

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH DEMOND THOMPSON,

Defendant-Appellant.

UNPUBLISHED

July 17, 2007

No. 258336

Genesee Circuit Court

LC No. 04-013556 – FH

ON REMAND

Before: Donofrio, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Defendant was convicted after a jury trial of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and maintaining a drug vehicle, MCL 333.7405(1)(d). Defendant appealed as of right both convictions, and in our prior opinion we affirmed the cocaine delivery conviction, but reversed the drug vehicle conviction on the basis that there was insufficient evidence to support the conviction under this Court’s opinion in *People v Griffin*, 235 Mich App 27; 597 NW2d 176 (1999), which interpreted MCL 333.7405(1)(d). *People v Thompson*, unpublished opinion per curiam of the Court of Appeals, issued February 23, 2006 (Docket No. 258336) (*Thompson I*). The Michigan Supreme Court then vacated our opinion, overruling *Griffin*, and remanded the case for reconsideration in light of the new test established by our Supreme Court in this case relative to the construction of MCL 333.7405(1)(d). *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007) (*Thompson II*). On remand, we again affirm in part and reverse in part.

Defendant’s crimes arose after the police received information from a confidential informant that an individual by the name of “Dough” or “Doughboy,” defendant’s known nickname, would be delivering drugs in a Little Caesar’s parking lot on the evening of April 9, 2003. Six police officers set up surveillance at the Little Caesar’s parking lot. Seven or eight minutes into the surveillance, an officer observed a female, later identified as Amber Allen, driving a red Oldsmobile, which pulled into the parking lot. Allen remained in the Oldsmobile for several minutes and then drove over to a telephone booth. After making a phone call, she drove back to her original parking spot.

Police then spotted a vehicle, a white, full-size Ford van, pull into the parking lot. The van was driven by defendant, and he had a passenger, Frederick Paige. Allen immediately got out of her car and walked over to the van. She entered the van using the rear passenger door. The police then decided to approach both vehicles. As police were moving in, Allen exited the

white van and reentered her car. Police approached the driver's side of Allen's vehicle, and Allen was ordered to get out of the car. As she stepped out of the car, police observed a male, later identified as a Mr. Robinson, lying on the back floorboard, and he was removed from the vehicle. With respect to the van, as police approached, Paige was seen removing a piece of plastic from his mouth and tossing it on the front floorboard of the van. Police ordered Paige to exit the vehicle and then took him into custody. No marijuana was viewed being collected from Paige's person. Another officer approached defendant on the driver's side of the van, and the officer observed defendant start to exit the van. Defendant turned around, made eye contact with the officer, and partially ducked back into the open area of the driver's side of the van. Defendant was still standing outside of the van but his upper body was in the van, prohibiting police from seeing defendant's hands. Eventually defendant turned and faced police. An officer saw a silver object, later determined to be a cell phone, in defendant's hands. The prosecution theorized that when defendant ducked back into the van, he gave Paige a baggy of cocaine, which Paige then swallowed. Defendant was taken into custody.

Police found four rocks of crack cocaine on the front floorboard and a crack pipe on the back floorboard of the Oldsmobile driven by Allen. Officers also discovered a fifty-dollar bill laying in the console area of the van. The police further collected the plastic baggie that had been seen being removed from Paige's mouth. There was testimony that plastic baggies are commonly used in the drug trade. Drug dealers package cocaine in the corner of a plastic baggie, twist the baggie, tie the baggie up, and then rip the top of the baggie off. The plastic baggie found in the white van had a "feathering" out from the corner. Other than the baggie, no drugs or drug paraphernalia were found in the van. Police searched defendant and found a one-hundred dollar bill in his wallet. They also found several pieces of paper on defendant, but none drew their attention.

At the police station, Paige started to act strange. His eyes began to water and became bloodshot, he started choking and spitting, and his speech became slurred. Police asked Paige if he was okay, and Paige replied that he had swallowed some cocaine. Police called paramedics and an ambulance, and Paige was transported to a nearby hospital.

