

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOHN J. SELLORS,

Defendant-Appellee.

UNPUBLISHED
November 6, 2003

No. 241761
Oakland Circuit Court
LC No. 00-174817-FC

Before: Gage, P.J., and Cooper and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of conspiracy to deliver cocaine between 50 and 225 grams, MCL 750.157a; MCL 333.74012(a)(iii); delivery of cocaine between 50 and 225 grams, MCL 333.7401(2)(a)(iii); and possession of cocaine under 25 grams, MCL 333.7403(2). The trial court sentenced defendant to life terms (enhanced under MCL 769.12) on the conspiracy and delivery charges, and to one to fifteen years' imprisonment on the possession charge, to be served consecutively. Defendant appeals as of right and we affirm.

I

Defendant and three others were arrested and charged in an eight-count complaint with multiple drug offenses, arising from an undercover drug investigation by the Royal Oak Police and the federal Drug Enforcement Agency (DEA) [called "Group Three"] that culminated on the evening of August 31, 2000, at a Chi-Chi's restaurant. The principal target of the investigation was former co-defendant Jerome Bolton, whose drug activities the Royal Oak Police had been investigating for years. The police used a confidential informant, Randall Beninati, to set up the buy from Bolton and procure the cocaine. Bolton later entered a plea.

Royal Oak police officer Kenneth Bean testified at trial that on the evening in question he was backing up Officer Martin Lavin, the officer in charge of the case. Bean was positioned east of Hoover and south of I-696, just east of the Chi-Chi's parking lot, out of sight. He was instructed to assist DEA agents Hiorns and Bowler in arresting a person driving a Mercedes Benz. The DEA agents stopped the Mercedes, and struggled with the driver for about one minute. Bean identified the driver as defendant. After being handcuffed, defendant was searched and two square pieces of folded paper (aka "flavor seals") containing a white powdery substance were found in his pant pocket, as well as \$715 dollars.

Randall Beninati (the confidential informant) testified that while in the Oakland County Jail on drug charges, Beninati met Jerome Bolton for the first time. When Beninati got out of jail, his lawyer contacted the police seeking to make a deal, and offering to cooperate. Beninati met with Officer Lavin, told him he had met Bolton in jail, and assisted Lavin with set-up buys and surveillance involving Bolton. Beninati testified that he wore a wire and that he first arranged to buy an ounce from Bolton. In early August 2000, Bolton delivered an ounce to Beninati at The Green Lantern, a pizza place on 11 Mile Road.

Beninati testified that about two weeks later, he went to Bolton's Royal Oak home and asked Bolton to get him two ounces of cocaine, and if he could not, one ounce would do. On the evening of August 31, 2000, Beninati returned to Bolton's home wearing a wire. Bolton and Trina Ashburn, Bolton's girlfriend, drove to Chi-Chi's in one vehicle and Beninati drove his own car. Beninati stopped on the way to Chi-Chi's to get \$3,000 in marked bills from the task force.

Beninati testified that when he got to Chi-Chi's, he saw Ashburn and Bolton getting out of their truck, which they had parked in the lot by the service drive, where no other cars were around. Bolton told Beninati that he (Bolton) needed to go inside Chi-Chi's to meet with his people. Ashburn got into Beninati's vehicle, and Beninati saw Bolton go in the front door of the restaurant. Bolton was in the restaurant for about ten minutes and when he came out, Bolton and Ashburn argued, Beninati gave Bolton the money and per Bolton's instructions, Beninati moved his car by the wall of the hotel behind Chi-Chi's. Bolton took the money in the restaurant, and when he came back out he had a sample of cocaine packaged in a little piece of paper, which he gave to Ashburn. Bolton and Ashburn sampled the cocaine, and then Bolton went back in the restaurant for the third time. Ashburn got upset because Bolton was taking too long, and she went into the restaurant. Ashburn later returned to Beninati's car, alone, followed by Bolton about ten minutes later. When Bolton came out of the restaurant he took a bag from his pants and crotch and "walked up to the passenger window, threw two ounces of cocaine into my lap, and Trina and him [sic] left." Beninati testified that the bag was tied in a knot, that he looked in the bag, and that he saw "Two big rocks of cocaine and some powder on the bottom." When Ashburn and Bolton were ten to fifteen feet away from his car, Beninati gave the pre-agreed on signal, Bolton and Ashburn were arrested, and Beninati gave Lavin the bag of cocaine.

