

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOBBY WORD,

Defendant-Appellant.

UNPUBLISHED

August 22, 1997

No. 187214

Kalamazoo Circuit Court

LC No. 94-000870-FH

Before: Cavanagh, P.J., and Holbrook, Jr. and Jansen, JJ.

PER CURIAM.

Defendant was convicted by a jury of delivery of less than fifty grams of heroin, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and conspiracy to deliver less than fifty grams of heroin, MCL 750.157a; MSA 28.354(1)(a). Defendant was thereafter sentenced as a second controlled substance offender, MCL 333.7413(2); MSA 14.15(7413)(2), to two-and-a-half to forty years' imprisonment for the delivery conviction and two-and-a-half to twenty years' imprisonment for the conspiracy conviction, to be served consecutively. He appeals as of right. We affirm.

Defendant first claims the trial court erred in finding that he was not entrapped. We disagree. The trial court issued a lengthy written opinion that sets forth detailed, specific findings of fact as to the entrapment issue that was well reasoned and thorough. Our review reveals no clear error as to the court's findings or to the test that it utilized in analyzing the issue. See *People v Juillet*, 439 Mich 34, 61; 475 NW2d 786 (1991) (Brickley, J.); *People v Fabiano*, 192 Mich App 523, 525; 482 NW2d 467 (1992). Defendant is mistaken that the court could not consider his "willingness" to sell drugs to the informant. See *Juillet, supra* at 54; *Fabiano, supra* at 527. The police did not engage in impermissible conduct that would have induced a person similarly situated as defendant, although otherwise law-abiding, to commit the crime, and the conduct engaged in by the police and its informant was not reprehensible. See *Juillet, supra*.

Although defendant argues that the trial court should have found entrapment based on the informant's appeals to sympathy and friendship combined with repeated direct and indirect requests for drugs made by the informant, the trial court found that defendant was not credible in his characterization

of himself as someone subject to being manipulated. The trial court further concluded that the informant's appeals to defendant to sell him drugs did not instigate the crimes or cause defendant to do something he was not predisposed to do. We will not interfere with the trial court's assessment of credibility. See *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992).

Next, defendant claims there was insufficient evidence of a conspiracy to support that conviction. Although the gist of a conspiracy lies in the unlawful agreement, *People v Atley*, 392 Mich 298, 311; 220 NW2d 465 (1974), direct proof of an agreement is not required and it is not necessary to prove a formal agreement, *People v Blume*, 443 Mich 476, 507; 505 NW2d 843 (1993). The circumstances, acts, and conduct of the parties may establish an agreement in fact, and the conspiracy may be established by circumstantial evidence and may be based on inference. *Atley, supra*. Viewing the evidence in a light most favorable to the prosecution, we conclude that a reasonable trier of fact could infer that Tim McElrath and defendant had an agreement whereby defendant would supply the informant with heroin through McElrath. See *id.* There was sufficient evidence of a conspiracy to deliver heroin to support defendant's conviction on that charge.

Defendant also claims the trial court erred in instructing the jury on the consequences of the informant breaching a plea agreement to testify against him. We conclude that the instruction given was an accurate statement of the law, MCR 6.310(C), and was appropriate in light of the issues raised and testimony presented at trial.

Next, defendant claims that the prosecutor engaged in misconduct by allowing the informant's inaccurate statements regarding the terms of his plea agreement to stand uncorrected and by making misleading statements regarding the informant's interest in testifying against defendant. Due process is violated when a prosecutor allows a principal witness' false testimony, including testimony that the witness had received no promise of consideration for his cooperation or testimony, to stand uncorrected, even where the prosecutor did not solicit the testimony. *People v Wiese*, 425 Mich 448, 453; 389 NW2d 866 (1986); *People v Canter*, 197 Mich App 550, 568; 496 NW2d 336 (1992). The prosecutor has an affirmative duty to correct such testimony even where the false testimony goes only to the credibility of the witness. *Wiese, supra* at 453-455; *Canter, supra* at 568.

In the present case, the jury was made well aware of the promises and consideration given to the informant in return for his cooperation. The informant's obligation under his plea agreement to testify in this case effectively ended at the time he was sentenced.¹ Thus, any error by the prosecutor in not immediately correcting the informant's testimony regarding what he was told at his plea proceeding about his obligations under the plea agreement was harmless. Defendant was not denied a fair and impartial trial. See *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

Finally, defendant claims the trial court erred in imposing consecutive sentences for his delivery and conspiracy convictions. However, the Supreme Court has recently held that the Legislature intended the consecutive sentencing provision of MCL 333.7403(3); MSA 14.15(7403)(3) to fall within the term "penalty" in the conspiracy statute. *People v Denio*, 454 Mich 691, 695; 564 NW2d 13 (1997). Thus, the trial court was *required* to impose consecutive sentences. See *id.* at 703. Accordingly, we find that the trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Donald E. Holbrook, Jr.

/s/ Kathleen Jansen

¹ A prosecutor may seek to have a defendant's plea vacated *before* sentence is imposed if the defendant has failed to comply with the terms of a plea agreement. MCR 6.310(C). However, the trial court lacks authority to set aside a valid sentence once the defendant begins serving it. MCR 6.429(A); *People v Wybrecht*, 222 Mich App 160, 166; 564 NW2d 903 (1997).