

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARNELL LEVANS DICKERSON,

Defendant-Appellant.

UNPUBLISHED

May 12, 1998

No. 187953

Leelanau Circuit Court

LC No. 94-000744 FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARNELL LEVANS DICKERSON,

Defendant-Appellant.

No. 197954

Grand Traverse Circuit Court

LC No. 94-006596 FH

Before: Holbrook, Jr., P.J., and Gribbs and R.J. Danhof,* JJ.

PER CURIAM.

In docket no. 187953, a Leelanau County jury convicted defendant of two counts of delivery of 50 or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). In docket no. 187954, defendant pleaded guilty in Grand Traverse Circuit Court to one count of delivery of 50 or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). Defendant was sentenced to serve consecutive prison terms of ten to twenty years for each conviction. He appeals as of right in each case. The appeals have been consolidated. We affirm.

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

Defendant asserts that the trial court did not have jurisdiction to hear plaintiff's motion to reinstate the conspiracy charge dismissed by the district court. Whether the circuit court had jurisdiction is a legal question. This Court reviews questions of law de novo. *People v Conner*, 209 Mich App 419, 423; 531 NW2d 734 (1995). The trial court relied on *Genesee Prosecutor v Genesee Circuit Judge*, 391 Mich 115, 119-120; 215 NW2d 145 (1974), in determining that it had authority to review plaintiff's motion, and then proceeded to evaluate the district court's decision, finding an abuse of discretion in failing to bind defendant over for trial on the conspiracy charge. On appeal, defendant challenges only the circuit court's authority to entertain the motion to reinstate the charge.

The prosecution is entitled to seek review of a district court dismissal order in the circuit court. MCL 600.8342; MSA 27A.8342. A party may appeal a district court decision as of right if the appeal is filed within twenty-one days of the entry of the order or judgment being appealed. MCR 7.102(A). If twenty-one days have passed since entry of the order being appealed, the party must file an application for leave to appeal. MCR 7.103(A)(2). In *People v Goecke*, 215 Mich App 623, 627-628; 547 NW2d 338 (1996), this Court held that the prosecutor's failure to file an application for leave to appeal the district court's decision was fatal to its attempt to amend the information:

The time requirements for filing an appeal are jurisdictional. If an appeal as of right is not taken within twenty-one days, the circuit court loses jurisdiction to consider the appeal. Although the circuit court would still possess jurisdiction to consider an application for leave to appeal, the parties must file such an application. . . . A circuit court may review the dismissal order of the district court only through an appeal as of right or by leave granted. . . . Because the prosecution failed to use the appropriate appellate process, the circuit court had no jurisdiction to consider the prosecution's claims.

* * *

Because the proper time and manner to appeal a district court decision are rules of practice and procedure, we . . . hold that a circuit court may not consider an appeal of the district court's decision not to bind a defendant over on a specific charge when the prosecution moves to amend the information without filing either an appeal as of right or an application for leave to appeal. [Citations omitted.]

The principal evils of allowing the prosecution's motion to amend lay in "permitting prosecutors to ignore our time requirements for filing an appeal and . . . authorizing the circuit court to employ a standard of review other than the abuse of discretion standard to the bindover decisions of the district court." *Id.* at 628. Because plaintiff here failed to file an application for leave to appeal, *Goecke* indicates that the circuit court should not have heard plaintiff's motion to reinstate charges.

Nonetheless, we find that any error by the circuit court was harmless. MCL 769.26; MSA 28.1096; *People v Dunham*, 220 Mich App 268, 276-277 (Griffin, J), 278 (White, J, concurring); 559 NW2d 360 (1996). See also *People v Hall*, 435 Mich 599; 460 NW2d 520 (1990). Sufficient evidence was presented at the preliminary examination to bind defendant over on the conspiracy charge. Moreover, defendant suffered no prejudice where the jury acquitted defendant of the charge at trial.

As a result of the trial court's correct decision with regard to the conspiracy charge, and exercise of jurisdiction over that charge, venue was properly laid. A conspiracy can be prosecuted in any jurisdiction in which an overt act occurs in furtherance of the conspiracy. *People v Rannay*, 304 Mich 315; 8 NW2d 80 (1943). This Court has held that when a seller of drugs travels through a county, that seller has committed an overt act in furtherance of a conspiracy so as to establish venue in that county. *People v Meredith*, 209 Mich App 403; 531 NW2d 749 (1995). In this case, a co-conspirator contacted defendant from these counties and sold cocaine in them as well. Clearly, these are overt acts in furtherance of a conspiracy. The trial court did not abuse its discretion in denying defendant's motion to dismiss based upon his claim of improper venue. *People v Williams*, 188 Mich App 54, 59; 469 NW2d 4 (1991).