Jerome Bolton's trial testimony regarding meeting Beninati, arranging to sell to Beninati after getting out of jail, and the one-ounce sale at the Green Lantern (not involving defendant) was in accord with Beninati's testimony. Bolton's testimony about the next transaction with Beninati was also in accord with Beninati's testimony. Bolton testified that they eventually agreed on an amount of two ounces, that at first Beninati had said he wanted one ounce, but later said, "why don't you just get me two?" Bolton testified that when he could not reach the person who provided the cocaine at the Green Lantern, Reyes, he went to defendant, a friend of eighteen years, and asked if defendant could get an ounce of cocaine. Bolton testified he called defendant a second time and asked for two ounces of cocaine. Defendant told Bolton that he was working full-time as a car salesman and was not selling cocaine like he used to. The two talked on the day of the delivery, and defendant did not tell Bolton whether he could deliver two ounces, he said whatever he could get, he would have when they met.

Bolton testified that defendant asked to meet him at Chi-Chi's, and that defendant knew that the cocaine was not for Bolton, but for somebody else. Bolton testified that he took a bag of "cut," which he explained was baby laxative or a food supplement, with him to Chi-Chi's to cut

the cocaine, but that he had not discussed doing so with defendant because he owed defendant money. After Beninati met him at Chi-Chi's and gave him the \$3,000, Bolton went in to Chi-Chi's, drank with defendant at the bar and, while they waited for the cocaine to be delivered, defendant gave Bolton a sample of cocaine packaged in a business card. Defendant told Bolton that the guy bringing the cocaine was on his way. Ashburn came into Chi-Chi's, Bolton and Ashburn went outside, and defendant came outside and met Bolton. The two men then returned to the restaurant, and went into a bathroom stall. Defendant gave Bolton two bags, each tied in a knot in the corner. Bolton testified that he "just ripped the knots off of each one and poured them into the third bag. And then I had some cut that was in my crotch. I pulled that out and poured that in there."

Q. What happened – did Mr. Sellors – or was he present when you did this withdrawing the coke and putting in the inositol?

A. At the beginning, he had taken some out himself.

Q. He had taken some out himself. Was that in your presence?

A. Yeah. I saw him take some out. I don't know if he took out any before that.

* * *

Q. (Interposing) He did not – Mr. Sellors did not open up either bag and take any out before he gave you the two ounces?

A. I don't know.

Q. As far as – at least while he was in your presence?

A. No.

Q. It was after you, yourself, had received the two ounces and opened them up that Mr. Sellors reaches in?

A. Right.

Bolton testified that while in the bathroom he gave defendant \$2,400, and put the rest of the \$3,000 in his sock.

DEA Special Agent Dennis Hiorns testified that he observed defendant leave Chi-Chi's, get in the Mercedes, and that a short time later, he observed a black male get out of the passenger side of the Mercedes. At that point, he was advised that Bolton was being arrested on the other side of the restaurant and to arrest defendant. He and Agent Bowler followed defendant on the I-696 service drive and pulled defendant over, there was a struggle, and eventually, they were able to handcuff defendant and search his person. Defendant was upset, yelling and crying. They recovered two very small flavor-seal packages from defendant's breast pocket and cash from his pants' pocket.

DEA Agent Michael Lynch testified that he saw defendant get out of the Mercedes, get back into it, and a short while later a black male got out of the Mercedes. The black male went into a convenience store of a Mobil station that was next to Chi-Chi's parking lot and was arrested when the agents received the order.

DEA Agent Howard Schneider testified that he, Officer Lavin, and another officer were in the same car and had radios on DEA frequencies, Royal Oak frequencies, and each of them had a cell phone, monitoring the confidential informant's (Beninati) transmissions. The signal for the bust came from his vehicle.

Counsel stipulated that marked bills of \$2,200 were found on Harris, \$500 on Bolton, and \$300 on defendant, and that a white dish and digital scale were found in Ashburn's purse. Defense counsel stipulated to qualifying Ralph Sochocki of the State Police crime laboratory as an expert chemist. Sochocki testified regarding two bags, each containing an interior knotted plastic bag. One bag had "approximately 51.94 grams of substance. . . And the other one was 13.65." Sochocki did spot tests on both bags; both produced cocaine crystals. Sochocki testified that the bag containing 13.65 grams had some loose powder in it, weighing probably plus or minus one gram.

Officer Lavin testified he gave Beninati \$3,000 in pre-recorded funds for the second buy, and a pager-transmitter, and that he and a team of officers conducted surveillance at Chi-Chi's. He was present when Bolton was arrested and he took custody of the cocaine Beninati had gotten from Bolton. He seized from Ashburn a folded business card of defendant's.

Once the arrests were made, Lavin went to the Royal Oak police station and advised defendant of his *Miranda* rights while two other officers were present. Defendant agreed to waive his rights and initialed and signed the waiver of rights form. After his memory was refreshed with his written report, Lavin testified that defendant told him how he came to be at Chi-Chi's:

A. That he was contacted on that evening at about 6:00 o'clock by Jerry Bolton. Jerry had asked him for – if he could get him two ounces of cocaine. Mr. Sellors stated that he knew a guy from work named "Carl" that he could get the cocaine from, and that he would obtain that cocaine and meet him later in the evening.

Q. Did Mr. Sellors indicate to you the amount that was being requested by Mr. Bolton?

A. Yes, two ounces.

Q. And did Mr. Sellors talk to you about what he requested from this Carl person?

A. Two ounces.

* * *

Q. . . . at the conclusion of your verbal interview, did you ask Mr. Sellors to do anything?

A. Yes. I asked him if he would be willing to provide a written statement as to what happened on that evening, and he agreed to do that?

Q. And did in fact Mr. Sellors write out, in his own handwriting, a statement?

A. Yes, he did.

Lavin testified he neither taped nor videotaped his interview of defendant. Defendant's written statement was admitted at trial and read into the record. It stated:

Yesterday Jerry Bolton asked me if I could get him some drugs to pay me back money I lent him. I said, 'yes,' I would try. He told me to meet him last night at 9:30 at a body shop . . . He was not there.

He called me today and asked me for some shit," parentheses, "(meaning coke). I told him I could. Then I called Carl. He told me he could get me two ounces.

I told him to meet me at Chi-Chi's, and then I told Jerry to meet me at Chi-Chi's. Then I saw Jerry. Then I saw Carl outside. Carl gave me the coke.

I went into Chi-Chi's bathroom, gave Jerry the coke. Jerry gave me the money. I went back outside in my car and gave Carl the money. Then I left the parking lot and was pulled over.

Lavin admitted that his written report had several errors, including that someone had seen defendant deliver cocaine to Bolton. Lavin testified that he wrote that down because he thought he had heard it in the radio transmissions. Lavin conceded that he did not corroborate what Bolton told him transpired, i.e., he did not go into the Chi-Chi's bathroom to see whether there were any bag sections with knots ripped off, did not check if there were any bags in there, and did not have fingerprints run on any of the bags.

The jury convicted defendant as charged.

II

Defendant argues that the prosecution failed to prove beyond a reasonable doubt that the cocaine delivered was in the amount of fifty grams or more. We disagree.

