STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLARENCE MITCHELL,

Defendant-Appellant.

UNPUBLISHED
May 15, 1998

No. 198655
Kent Circuit Court
LC No. 95-003304-FH

Before: Hoekstra, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of possession with intent to deliver 50 grams or more, but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and conspiracy to possess with intent to deliver less than fifty grams of cocaine, MCL 750.157a; MSA 28.354(1); MCL 333.7401(2)(a)(iv)(c); MSA 14.15(7401) (2)(a)(iv)(c). Defendant was sentenced to consecutive prison terms of fifteen to forty years for the possession with intent to deliver conviction, and five to forty years for the conspiracy conviction.[1] We affirm.

This case arises out of several drug deals that occurred on October 12 and 13, 1995, in the City of Grand Rapids. The prosecutor presented evidence that defendant was dealing drugs out of his automobile, and that he conspired to do such with codefendant Clifford Bell, Justice Ross, and a fourth unidentified person. The area was under surveillance by undercover police officers, specifically to watch for drug activity. Defendant's theory was that he had loaned his automobile to someone who used the automobile to deal drugs. Defendant claimed that he was unaware that the person would be dealing drugs, and, although defendant was not dealing drugs, the police mistook him for one of the drug dealers they had under surveillance.

I

Defendant first argues that the police did not have probable cause to arrest him, and any evidence seized pursuant to the search incident to his arrest was inadmissible. Alternatively, defendant argues that even if there was probable cause to arrest him, the police did not have probable cause to search the trunk of his automobile.

A

The issue whether the police had probable cause to arrest defendant was not raised below. Appellate courts will consider claims of constitutional error for the first time on appeal when the alleged error could have been decisive of the outcome. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). An arresting officer may make a warrantless arrest if a felony in fact has been committed and the arresting officer has reasonable cause to believe that the person committed it. MCL 764.15(1)(d); MSA 28.874(1)(d). Probable cause to arrest exists where the facts and circumstances within the officer's knowledge and of which the officer has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been or is being committed. *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996).

In this case, Police Officers Jonathan Wu and John Keelean testified[2] that they had experience in undercover drug buys. The experience of the officers involved is a factor to be weighed in determining probable cause. *People v Alfafara*, 140 Mich App 551, 557; 364 NW2d 743 (1985); *People v Alexander*, 112 Mich App 357, 359; 315 NW2d 543 (1981); *Wayne County Prosecutor v Recorder's Court Judge*, 101 Mich App 772, 777; 300 NW2d 516 (1980). Also, both Officers Keelean and Holly Botts testified that they knew the area under surveillance as a heavy drug sales area with a great deal of street level drug activity. Officer Keelean had also done several surveillances and made about ten undercover drug buys in the same area. Associating a locality with prior drug involvement can raise mere suspicion to probable cause. *Wayne County Prosecutor, supra*, pp 776-777.

Also, defendant was seen in the area handing small objects to others, including codefendant Bell, for which he was given money. Bell then met a man, handed a small object to him, and the man gave him some money. Defendant and Bell were then seen flagging down cars which, the testifying officers stated, is a means of getting the attention of potential crack cocaine customers. Defendant approached the stopped vehicles, one of which about ten other people also approached. The officers testified that often several competing drug dealers will approach a stopped car to try to make sales. Defendant was also seen handing something pinched between his fingers to a woman who gave him some money. Officer Keelean testified that he believed he saw a drug transaction take place between defendant and another woman. Lastly, defendant made a furtive gesture in the taxicab in which he was seated as the police approached. A furtive gesture by one aware that he is under police observation is a factor that may be considered in determining the existence of probable cause. *People v Young*, 89 Mich App 753, 761-762; 282 NW2d 211 (1979).

Accordingly, the arresting officers had probable cause to believe that an offense had occurred and that defendant committed it. Therefore, defendant's arrest was legal, and the evidence seized from his person incident to his arrest was admissible. *Champion, supra*, p 115 (a search of a person incident to an arrest requires no additional justification).

B

Defendant also argues that, alternatively, even if there was probable cause to arrest him, the police did not have probable cause to search the trunk of his car. This issue is properly preserved for review because defendant moved to suppress the evidence of the drugs found in the trunk of his car, contending that the police did not have probable cause to conduct a warrantless search of the car.[3] The trial court's factual findings are reviewed for clear error, while the trial court's ultimate decision on a motion to suppress is reviewed de novo. *People v Darwich*, 226 Mich App 635, 637; ___ NW2d ___ (1997).

Generally, searches must be conducted pursuant to a warrant issued by a neutral and detached judicial officer. *People v Taylor*, 454 Mich 580, 587; 564 NW2d 24 (1997). One recognized exception to the warrant requirement is the automobile exception. The search of an automobile without a warrant, based on probable cause to believe that the automobile contained evidence of a crime in light of the exigency arising out of the mobility of the vehicle, does not contravene the warrant requirement. *Id.*, p 588. The existence of exigent circumstances justifying the search of the automobile without a warrant is to be determined at the time the automobile was seized. *Id.*

The officers testified that the trunk of defendant's car was opened and closed several times as people came and went. Defendant was seen near the rear of the car, close to the trunk, handing out small objects from the trunk and receiving money in return. Also, found on defendant's person were the keys to the car, including the trunk key. Under the totality of the circumstances, these factors, combined with the behavior exhibited by the subjects involved, sufficiently supported probable cause to believe that the trunk of defendant's car contained evidence of drug dealing. Therefore, a warrantless search of the trunk was proper, *United States v Ross*, 456 US 798, 807-808; 102 S Ct 2157; 72 L Ed 2d 572 (1982); *People v Anderson*, 166 Mich App 455, 478-479; 421 NW2d 200 (1988), and the evidence seized from the trunk of defendant's car was admissible.

II

Defendant next argues that the trial court committed a clear procedural error by failing to conduct a formal evidentiary hearing on defendant's motion to suppress evidence seized from the trunk of his car, and that he was denied effective assistance of counsel where his attorney failed to request such a hearing.[4]

A criminal defendant has a right to an evidentiary hearing on a motion challenging the admissibility of evidence based on constitutional grounds "if such a hearing is requested." *People v Wiejecha*, 14 Mich App 486, 488; 165 NW2d 642 (1968). Here, the record does not show that defendant made any type of a request for a separate evidentiary hearing. Defendant simply requested, in his motions to suppress, that the evidence found in the trunk be suppressed, but no formal request for an evidentiary hearing was made. Rather, the trial court used the preliminary examination transcript to decide the motion to suppress.

We recognize that our Supreme Court in *People v Talley*, 410 Mich 378, 389; 301 NW2d 809 (1981) held that "a motion to suppress evidence requires the holding of a full evidentiary hearing and any attempt to rule on such a motion on the basis of a preliminary examination transcript is inadequate and erroneous." However, the Court noted that the issue whether opposing counsel may stipulate to the trial court's sole reliance on a preliminary examination transcript in deciding a motion to suppress was not before the Court and need not be decided. *Id.*, p 392, n 4. This Court has subsequently held that where a sufficiently complete stipulation of facts is made, the trial court may decide a motion to suppress on the basis of the stipulation without conducting an independent hearing. *People v Armendarez*, 188 Mich App 61, 65; 468 NW2d 893 (1991); *People v Futrell*, 125 Mich App 568, 571; 336 NW2d 834 (1983). Here, defense counsel specifically stated on the record that the motion to suppress could be based on the facts as indicated in the preliminary examination.

Accordingly, defense counsel stipulated to the trial court's reliance on the preliminary examination transcript to decide the motion to suppress, and did not request an additional evidentiary hearing. The trial court did not err in relying on the preliminary examination transcript to decide the motion to suppress under these circumstances.

Further, we find that defendant was not denied effective assistance of counsel for counsel's failure to request an evidentiary hearing. It is not reasonably probable that the outcome of the trial would have been different had defendant's attorney made the request because, as we have held in Issue I(B), there was probable cause to search the automobile and the evidence was properly admitted. Accordingly, defendant has not shown that counsel's representation prejudiced him. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994).

III

Next, defendant argues that the prosecutor's closing remarks and the trial court's jury instructions on conspiracy broadened the charge against defendant from that which was specified in the information,[5] thus depriving defendant of his constitutional due process right to know the charge against him with a fair degree of certainty.

The prosecutor's unchallenged remarks at closing argument, that defendant conspired to "distribute" cocaine rather than the charge, as specified in the information, that defendant conspired to possess with intent to deliver cocaine, did not unfairly broaden the charge. The jury would not have been so swayed by these remarks so as to disregard the trial court's instructions on the conspiracy to possess with intent to deliver charge, thus taking the prosecutor's remarks to mean that defendant was charged with a different offense. Moreover, the trial court specifically instructed the jury that if "a lawyer says something different about the law, then you follow what I say" and that the lawyers' statements and arguments were not evidence.