Police interviewed defendant later that night after defendant waived his *Miranda* rights. Defendant initially stated that a female who owed him fifty dollars got into his van and paid him the money. An officer accused defendant of lying, and defendant then said something like "you're right, you're right" or "okay, okay" and stated that he had delivered some crack cocaine to the female. Defendant stated that she owed him fifty dollars, which she paid, and he gave her a 20-dollar piece of rock, crack cocaine.

Defendant testified that his nickname has been "Doughboy" since he was little. On April 9, 2003, he and Paige were headed to a friend's house for a couple of beers. Defendant's girlfriend called and asked him to bring home some pizza. He went to Little Caesar's to pick up some pizza, and he was driving a white Ford van. In the Little Caesar's parking lot, Allen approached his van, and she entered the van through the passenger side door and talked with Paige. Defendant claimed that he did not provide drugs to Allen. After she left, his van was approached by the police. Defendant testified that he followed an officer's instruction to exit the vehicle, and he reached back into the van to retrieve his cell phone, which was on his seat. When he got out of the van, there was no fifty-dollar bill in the console area. Defendant denied making any statements to police about drugs, fifty dollars, or being owed money by a female. Defendant

was convicted of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and maintaining a drug vehicle, MCL 333.7405(1)(d).

On appeal, defendant argued that his conviction for maintaining a drug vehicle was not supported by sufficient evidence because there was no evidence that he kept or maintained the van he was driving at the time of the incident for the purpose of selling or keeping drugs. We agreed with defendant's position.

When reviewing the sufficiency of the evidence to sustain a conviction, this Court "must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002), quoting *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

MCL 333.7405(1)(d) provides that a person "[s]hall not knowingly keep or maintain a . . . vehicle . . . that is used for keeping or selling controlled substances in violation of this article." The statute does not define "keep or maintain." This Court previously held that, to convict a defendant of keeping or maintaining a drug house under MCL 333.7405(1)(d), the defendant need only "exercise authority or control over the property for purposes of making it available for keeping or selling proscribed drugs and to do so continuously for an appreciable period." *Griffin*, *supra* at 32, overruled in *Thompson II*, *supra*.

In *Thompson I*, we declined the prosecutor's request to reconsider the holding in *Griffin*. We found that the prosecution did not present sufficient evidence that defendant exercised authority or control over the van continuously for an appreciable period of time for the purposes of making the van available for selling or keeping drugs. The prosecution only presented evidence that defendant used the van for selling or keeping drugs on the night of April 9, 2003.

In *Thompson II*, *supra* at 148, the Supreme Court overruled *Griffin* and held that "while [MCL 333.7405(1)(d)] precludes a conviction for an isolated incident without other evidence of continuity, the statute does not require the prosecution to show that a defendant's actions occurred 'continuously for an appreciable period.'" Here, viewing the evidence in a light most favorable to the prosecution, it only established that defendant engaged in an isolated drug transaction in the Little Caesar's parking lot, and there was no other evidence of continuity. The cocaine, the money, and the baggie all pointed to a single drug transaction. There was no evidence of repeated drug transactions, nor circumstantial evidence that could be inferred as showing that defendant had participated in other drug transactions using the van. *Thompson II*, *supra* at 155. Accordingly, under the new interpretation of MCL 333.7405(1)(d) as set forth in *Thompson II*, there still was insufficient evidence to support the drug vehicle conviction, and we again reverse defendant's conviction on that charge.

Although our Supreme Court only looked at the drug vehicle conviction and solely addressed the interpretation of MCL 333.7405(1)(d), it nevertheless vacated our entire prior judgment. Because the Supreme Court found no need to discuss the other appellate issues, we conclude that the Court found no error with our resolution of these issues. Accordingly, we incorporate and adopt the analysis and resolution of these issues as set forth in *Thompson I*, in which we stated:

Next, defendant argues that the trial court erred in allowing police officers to testify to the substance of the confidential informant's tip because the tip identified and incriminated him, thus making it inadmissible hearsay which deprived him of his constitutional right of confrontation. Generally, this Court reviews a trial court's ruling regarding the admission of evidence for an abuse of discretion, *People v Hine*, 467 Mich 242, 251; 650 NW2d 659 (2002), but claims of constitutional error are reviewed de novo. *People v Geno*, 261 Mich App 624, 627; 683 NW2d 687 (2004).

