

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JESSE LEON RITCHIE,

Defendant-Appellant.

UNPUBLISHED

April 22, 2004

No. 247490

Isabella Circuit Court

LC No. 02-000770-FH

Before: Bandstra, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions following a bench trial on two counts of delivery of less than fifty grams of cocaine to a minor, MCL 333.7410(1), one count of conspiracy to commit the same, MCL 333.7410(1), one count of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and one count of conspiracy to commit the same, MCL 333.7401(2)(a)(iv). On appeal, defendant also challenges the consecutive sentences imposed on those convictions. We affirm.

Defendant argues first that the evidence was insufficient to convict him on any of the counts. We disagree.

A challenge to the sufficiency of the evidence for a criminal conviction is reviewed de novo to determine if, when reviewed in the light most favorable to the prosecutor, it could lead a rational trier of fact to find all the essential elements of the crime proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Here, there was direct evidence of a cocaine sale by defendant to a confidential informant. There was direct evidence from a witness who saw defendant sell cocaine to one minor, and evidence supporting a reasonable inference of a sale to the other, who was in the company of the first. As to the conspiracy counts, the circumstantial evidence was more than sufficient. A number of persons were seen involved in drug activity at the same place at the same time, and their activities were clearly coordinated. Defendant in combination with co-conspirator Jevar White had acted in concert to book the hotel room from which the operation was conducted. There was also evidence that defendant acted in concert with both White and an unidentified person known as “D” to obtain the drugs for sale. Viewed in the light most favorable to the prosecution, the evidence was more than sufficient to sustain defendant’s convictions.

Defendant next argues that the trial court erred when it found that the prosecution had exercised due diligence to obtain the live testimony of Sabrina Floyd but had been unable to do so, and therefore could present her videotaped testimony from the preliminary examination hearing in the bench trial. We disagree.

We review this evidentiary ruling for abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). A witness is deemed unavailable if, after reasonable means, the witness's presence at trial cannot be procured. MRE 804(b). If a witness in a criminal proceeding cannot be produced, the prosecution can present the witness's preliminary examination testimony. MCL 768.26. The determination of reasonable efforts to procure attendance is made on a case-by-case basis. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

Here, though the situation presented is a very unusual one, we do not think that the trial court abused its discretion in finding the exercise of due diligence. The record indicates that the prosecution made substantial efforts to procure Sabrina Floyd's presence at trial. However, while defendant's trial was going on, Floyd happened to enter a tribal police station on a matter unrelated to this case. Knowing that she was to be called as a witness in another case the next month, police served Floyd with a subpoena in that case. However, the police were apparently unaware that she was also to be a witness in this trial and so allowed her to leave the station. This fact was immediately revealed by the prosecutor to the court before it made a final ruling on Floyd's availability. The court found that the failure of the tribal police officer to detain Floyd when she unexpectedly appeared in the station did not negate the due diligence undertaken to procure her attendance at trial. We do not consider this ruling an abuse of discretion. *Starr*, *supra*.

The next issue also involves an evidentiary question governed by an abuse of discretion standard, and also involves an unusual circumstance. Co-conspirator Jevor White indicated to the court that he would invoke his Fifth Amendment right not to testify. Over defendant's objections, the court found that a statement White had made to police just after being arrested bore sufficient indicia of reliability to be admissible, and the police officer to whom it was made testified. While the officer was still on the stand, after direct examination but before cross-examination, it was revealed to the court that White had changed his mind and now wanted to testify. Defendant indicated that he did not want the issue of the admissibility of the statements revisited, and proceeded to cross-examine the officer. However, the next day, defendant changed his mind after the court indicated that White's testimony would be received not just for the limited purpose of rebutting the officer's testimony but generally as well. Defendant asked that the officer's testimony be stricken, but did not specify grounds for doing so. The court overruled the motion. Defendant contends that it was error to admit the officer's testimony. In addition, he argues that the testimony ought to have been stricken when the officer testified.

Admissibility of the statement to police is governed by a totality of the circumstances standard, considering its indicia of reliability. *People v Washington*, 468 Mich 667, 674; 664 NW2d 203 (2003). The trial court did not abuse its discretion in finding it admissible under this standard. White's statements to police were contemporaneous with the event, voluntary, and inculpatory. They contained a high degree of detail and a comprehensive and coherent description of the drug operation in which White admitted he, and said defendant, was involved. Certainly there were indicia of reliability to these statements. Given their inculpatory character,

the motive for fabrication is lacking. White later testified that he told police what they wanted to hear because he wanted to get out of jail. The trial court, however, discounted this statement, finding White not to be a credible witness. We find no abuse of discretion in the ruling admitting the police officer's testimony about White's statements.

As for the claim that the police officer's testimony should have been stricken once White testified, we note that the trial court specifically asked defendant, while the officer was still on the stand, if he wished to move that the testimony be stricken. Defendant indicated that he did not. The intentional relinquishment of a known right constitutes a waiver which extinguishes the error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Thus he cannot raise this issue now.

Defendant also argues that the decision of the United States Supreme Court in *Lily v Virginia*, 527 US 116; 119 S Ct 1887; 144 L Ed 2d 117 (1999), imposes a blanket ban on admission of such out-of-court co-conspirator statements under the Confrontation Clause. However, as noted by a concurring opinion in that case, 527 US 148, and observed by this Court in *People v Schutte*, 240 Mich App 713, 717 n 4; 613 NW2d 370 (2000), and in *People v Beasley*, 239 Mich App 548, 559; 609 NW2d 581 (2000), that view was expressed by only a plurality of the *Lily* Court, and hence does not have the effect of law.

Defendant next raises two objections to the trial court's imposition of consecutive sentences for drug offenses. Because one of these issues addresses the question of scoring permitted only when mandatory consecutive sentences are imposed, we must consider whether the change in MCL 333.7401(3), making such consecutive sentences in drug cases discretionary with the trial court rather than mandatory, applied to all sentences rendered after the amendment's effective date of March 1, 2003, even if the crimes were committed before that date, or only to crimes committed after that date. We hold that the amendment applies only to crimes committed after its effective date, and we disagree with defendant that the trial court's imposition of consecutive sentences must be reversed. The statutory guidelines themselves, MCL 769.34, are clear that their effective date is governed by the date on which the crimes were committed, not when sentence is imposed. Moreover, the general rule, set out in MCL 8.4a, is:

The repeal of any statute or part thereof shall not have the effect to release or relinquish any penalty, forfeiture, or liability incurred under such statute or any part thereof, unless the repealing act shall so expressly provide, and such statute and part thereof shall be treated as still remaining in force for the purpose of instituting or sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.

Therefore, the trial court properly held that the amendment applied only to crimes committed before its effective date. Defendant argues that there were certain cases decided when an earlier change in sentencing law occurred early in the last decade which were applied retroactively to cover crimes committed before the effective date of the amendment, but because those cases deal with a different amendment, they are not binding here. Moreover, the language of the statutory guidelines is so clear as to the means of determining the effective date of the sentences it imposes that we do not find room for doubt on that issue.

Finally, defendant asserts that his trial counsel was ineffective because counsel did not argue for retroactive application of the consecutive sentencing amendment. Because the trial court did not abuse its discretion in deciding to impose consecutive sentences, counsel was not ineffective in failing to make that argument. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000); *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Affirmed.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald