

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE DAVIS,

Defendant-Appellant.

UNPUBLISHED

July 19, 2002

No. 225862

Wayne Circuit Court

Criminal Division

LC No. 99-001952

Before: O’Connell, P.J., and White and Cooper, JJ.

PER CURIAM.

Defendant was convicted by a jury of conspiracy to deliver 650 or more grams of cocaine, MCL 750.157a and MCL 333.7401(2)(a)(i), two counts of delivery of 225 or more but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii), and two counts of delivery of 50 or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii). He was sentenced to consecutive prison terms of twenty to forty years for the conspiracy conviction, two to thirty years for each of the delivery convictions involving 225 to 650 grams, and two to twenty years for each of the delivery convictions involving 50 to 225 grams. He appeals as of right, challenging only the conspiracy conviction. We affirm.

The charges stem from a series of controlled buys by a police informant. When considered separately, each sale involved amounts of cocaine less than 650 grams. The aggregate amount sold, however, exceeded 650 grams.

Defendant argues on appeal that there was insufficient evidence to permit the separate sales to be aggregated, that the evidence never showed that he possessed 650 grams at any single point in time, and there was no predetermined plan at any time to deliver that amount. In reviewing a sufficiency claim, this Court determines whether, when viewed in the light most favorable to the prosecutor, the evidence was sufficient to allow a rational trier of fact to find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

The elements of conspiracy to deliver controlled substances are:

(1) the defendant possessed the specific intent to deliver the statutory minimum as charged, (2) his coconspirators possessed the specific intent to deliver the statutory minimum as charged, and (3) the defendant and his coconspirators

possessed the specific intent to combine to deliver the statutory minimum as charged to a third person. [*People v Justice (After Remand)*, 454 Mich 334, 349; 562 NW2d 652 (1997).]

To the extent defendant challenges the sufficiency of the evidence on the basis that the prosecutor was required to show simultaneous possession of 650 grams of cocaine, we reject this argument. Conspiracy does not require actual possession; “[t]he crime is complete upon formation of the agreement,” *Justice, supra* at 345-346 quoting *People v Carter*, 415 Mich 558, 568; 330 NW2d 314 (1982),¹ and, under appropriate circumstances the amounts involved in individual sales can be aggregated. *Justice, supra*.

Viewing the evidence in the light most favorable to the prosecution, one could reasonably conclude that the August, October, December and February sales were part of the same conspiracy. There was evidence that defendant and codefendant Moore were involved in the August sale. There was also evidence that “Yabo” was also somehow related to the August sale based on the testimony that Moore told Morgan that “Yabo” was the ultimate source, and that both defendant and Moore told Morgan that he still owed \$100, although Moore had supposedly given the money to Yabo’s mother.

One could reasonably conclude that the October sale was part of the same conspiracy based on the evidence that Harris went to Yabo’s house, a phone call was made in which it was confirmed by defendant that Morgan wanted the drugs at that time, and then Harris and another man went down the block to defendant’s house, where the drugs were delivered. Regarding the December and February sales, there was evidence that the same man seen with Harris during the October sale delivered the drugs to defendant’s house. Finally, there was evidence that pre-recorded funds from the February sale were found at Harris’ residence the day after the sale. Thus there was evidence of an overall conspiracy concerning all the August, October, December and February sales, involving a total amount in excess of 650 grams.

Defendant argues that there were four separate conspiracies to deliver lesser amounts, and that it was not shown that defendant or the alleged coconspirators ever had the intent to deliver in excess of 650 grams. The question is whether there was sufficient evidence that these individual conspiracies were part of a single scheme or plan, a larger conspiracy to deliver over 650 grams. *People v Porterfield*, 128 Mich App 35; 339 NW2d 683 (1983).

Defendant argues that *Porterfield* establishes an eight-prong test for aggregating narcotic sales. Although the Court in *Porterfield* relied on many facts in affirming the convictions, it did not imply that it was establishing a specific test for future cases. In *Justice, supra*, multiple sales were aggregated to reach the necessary weight amounts. We conclude that under *Justice, supra*, defendant’s conviction must be affirmed. There was sufficient evidence of a continuing enterprise to deliver large amounts of cocaine to Morgan over a period of time. Although cocaine was apparently unavailable on two occasions, on the remaining occasions defendant obtained the large quantities quickly from the coconspirators. There was sufficient evidence of

¹ *Carter, supra*, was overruled in part on other grounds, *People v Robideau*, 419 Mich 458; 355 NW2d 592 (1984).

an overall conspiracy to deliver and continue to deliver large quantities to Morgan, as requested, in the aggregate in excess of 650 grams.

Defendant's second claim, asserting instructional error, is not preserved for appeal because defendant did not object to the court's instructions at trial or request the instruction urged on appeal. Therefore, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). The jury instruction adequately explained the requirement that the jury find an agreement to commit an illegal delivery of the amount specified. We find no plain error affecting defendant's substantial rights.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Jessica R. Cooper