances surrounding his conviction did not constitute entrapment. Whether entrapment occurred is a question of law for the trial court to decide. *People v Patrick,* 178 Mich App 152, 154; 443 NW2d 499 (1989). The trial court must make specific findings of fact when rendering its decision, and this Court reviews those findings under the clearly erroneous standard. *Id.*

The purpose of the entrapment defense is to deter law enforcement officials from instigating or manufacturing a crime by a person who would not otherwise commit the crime. *People v Juillet*, 439

Mich 34, 52 (Brickley, J); 475 NW2d 786 (1991). Michigan has adopted an objective test for determining whether entrapment has occurred. *Id.* at 53. In *People v Fabiano,* 192 Mich App 523, 525-526; 482 NW2d 467 (1992), this Court concluded that entrapment can be found in one or both of the following two circumstances: "(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." *Id.* at 526.

The first prong of the entrapment test looks to "whether the government activity would induce a hypothetical person not ready and willing to commit the crime to engage in criminal activity." *People v Williams,* 196 Mich App 656, 661-662; 493 NW2d 507 (1992). A number of factors are relevant to determining whether entrapment has occurred under this prong:

> (1) whether there existed any appeals 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 there were any long time lapses between the investigation and the arrest; (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen; (5) whether there were offers of excessive consideration or other enticement; (6) whether there was a guarantee that the acts alleged as crimes were not illegal; (7) whether, and to what extent, any government pressure existed; (8) whether there existed sexual favors; (9) whether there were any threats of arrest; (10) whether there existed any government procedures that tended to escalate criminal culpability of the defendant; (11) whether there was police control over any informant; and (12) whether the investigation is targeted. [*Id.* at 661-662.]

The second prong analyzes whether the police conduct "run[s] afoul of the basic fairness required by due process." *Id.* at 663. The fact that the government supplied contraband is not reprehensible per se, but is one factor to consider. *People v Jamieson,* 436 Mich 61, 88-90 (Brickley, J); 461 NW2d 884 (1990). Similarly, the use of undercover agents is not reprehensible per se. *People v Nixten,* 160 Mich App 203, 208; 408 NW2d 77 (1987), on remand 183 Mich App 95; 454 NW2d 160 (1990). Where a person who is not a law-enforcement official acts with official encouragement or assistance, he is treated as a government agent for purposes of an entrapment defense. *People v Jones,* 165 Mich App 670, 674; 419 NW2d 47 (1988).

Defendant's entrapment claimed is premised on his alleged belief that he was acting on behalf of the government when he arranged the transaction and that he believed his conduct was not illegal. Thus, defendant contends he was entrapped because he was led to believe his action was permissible under the law. We reject defendant's argument and conclude that the trial court did not err in determining that defendant was not entrapped.

The record indicates that while defendant was cooperating with federal authorities in the investigation of a Canadian target, defendant arranged this proposed drug transaction on his own. Although defendant asserts that he was never given any guidelines for his cooperation with the

government, a number of federal agents, prosecutors, and government informants testified that an informant cooperating in an investigation is not permitted to arrange transactions on his own and that he is required to inform his control agent of everything that occurs. Although defendant testified that he told one of his attorneys that he was arranging a transaction, there was also testimony from federal authorities that defendant's attorneys were not aware of the proposed transaction. Moreover, when Agent Taylor gave defendant the opportunity to reveal the proposed transaction, defendant declined to do so. Given the conflicting nature of the testimony presented, as well as the trial court's unique ability to assess the credibility of witnesses, *People v Marshall*, 204 Mich App 584; 517 NW2d 554 (1994), we conclude that the court did not err in denying defendant's motion to dismiss.

Defendant next argues that MCR 6.425(F)(2)(a)(i), which excepts transcripts of voir dire from those proceedings that must be transcribed, deprives him of due process. However, it is unnecessary to reach defendant's constitutional argument because he is entitled to the transcript under the rule. MCR 6.425(F)(2)(a)(i) excludes the transcript of voir dire unless "the defendant challenged the jury array, exhausted all peremptory challenges, was sentenced to serve a term of life imprisonment without the possibility of parole, or shows good cause." Since defendant was sentenced to two terms of life without parole, and thus had access to the transcripts, he has no standing to make this argument.

Defendant's next argument is that the prosecutor placed undue emphasis on defendant's proffer statement[1] and that the trial court should have issued a limiting instruction. A decision to admit evidence is within the sound discretion of the trial court. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

Defendant's proffer statement was admitted into evidence as an exhibit without objection. Both attorneys used the statement to question various witnesses. When the prosecutor began to cross-examine defendant about the specific information contained in the statement, defense counsel objected on the basis that the prosecutor was impermissibly "reading in an Exhibit." On appeal, defendant argues that this questioning was improper and that the trial court should have issued a limiting instruction. We disagree. First, defense counsel used portions of the statement to establish that defendant wanted to cooperate with the government. Additionally, defendant concedes that the proffer statement was the "linchpin" of his defense. Given the fact that defense counsel used the statement, and that the statement was highly relevant, the prosecutor was entitled to question defendant on the statement.

Defendant also contends that the trial court should have issued a limiting instruction providing that the evidence was not admissible to prove defendant's guilt. However, defendant did not request a limiting instruction, nor did he object to the lack of such an instruction. Thus, this Court will consider the issue only to determine whether manifest injustice occurred. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Given the overwhelming evidence that defendant set up the proposed drug transaction on his own, we find no manifest injustice.[2]

Next, defendant argues that the trial court erred by refusing to give a claim-of-right instruction and by precluding defense counsel from arguing claim of right. Defense counsel submitted a proposed claim-of-right instruction which, in essence, informed the jury that they could not convict defendant if he honestly believed that he had a legal right to arrange the proposed transaction. The trial court

concluded that it would not give the instruction, and precluded counsel from arguing claim of right as a legal defense. However, the trial court noted that counsel could argue that defendant did not have the specific intent to commit the crime because he did not believe that he was committing a crime by arranging the proposed transaction.