Nor did the asserted application of Wharton's Rule require dismissal. Determination of the applicability of the rule requires focus on the nature of the target offense or the elements of the crime rather than on the particular factual setting of a case. *People v Davis*, 408 Mich 255, 285, n 6; 290 NW2d 366 (1980). If an "agreement between the essential participants [in the target offense] is already implicit in the definition of the target offense," the rule forecloses a conspiracy charge. *Id.* at 311 (opinion of Levin, J). The target offense in the instant case, delivery of a controlled substance, does not imply an agreement between two actors. *People v Betancourt*, 120 Mich App 58; 327 NW2d 390 (1982). Therefore, Wharton's Rule does not apply. *Id.*

The trial court did not abuse its discretion in denying defendant's motion to sever the charges for trial. *People v Moscara*, 140 Mich App 316, 318; 364 NW2d 318 (1985). When there are multiple offenses that are part of a single scheme or plan, the resultant charges may be tried together. *People v Tobey*, 401 Mich 141, 151; 257 NW2d 537 (1977). The evidence adduced at the preliminary examination showed that the charged offenses were part of an ongoing scheme to sell and distribute cocaine. The trial court did not abuse its discretion in denying defendant's motion to sever.

We next address defendant's claim that the trial court erred in denying his motion for mistrial on the basis of the prosecutor's alleged improper arguments. This Court reviews a trial court's denial of a motion for a mistrial for an abuse of discretion. *People v Sowders*, 164 Mich App 36, 47; 417 NW2d 78 (1987). A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to receive a fair trial. *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v LeGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). Here, considered in context, a listener would not discern any reference to defendant being charged in a separate case. Similarly, the reference to a witness testifying "again" would elude even a careful listener. The trial court did not abuse its discretion in denying defendant's motion for mistrial. The

irregularity, if any, was not so prejudicial to the rights of defendant as to impair his ability to receive a fair trial. *Lugo*, *supra* at 704.

Next, defendant's claim of selective prosecution is abandoned for failure to cite controlling authority. *In re Powers*, 208 Mich App 582, 588; 528 NW2d 799 (1995); *Hover v Chrysler Corp*, 209 Mich App 314, 319; 530 NW2d 96 (1995). Moreover, the prosecutor is a constitutional officer with discretion to decide whether to initiate criminal charges. *People v Herrick*, 216 Mich App 594, 598, 550 NW2d 541 (1996).

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There is a dispute between the parties as to whether defendant waived appellate review of most of the issues raised on appeal. Plaintiff contends that the plea was taken pursuant to *People v Rodriguez*, 192 Mich App 1; 480 NW2d 287 (1991), and that defendant expressly waived his right to appeal all non-sentencing issues. Defendant ostensibly disagrees, but quotes the plea transcript as stating that "there would be some substantive limitation on that right to appeal and that Defendant would waive any challenges to the charge, the bindover, or the information" The language quoted by defendant appears to bring this case squarely within the ambit of *Rodriguez*, in which this Court held that a defendant may waive the constitutional appeal of right from a plea-based conviction, in exchange for charging or sentencing concessions. Although defendant contends that the issues raised on appeal do not relate to the information, the bindover, or the charges, we disagree and find that the issues relate to the *charge* of conspiracy and its concomitant venue implications, the failure to sever *charges* for a trial that defendant did not pursue, and the decision of the prosecutor as to what *charges* should be brought. Thus, under the language quoted by defendant, the non-sentencing issues were waived.¹ Regardless, the issues mirror those raised in Docket No. 187953, and, for the reasons previously discussed, do not merit reversal.

Defendant's claim of double jeopardy with respect to the conspiracy count is also moot, since that charge was dismissed as part of the plea agreement. *Schumacher v Tidswell*, 138 Mich App 708, 717; 360 NW2d 915 (1984).

Lastly, the trial court did not abuse its discretion in sentencing defendant to the statutory mandatory minimum term of imprisonment prescribed by MCL 333.7401(2)(a)(iii); MSA 14.14(7401)(2)(a)(iii). A trial court may depart from the term of imprisonment prescribed by § 7401(2)(a)(iii), if it finds on the record that there are substantial and compelling reasons to do so. MCL 333.7401(4); MSA 14.15(7401)(4). The statutory authorization to depart downward from the required minimum sentence was intended to vest sentencing courts with discretion only in exceptional cases, and the court's discretion is narrow. *People v Fields*, 448 Mich 58, 68; 528 NW2d 176 (1995); *People v Perry*, 216 Mich App 277, 282; 549 NW2d 42 (1996). In this case, the trial court did not abuse its discretion in finding that the reasons advanced by defendant at

sentencing did not constitute substantial and compelling reasons to depart from the statutory minimum sentence. *Fields, supra*.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Roman S. Gibbs

/s/ Robert J. Danhof

¹ The issues are also deemed waived because defendant has not produced a transcript of the plea hearing. *People v Dukes*, 189 Mich App 262, 264; 471 NW2d 651 (1991).