STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KOLA DEDVUKAJ,

Defendant-Appellant.

UNPUBLISHED
October 30, 1998

No. 204754
Recorder's Court
LC No. 90-009570

Before: Griffin, P.J., and Gage and R. J. Danhof*, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction for conspiracy to possess 50 to 224 grams of cocaine, MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii); MCL 750.157a; MSA 28.354(1). He was sentenced to six years, six months to twenty years in prison. This appeal is being heard with the appeal of codefendant, Martin Berishaj, in Docket No. 205700. We affirm.

Defendant's first argument on appeal is that the trial court clearly erred in finding that defendant conspired with Berishaj to possess 50 to 224 grams of cocaine. We disagree. Defendant contends that the evidence at trial indicated that defendant and Berishaj wanted to purchase an amount of cocaine greater than 224 grams. Defendant argues that the evidence therefore supported the original charge, i.e., conspiracy to possess more than 650 grams, but not the charge of which defendant was convicted. It is true that the trial testimony suggested that there had been some discussion and/or negotiation among defendant, Berishaj and undercover Alcohol, Tobacco and Firearms agent Joseph Secretti regarding the purchase by defendant and Berishaj of more than 224 grams of cocaine from Secretti. However, defendant brought less cash than the agreed-upon price of $16,000 to the meeting with Secretti in which defendant and Berishaj were to show Secretti that they had the money for the transaction. It was therefore reasonable for the trial court to find that defendant intended to purchase an amount less than what may have been previously discussed or agreed to by the parties. We conclude that the trial court's finding was not clearly erroneous. MCR 2.613(C).

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

Defendant's next argument on appeal is that his right to due process was violated because of the loss or destruction of evidence, including audio tapes of defendant's and Berishaj's conversations with Secretti and cash seized from defendant. Defendant's argument is without merit because he has not shown that the missing evidence was exculpatory or that the police acted in bad faith. *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993); *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). Testimony at trial indicated that the tapes may have been destroyed by flooding in the basement-level evidence room. Also, defense counsel admitted that he once had possession of the tapes and that he did not know whether he had returned them to the police or prosecutor. These facts do not establish that the police acted in bad faith. Moreover, defendant has adduced no evidence to establish that the tapes or cash were exculpatory. Defendant's due process rights were not violated.[1]

Defendant's next argument on appeal is that insufficient evidence was presented at trial to support his conviction. We disagree. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have concluded that all of the elements of the offense were proven beyond a reasonable doubt. *People v Sean Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993). A conspiracy conviction requires proof of two specific intents: the intent to agree and the intent to accomplish the underlying offense. *People v Missouri*, 100 Mich App 310, 340; 299 NW2d 346 (1980). Direct proof of a conspiracy is not required. Rather, "proof may be derived from the circumstances, acts, and conduct of the parties." *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997).

Here, the evidence adduced at trial was sufficient to establish a conspiracy to possess 50 to 224 grams of cocaine. Defendant and Berishaj met with Secretti to discuss the purchase of cocaine from Secretti. Defendant and Berishaj were concerned about whether Secretti was a police officer. On a later occasion, Berishaj and Secretti haggled over price. At the next meeting, defendant had large quantities of cash in his pocket, thus suggesting that defendant and Berishaj were working together. Defendant and Berishaj arrived together at the meetings with Secretti. This evidence establishes that defendant and Berishaj intended to agree and intended to perpetrate the underlying offense, i.e., to possess cocaine. It does not matter, as contended by defendant, whether Secretti ever intended to sell cocaine to defendant and Berishaj, or whether a final agreement was reached with Secretti. The conspiracy here existed between defendant and Berishaj, not between defendant and Secretti. We conclude that sufficient evidence was adduced at trial to support defendant's conviction.

Defendant also contends that the verdict is against the great weight of the evidence. Defendant has failed to argue the merits of this alleged error in his brief. *Sean Jones*, *supra* at 456-457. In any event, our review of the record indicates that the verdict is not manifestly against the clear weight of the evidence. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993).

Defendant's final argument on appeal is that the case should have been dismissed because defendant was entrapped. Consideration of this issue is barred by the law of the case doctrine. The trial court originally dismissed this case on the grounds of entrapment. This Court then reversed and remanded, finding that there was no entrapment. *People v Dedvukaj*, unpublished opinion per curiam of the Court of Appeals, issued June 7, 1996 (Docket Nos. 169723 and 169759). Defendant then

sought to raise the issue during trial, but the trial court disallowed its consideration in light of this Court's prior opinion. We agree with the trial court.

"Under the law of the case doctrine, an appellate court's determination of law will not be differently decided on a subsequent appeal in the same case if the facts remain materially the same." *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996). The facts in this case have remained materially the same. We reject defendant's contention that we should revisit this issue in light of his testimony at trial. We note that defendant could have testified at the entrapment hearing but chose not to do so. We do not believe that a defendant can simply delay testifying on the entrapment issue until after this Court has rendered a decision on the issue in order to avoid application of the law of the case doctrine. In any event, our review of defendant's trial testimony indicates that it does not materially change the facts that are relevant to the entrapment issue. We therefore conclude that consideration of the entrapment issue is barred by the law of the case doctrine.

Affirmed.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Robert J. Danhof

[1] Even if the authority cited by defendant, including *People v Wallace*, 102 Mich App 386, 390; 301 NW2d 540 (1980), is controlling, defendant's right to due process still was not violated because there is no evidence that the tapes were favorable to the defense.