Further, the trial court's jury instructions on conspiracy, which were not objected to by defendant, did not constitute manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

The trial court instructed the jury that "[a]nyone who knowingly conspires with *someone else* to commit this particular crime is guilty of what the law calls a conspiracy," "the defendant and *someone else* knowingly agreed to commit the crime of possession with the intent to deliver cocaine," "you must decide whether each individual defendant intentionally joined with *anyone else* to commit the crime [of] possession with intent to deliver cocaine," and that it "is not necessary for all members of the conspiracy to know each other." [Emphases added]. Defendant contends that these instructions were erroneous because the trial court should have specified that defendant and codefendant Bell were charged with the conspiracy, and should not have used the phrase "someone else" or "anyone else."

We note that defendant and codefendant Bell were tried together before the same jury. Therefore, the trial court's instructions had to cover both defendants. It would not have been practical to name each defendant and the trial court's instructions had to be broad enough to include both defendants. In fact, the trial court specifically instructed the jury, "And my instructions that I'm about to give you will apply to both of these defendants unless I specifically state otherwise." Further, the trial court instructed the jurors before voir dire that "Clarence Mitchell and Clifford Idris Bell did unlawfully conspire, combine, confederate, and agree together with one another to commit the crime of possession with the intent to deliver more than 50 grams of cocaine."

There is no manifest injustice under these circumstances. Although the trial court did not reference each defendant by name, the instructions were such that, taken in context, the jury would understand that the defendant and codefendant conspired with each other to possess with intent to deliver the cocaine. Accordingly, the trial court's instructions did not effectively broaden or amend the information.

IV

Next, defendant argues that the trial court improperly allowed Officer Wu to testify that, in his opinion, defendant and Bell were working together because this amounted to an impermissible opinion on the ultimate issue whether defendant was guilty of conspiracy.

This Court reviews decisions to admit evidence for an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). MRE 701 allows opinion testimony by a lay witness if it is rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

At trial, Officer Wu testified that based on Bell looking in the trunk and observing what defendant was doing, and acting as a lookout, it was his opinion that defendant and Bell were working together. Here, Officer Wu's testimony was based on his own physical observations, and based on his perception of Bell's actions in relation to defendant. Officer Wu did not state that defendant and Bell agreed or conspired to commit possession with the intent to deliver cocaine. Rather, Officer Wu stated that defendant and Bell were apparently working together, which is not tantamount to an opinion whether defendant was guilty of conspiracy. Accordingly, the trial court did not abuse its discretion in allowing Officer Wu's opinion testimony because it was based on his perception and assisted the jurors in determining whether defendant was involved in a conspiracy.

V

Lastly, defendant argues that the evidence was insufficient to support a finding beyond a reasonable doubt that he committed a conspiracy.

Criminal conspiracy is a mutual understanding or an agreement, express or implied, between two or more persons to commit an unlawful or criminal act. *People v Hamp*, 110 Mich App 92, 102; 312 NW2d 175 (1981). Although the essence of a conspiracy is the agreement itself, neither direct proof of an agreement nor proof of a formal agreement is required. *People v Cotton*, 191 Mich App 377, 392-393; 478 NW2d 681 (1991). It is sufficient to show that the circumstances, acts, and conduct of the parties establish an agreement. *Id.*

The testimony established that defendant handed Bell a small object from defendant's trunk, for which Bell gave him money. A later search of the trunk revealed that it contained cocaine. Bell met a man nearby, handed him an object, and the man gave him some money. Defendant and Bell were also seen flagging down cars, and met twice to count money. On two occasions, they handed something to each other. At one point, defendant conducted a transaction for money with a woman while Bell acted as a lookout. Further, Officer Wu testified that it appeared as though Bell was working with defendant. These circumstances, acts, and conduct of defendant and Bell were sufficient to show an implied agreement. Therefore, viewed in a light most favorable to the prosecution, a rational trier of fact could conclude that the essential elements of a conspiracy to possess with intent to deliver cocaine were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Hilda R. Gage

[1] Defendant was sentenced as a second controlled substance offender pursuant to MCL 333.7413(2); MSA 14.15(7413)(2).

[2] Because there was no separate evidentiary hearing held regarding the lawfulness of the arrest, we will rely on the trial testimony to determine whether defendant's arrest was based on probable cause.

[3] Although defendant moved to suppress the evidence, a separate evidentiary hearing regarding the search of the automobile was not held. Rather, the trial court relied on the preliminary examination testimony to decide the issue. However, the preliminary examination transcript has not been provided to this Court. Therefore, we will rely on the trial testimony of the police officers.

[4] Defendant's argument that he was denied the effective assistance of counsel due to counsel's failure to request an evidentiary hearing on the motion to suppress was raised in a supplemental brief filed *in propria persona.*

[5] The information charged defendant, codefendant Bell, and Justice Ross with conspiracy (with one another) to commit possession with intent to deliver less than fifty grams of cocaine. The charges against Ross were dismissed by the trial court before trial.