We agree with the trial court's ruling. As is apparent from the standard jury instruction upon which the proposed instruction was based, the claim-of-right defense applies in situations where the defendant has taken property believing he or she had a right to do so. CJI2d 7.5; see, e.g., *People v Karasek*, 63 Mich App 706; 234 NW2d 761 (1975) (assault with intent to rob) and *People v McCann*, 42 Mich App 47; 201 NW2d 345 (1972) (larceny). Clearly, the present case does not involve such a situation, and defendant was not entitled to the instruction. Moreover, as noted by the trial court, defendant was not precluded from arguing that he lacked specific intent based on his belief that he could legally arrange the proposed transaction.

Finally, defendant argues that he was deprived of the benefits of the 180-day rule, MCL 780.131(1); MSA 28.969(1), and his right to a speedy trial. Initially, we note that defendant was not incarcerated in *this state*, but in a county jail in North Carolina and a U.S. penitentiary in Atlanta. This Court has held that "the 180-day rule only applies to inmates in state penal institutions in Michigan." *People v Shue*, 145 Mich App 64, 71; 377 NW2d 389 (1985). Therefore, the 180-day rule is inapplicable to defendant.

Finally, we do not believe that defendant was denied his right to a speedy trial. Determining whether defendant was denied a speedy trial is a mixed question of fact and law. This Court reviews the factual findings for clear error and the constitutional issue de novo. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). Four factors are relevant to our consideration of this issue: "(1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to defendant from the delay." *Id.* at 459. A delay of more that eighteen months is presumptively prejudicial to defendant, and the burden shifts to the prosecution to prove that defendant was not prejudiced. *Id.* at 460; *People v Wickham*, 200 Mich App 106, 109; 503 NW2d 701 (1993).

Defendant's argument is premised on the fact that the warrant in the present case was originally filed on April 26, 1993, but defendant's trial did not begin until June 24, 1996. However, at the time defendant committed the offense, he was incarcerated on pending federal charges. Defendant was not sentenced on these charges until September 5, 1995, and the federal prosecutor stated by way of affidavit that despite repeated requests from the Oakland County Prosecutor's Office, he refused to relinquish custody until defendant was sentenced. This Court has stated that "[d]ispositions of charges in another state should not be considered the responsibility of the prosecutor." *Shue, supra* at 73. Therefore, the period from April 26, 1993, to September 5, 1995, should not be attributed to prosecutorial delay. Moreover, the record reveals that it was defendant's conduct which delayed resolution of his federal charges, and consequently, resolution of the present charges. Therefore, the period of delay from April 26, 1993, to September 5, 1995, should be attributed to defendant.

Moreover, the prosecution began the process of bringing defendant to this state three days after he was sentenced for the federal case. Defendant was transferred to the Michigan Department of Corrections on January 30, 1996, arrested on February 27, 1996, and arraigned in March of 1996. Scheduling delays and delays caused by the court system are technically attributed to the prosecutor. However, they should be given only "minimal weight." *Gilmore, supra* at 460; *Wickham, supra* at 111. Beginning April 1, 1996, defendant filed several motions, including motions to dismiss and a motion for an entrapment hearing. The motions to dismiss were denied on May 22, 1996, and the entrapment hearing was held on June 25, 1996. Delays caused by the adjudication of motions filed by defendant are attributable to defendant. *Gilmore, supra* at 461. We also note that defendant did not demand a speedy trial until February 28, 1996. Defendant's failure to promptly assert this right weighs heavily against his claim that he was denied the right. *People v Rosengren,* 159 Mich App 492, 508; 407 NW2d 391 (1987).

Finally, this Court must consider the prejudice to defendant from the delay. Prejudice may be caused in two ways: prejudice to the person and prejudice to the defense. *Gilmore, supra* at 462. Prejudice to the person results when the person is incarcerated before trial. *People v Ovegian,* 106 Mich App 279, 284; 307 NW2d 472 (1981). Defendant was incarcerated in this state approximately five months before he was tried and convicted. However, defendant does not assert that his pretrial incarceration was excessively oppressive. See *id.* The second and more crucial type of prejudice is prejudice to the defense. Defendant makes no specific argument that his defense was prejudiced by the delay. General allegations of prejudice are not sufficient to establish that he was denied the right to a speedy trial. *Gilmore, supra* at 462.

After weighing and analyzing the factors, we conclude that defendant was not deprived of his right to a speedy trial. Most of the delay was attributable to defendant, who did not assert his right until February 28, 1996. The period of delay attributable to the prosecution was caused by normal scheduling delays and the necessity of bringing defendant to the state. There is no evidence that defendant's defense was prejudiced by the delay. Therefore, defendant was not denied his right to a speedy trial.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ William C. Whitbeck

[1] A proffer statement is a written statement usually prepared by the defendant's attorney which outlines defendant's criminal involvement and makes suggestions as to what the defendant could do to assist in the prosecution of others.

[2] We also note that during his closing argument, the prosecutor informed the jury that they could not convict defendant because the proffer statement indicated that defendant was a criminal. The

prosecutor stated that the jury's verdict must be based on the facts which proved the elements beyond a reasonable doubt.