The substance of a confidential informant's tip is generally inadmissible as hearsay. *People v Starks*, 107 Mich App 377, 383; 309 NW2d 556 (1981). Any testimony in regard to a confidential informant's tip should, at a minimum, be limited to a general, nonspecific statement that the officers were responding to a tip. *People v Wilkins*, 408 Mich 69, 73; 288 NW2d 583 (1980). This would provide the jury with an explanation of the police conduct. *Id.* The *Wilkins* Court addressed the admissibility of an informant's tip, where an officer was permitted by the trial court to testify in detail about the substance of the incriminating tip. The Court, reversing the defendant's conviction, concluded:

Even if we were to accept (which we cannot) the argument that the evidence in question was relevant, the prejudice emanating from the introduction of such evidence far outweighed its probative value. The testimony, while bearing upon the reason why the officers acted as they did, also provided the jury with the content of an unsworn statement of an informant who was not produced at trial. This statement pointed to the defendant's guilt of the crime charged. Putting aside the confrontation problems which the admission of this statement engenders, the prejudicial impact of this evidence, offered for a limited purpose, is self-evident. [*Id.* at 74.]

Regarding confrontation problems, we note the United States Supreme Court's recent decision in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), in which the high Court held that an out-of-court statement by a witness that is testimonial in nature is inadmissible under the Confrontation Clause, US Const, Am VI, where the witness is unavailable to testify and the defendant did not have a prior opportunity to cross-examine the witness, regardless of whether the statement is deemed inherently reliable. The informant's tip or statement to police would be testimonial in nature. See *Crawford, supra* at 51-52.

Here, the officers' testimony regarding the substance of the confidential informant's tip went beyond the non-hearsay purpose of explaining the police conduct, and the jury was presented with a statement from the informant which indicated that defendant would be delivering drugs in the restaurant parking lot. The admission of this evidence offended the rules of evidence as well as the Confrontation Clause. The trial court erred in allowing the testimony and in allowing the prosecutor to reference the substance of the informant's tip during closing argument.

Having found error, we nonetheless affirm the drug delivery conviction because the error was harmless beyond a reasonable doubt. In *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005), a case addressing an assumed violation of the Confrontation Clause, our Supreme Court stated that any “alleged error was not a structural defect requiring automatic reversal.” Rather, the question is whether the alleged constitutional error was harmless beyond a reasonable doubt. *Id.* The Court ruled:

Harmless error analysis applies to claims concerning Confrontation Clause errors[.] But to safeguard the jury trial guarantee, a reviewing court must “conduct a thorough examination of the record” in order to evaluate whether it is clear, beyond a reasonable doubt, that the jury verdict would have been the same absent the error. [*Id.* at 348 (citations omitted).]

The evidence concerning the substance of the informant’s tip was not sufficiently damaging as to warrant reversal. We note that, if there had been only a vague or general reference to the tip, or if there had been no reference at all, the jury, in all likelihood, would still have speculated that the police had some information that a crime was going to be committed simply because of the fact that the police had set up surveillance of the Little Caesar’s parking lot. There was testimony by a police officer that defendant admitted giving rock, crack cocaine to a female who had arrived at the parking lot in a separate vehicle and that the female had given defendant \$50 that was owed to him. While defendant testified that he had not provided drugs to anyone, there was evidence that the female purchaser walked over to the van driven by defendant and entered the vehicle, that she then left the van and reentered her vehicle via the driver’s side door of her car, that four rocks of cocaine were found on the driver’s side floorboard of her vehicle, that there was a \$50 bill in the van, that an empty baggie was found in the van which appeared to have been twisted in a manner typical of drug packaging, that defendant, upon making eye contact with an officer, ducked back into the driver’s side of the van, and that defendant’s passenger swallowed some cocaine. This evidence, when considered with the surrounding circumstances, provides strong corroboration of the confession given by defendant to police as it is consistent with his statement. We are confident that the jury’s verdict would have been the same absent the error. Accordingly, any error was harmless beyond a reasonable doubt.

Finally, we have reviewed defendant’s myriad claims of prosecutorial misconduct, and we conclude that, assuming some instances of arguably improper conduct, defendant has not shown that he was deprived of a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ Kirsten Frank Kelly