This Court reviews a challenge to the sufficiency of the evidence de novo, viewing the evidence in a light most favorable to the prosecution, to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992). Defendant moved for a directed verdict on this basis. The trial court denied the motion. When reviewing a trial court's decision on a motion for directed verdict, this Court reviews de novo the record presented up to the close of the prosecution's case to determine whether it could persuade

a reasonable factfinder beyond a reasonable doubt that the essential elements of the crime were proven. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

Although defendant is correct that chemist Sochocki did not separately weigh the cocaine rocks from the powder, defendant's statement to the police was that he delivered two ounces (56.70 grams) to Bolton, with no mention of having taken a cut for himself.¹ Further, there was evidence from which the jury could conclude that defendant "chipped" at the cocaine *after he delivered* two ounces to Bolton. Also, the jury was given the cocaine bag for viewing during deliberation and was instructed regarding the definition of "mixture." Viewed in a light most favorable to the prosecution, there was sufficient evidence for a reasonable juror to conclude that the elements of delivery of between 50 and 225 grams were established beyond a reasonable doubt.

III

Defendant next argues that insufficient evidence was presented to convict him of conspiracy to deliver fifty grams or more of cocaine. We disagree.

When reviewing a decision on a motion for directed verdict, this Court reviews de novo the record presented up to the close of the prosecution's case to determine whether it could persuade a reasonable factfinder beyond a reasonable doubt that the essential elements of the crime were proven. *Aldrich, supra* at 122.

Bolton testified at trial that he eventually asked defendant for two ounces, and defendant's statement to the police supported that defendant asked Harris for two ounces, which would weigh 56.70 grams. Bolton testified he told defendant the cocaine was not for him (Bolton), but for someone else. The trial court properly denied defendant's motion for a directed verdict under these circumstances.

IV

Defendant also argues that the judge that conducted the *Walker* hearing clearly erred in determining defendant's statement was voluntary. We disagree.

"Voluntariness of a confession is a question of law for the trial court's determination." *People v Johnson*, 202 Mich App 281, 287; 508 NW2d 509 (1993). In reviewing the trial court's determination of voluntariness, this Court examines the record and reaches an independent determination on the issue of voluntariness using the factors set forth in *People v Cipriano*, 431 Mich 315, 344; 429 NW2d 781 (1988). Those factors include: age of the accused, lack of education or intelligence level, extent of his previous experience with police, repeated and prolonged nature of the questioning, length of the detention before statement was given, lack of advice of constitutional rights, unnecessary delay in bringing him before a magistrate before he

¹ Although defendant asserts that the 51.94 grams was taken from Bolton and that 13.9 grams was taken from defendant, the evidence supports that 51.94 grams and 13.65 grams were taken from Beninati after defendant delivered the two knotted bags to Bolton.

gave the confession, whether he was injured, intoxicated, drugged or in ill health, whether he was deprived of food, sleep or medical attention, whether he was physically abused, and whether he was threatened with abuse. *Johnson, supra* at 287-288. This Court defers to “the trial court’s superior ability to view the evidence and the demeanor of the witnesses and will not disturb the trial court’s findings unless they are clearly erroneous.” *Johnson, supra* at 288.

The circuit court concluded after the *Walker* hearing that, given defendant’s two prior drug convictions and his prior cooperation with law enforcement (which had resulted in reduced charges or sentences), defendant’s will was not overborne by police promises of leniency, but rather, defendant hoped, and from prior experience knew, that his cooperation *could* result in leniency in the instant case. We find no error.

Regarding the *Cipriano* factors, the record reveals that defendant was thirty-nine years old when arrested in August 2000, that he was employed as a car salesperson at a Chrysler-Plymouth car dealership and had net earnings of \$2,400 per month, was married and had two children. Before the instant arrest, defendant had been convicted of conspiracy to deliver 50-225 grams of a controlled substance, and delivery of 50-225 grams of a controlled substance in September 1995. Defendant had cooperated with local law enforcement authorities before the instant case, and as a result had charges reduced and a minimum sentence reduced as well. There is no indication that defendant’s intelligence level was deficient, or that he was subjected to repeated and prolonged questioning. There is no testimony that he was detained for a long time before giving his statement. Although defendant denied that he was read his *Miranda* rights out loud, Officers Lavin and Bean testified to the contrary, and there was no dispute that defendant initialed and signed the advice of rights form. There is no allegation that there was unnecessary delay in bringing defendant before a magistrate before he gave the statement, or that he was injured, intoxicated, drugged, deprived of food, sleep or medical attention, physically abused, or threatened with abuse. Although the testimony was clear that defendant was distraught, that he physically struggled with the DEA agents making the arrest, and was hysterical and believed he was hyperventilating in the police car as he was transported to the police station, Officer Lavin and other officers testified that Lavin waited for defendant to calm down before beginning his interview at the police station. Under these circumstances, we conclude based on independent review of the record, that defendant’s statement was voluntary.

V

Defendant contends that although he was granted a *Walker* hearing, the court decided the arrest, search and seizure aspects based on the preliminary examination transcript, without an evidentiary hearing. Defendant maintains that this was error where trial counsel did not stipulate to waive the right to an evidentiary hearing.

The issue is preserved.² This Court reviews de novo the trial court’s interpretations of the law in deciding a motion to suppress. *People v Zahn*, 234 Mich App 438, 445; 594 NW2d 120

² Contrary to the prosecution’s contentions, defendant did not rely exclusively on the preliminary examination testimony. Nor does the record unequivocally support that the motion to suppress was heard on March 7, 2001, and that defendant waived this issue by failing to procure the
(continued...)

(1999). In *People v Talley*, 410 Mich 378; 301 NW2d 809 (1981), the Supreme Court “specifically disapprove[d] of the practice of relying exclusively on preliminary examination transcripts in the conduct of suppression hearings.” The Court overruled *Talley* in part in *People v Kaufman*, 457 Mich 266, 275; 577 NW2d 466 (1998), holding that “we overrule *Talley* insofar as it has been understood to mean that counsel cannot agree to have a motion to suppress decided on the basis of the record of the preliminary examination.”

In support of his argument that this Court should remand for an evidentiary hearing, defendant contends that the problems surrounding his arrest and probable cause are manifest in Officer Lavin’s trial testimony acknowledging his police report erroneously stated that an actual delivery of the cocaine had been seen. Defendant contends that:

This subject matter was known to counsel prior to the trial, and would have been the subject of the evidentiary hearing. The Court file contains multiple discovery requests relating to unsuccessful efforts by counsel to obtain tape recordings of radio transmissions during the surveillance; the purpose was investigation of probable cause.

Defendant is correct that there was no trial testimony supporting that anyone saw defendant deliver anything to Bolton, or to anyone else.

We conclude that under *Kaufman, supra*, defendant was entitled to an evidentiary hearing to further explore the incorrect statement in Lavin’s report that an actual delivery was witnessed on the evening in question. However, any error was without consequence, because the court did not rely on the content of Lavin’s incorrect statement, and determined that probable cause existed given the actual circumstances presented to and witnessed by the taskforce/Group Three on the evening in question. We agree that probable cause existed absent Lavin’s statement, given the suspicious activities the taskforce witnessed at Chi-Chi’s. To remand for an evidentiary hearing on defendant’s motion to suppress, as defendant requests, would thus be futile. An evidentiary hearing would not yield evidence that would undermine that probable cause existed to arrest defendant on the evening in question (absent Lavin’s incorrect statement).

Affirmed.

/s/ Hilda R. Gage
/s/ Helene N. White
/s/ Jessica R. Cooper

(...continued)

transcript of that hearing. The court’s docket printout states under March 7, 2001 that defendant’s motion to suppress was “TUA,” meaning, presumably, that it was taken under advisement. The court’s order dated the following day, March 8, 2001, states as to the motions to quash and suppress “opinion to issue.”