

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS L. MILLER,

Defendant-Appellant.

UNPUBLISHED

April 15, 1997

No. 176553

Oakland Circuit Court

LC No. 93-124419

Before: Taylor, P.J., and McDonald and C. J. Sindt*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver between 50 and 224 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and possession with intent to deliver marijuana, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c). On January 13, 1994, defendant was sentenced to ten to twenty years' imprisonment on the cocaine conviction, and one to four years' imprisonment on the marijuana conviction, to be served concurrently. Defendant appeals his convictions, and the prosecutor cross-appeals defendant's concurrent sentences. We affirm in part and remand for resentencing.

First, defendant argues that the affidavit in support of the search warrant of his home was defective, and not supported by probable cause. On appeal, this Court must look at the affidavit and determine whether the information contained in the document could have caused a reasonably cautious person to conclude that there was a substantial basis to conclude that the evidence sought might be found in a specific location. *People v Russo*, 439 Mich 584; 487 NW2d 698 (1992). The affidavit in this case indicates that Livonia Police had been investigating Thomas Lingo for drug trafficking, and on February 13, 1993, arrested him in possession of marijuana and cocaine shortly after he was observed visiting defendant's home. The marijuana seized from Lingo was wrapped in a folded section of a Royal Oak newspaper dated February 11, 1993. Lingo had not made any stops in or around Royal Oak where he might have purchased a newspaper, and there were no other newspaper sections on his person nor in his vehicle when he was arrested. Further, an unnamed informant had told the affiant that

* Circuit judge, sitting on the Court of Appeals by assignment.

Lingo had a system of using homes of associates for storage and distribution locations. We believe that the facts and circumstances described in the affidavit would indeed allow a person of reasonable prudence to believe that Lingo was using defendant's home to store drugs, and that marijuana, cocaine and other contraband would be found there.

We reject defendant's argument that the affidavit lacked information regarding the reliability of the unnamed informant. MCL 780.653; MSA 28.1259(3) provides that probable cause in an affidavit may be based upon information supplied by an unnamed informant if the affidavit contains allegations from which the magistrate can conclude that 1) the informant spoke from personal knowledge and 2) either the informant is credible or the information is reliable. A finding of personal knowledge should be derived from the information provided and not merely from a recitation that the informant had personal knowledge. *People v Stumpf*, 196 Mich App 218; 492 NW2d 795 (1992). In this case, the exhibit to the affidavit contained an extensive description by the informant of the alleged drug trafficking organization to which Lingo belonged. The informant stated that he or she had been involved in that distribution ring, and described the workings of the organization in detail. We conclude that the informant was speaking from personal knowledge. As to the reliability of the informant, we note that the informant's leads were verified by the police during the Lingo investigation. Thus, the informant could be considered reliable. See *People v Harris*, 191 Mich App 422; 479 NW2d 6 (1991).

We also find no merit in defendant's argument that the information in the affidavit was stale. The staleness of information in support of a search warrant rests on the totality of the circumstances, including the criminal, the items to be seized, the place to be searched, and the character of the crime. *Russo, supra*. The crime being investigated in this case was the trafficking of drugs, an ongoing endeavor rather than a single instance crime. The investigation yielded information that Lingo had not had any legitimate source of income in several years, suggesting that the drug trafficking was still occurring. Thus, we conclude that the affidavit in support of the search warrant was sufficient, and the search warrant was supported by probable cause.

The defendant next argues that the prosecutor shifted the burden of proof by suggesting in closing arguments that there was no evidence showing defendant's lack of knowledge about the cocaine in his house. Some prosecutorial remarks which could otherwise be considered improper may not require reversal if they address issues specifically raised by defense counsel. *People v Duncan*, 402 Mich 1; 260 NW2d 58 (1977). We note that defense counsel stressed to the jury in opening statement that "the only issue that will be before you is knowledge. Did Dennis Miller know that the cocaine was in the house." The prosecutor's comments in closing arguments were responsive to defendant's claim. Arguments regarding the weight of evidence presented by a defendant do not shift the burden to defendant to prove his innocence, but rather question the reliability of the evidence presented. *People v Fields*, 450 Mich 94; 538 NW2d 356 (1995). We find no error.

Further, we find no error stemming from the trial court's denial of defense counsel's motion to withdraw as counsel and for a continuance. Defense counsel indicated to the trial judge that he was present during a meeting where defendant told police where he received \$40,000 for the down payment on his home. Counsel stated that he had a different recollection of defendant's statement, and he was

therefore compelled to be a witness on his client's behalf if the prosecutor chose to pursue the issue. In reviewing this issue, this Court considers whether 1) defendant was asserting a constitutional right; 2) defendant had a legitimate reason for asserting that right; 3) defendant was guilty of negligence; and 4) defendant had caused prior adjournments of the trial. See *People v Williams*, 386 Mich 565; 194 NW2d 337 (1972); *People v Krysztopaniec*, 170 Mich App 588; 429 NW2d 828 (1988). We find that while defendant was asserting his constitutional rights to counsel and to testify in his own defense,¹ we do not believe that defendant had a legitimate basis for asserting these rights. If the issue of where defendant obtained the \$40,000 down payment was raised, and the prosecutor impeached defendant with his prior statement, defendant could have called his father or other family members as rebuttal witnesses to testify that the money for the home actually came from defendant's father. Further, defendant was negligent in failing to assert the right at an earlier date. The record reveals that defense counsel had notice of the officer's version of defendant's statement approximately one month prior to the trial date, but failed to raise the issue until the day of trial. Based upon the *Williams* factors, we conclude that the trial court did not abuse its discretion in denying defense counsel's request for withdrawal as counsel and for continuance.

Finally, we agree with the prosecution that defendant should have been sentenced to consecutive terms of imprisonment. Consecutive sentences may be imposed only if specifically authorized by statute. *People v Chambers*, 430 Mich 217; 421 NW2d 903 (1988). MCL 333.7401; MSA 14.15(7401)(3) provides:

A term of imprisonment imposed pursuant to subsection (2)(a) or section 7403(2)(a)(i), (ii), (iii), or (iv) shall be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony.

This consecutive sentencing requirement applies to convictions for any other felony for which the defendant was previously or simultaneously sentenced, including another controlled substances violation. *People v Morris*, 450 Mich 316; 537 NW2d 842 (1995). Defendant was convicted on the cocaine charge under MCL 333.7401(2)(a); MSA 14.15(7401)(2)(a), and was simultaneously sentenced for felony possession of marijuana with intent to distribute, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c). As a matter of law, the trial court was required to impose consecutive sentences pursuant to MCL 333.7401(3); MSA 14.15(7401)(3).

Remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Clifford W. Taylor

/s/ Gary R. McDonald

/s/ Conrad J. Sindt

¹ Defendant argued that he felt constrained not to testify because doing so would open the door to impeachment by the officer's recollection of defendant's statement.