STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED April 23, 1999
v	No. 205081 Wayne Circuit Court
MICHAEL ANTHONY THOMPSON, Defendant-Appellee.	LC No. 87-000982

Before: Whitbeck, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

The prosecution appeals by leave granted from the trial court order granting defendant's motion for relief from judgment, setting aside his conviction and sentence, and granting him a new trial. We reverse.

Defendant and codefendant Gary Fannon were both convicted of delivery of over 650 grams of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), and sentenced to the then-mandatory term of life in prison without parole. This Court subsequently affirmed both defendant's and Fannon's convictions.[1]

Fannon filed a motion for relief from judgment. On July 25, 1996, the trial court granted Fannon's motion. The trial court found that Fannon had been entrapped by Detective Kurt Johnston, and that both Fannon's trial counsel and appellate counsel had rendered ineffective assistance by failing to raise the issue. The prosecutor did not seek appellate review of that decision and subsequently declined to reprosecute Fannon.

Subsequently, defendant filed a motion for relief from judgment. Like Fannon, defendant claimed that he had been entrapped. The trial court found that defendant had not been entrapped by Johnston. Nevertheless, the court was troubled by the fact that Fannon was free while defendant continued to serve a life sentence, and it concluded that equity required that defendant be granted a new trial. On July 9, 1997, the trial court entered an order granting defendant's motion for relief from judgment, setting aside defendant's conviction and sentence, and granting him a new trial. This appeal ensued.

Generally, a trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. *People v Plummer*, 229 Mich App 293, 306; 581 NW2d 753 (1998). However, MCR 6.508(D)(3) imposes limits on the trial court's grant of a postappeal motion for relief from judgment. Pursuant to MCR 6.508(D)(3), a court may not grant relief to the defendant unless he demonstrates both good cause for failure to raise such grounds on appeal or in a prior motion and actual prejudice.

Our review of the record reveals that the trial court did not undertake the analysis required by MCR 6.508(D)(3) to determine whether defendant was entitled to a new trial. Instead, the trial court essentially granted defendant a new trial because it believed that it was unfair for him to be imprisoned for life while his codefendant was free. The court explained:

> I am bothered, however, by the inequities of what has happened here. As I read that whole transcript, if anyone is to blame for this whole transaction in terms of a defendant, it's Mr. Fannon way more than Mr. Thompson[2] and for him to be there for his life is just incredibly unjust, and for that reason, because, if I need to ascribe a legal reason, the taint of what happened in this case by the police officer does warrant in my opinion a new trial.
>
> And I know I am stretching, I say this to the prosecution, but if I have to be wrong in a case, I'm going to be wrong on this, and I am going to grant Mr. Thompson a new trial.

We conclude that the trial court's analysis was utterly without legal foundation. There is no legal principle that, because one defendant is able to avoid punishment by invoking a legal defense, a codefendant who lacks such a defense is also entitled to go free. Cf. *People v Jaffray*, 445 Mich 287, 294, n15; 519 NW2d 108 (1994). An analogous circumstance relates to the protection against unreasonable searches and seizures. Two codefendants may be equally culpable, but one has standing to challenge the illegal search of his house which uncovered the crucial evidence against them, while the second does not. Under this factual scenario, the first codefendant can avoid punishment by challenging the illegal search, while the second codefendant can be convicted on the basis of the evidence thereby obtained.

Furthermore, in our view, it would be untenable to adopt as a legal doctrine that a convicted criminal defendant has the right to complain because a codefendant avoids conviction and punishment on the basis of a serious policy consideration. In the instant case, if Fannon goes free but defendant does not, this will not be the result of an arbitrary rule but rather the result of the application of the doctrine of entrapment against the legitimate problem of police misconduct, which implicated Fannon's conviction but not defendant's. Absent arbitrary discrimination, a guilty criminal defendant should not be entitled to relief simply because a codefendant is relieved of criminal liability based on a legal doctrine not closely tied to actual guilt or innocence.

However, although the trial court erred in failing to analyze defendant's motion under MCR 6.508(D)(3), we conclude that remand for a determination of whether defendant met the "cause and

prejudice" standard of that subrule is not warranted. It is evident from the record that factual development of defendant's allegations would not entitle him to relief from judgment.

A review of the record indicates that defendant could not have proffered a successful entrapment defense.[3] First of all, an entrapment claim obviously presumes that defendant actually participated in a cocaine transaction, which he denied at trial. Moreover,

> [i]n Michigan, entrapment is analyzed according to a two-pronged test, with entrapment existing if either prong is met. The court must consider whether (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances, or (2) the police engaged in conduct so reprehensible that it cannot be tolerated. Entrapment will not be found where the police do nothing more than present the defendant with the opportunity to commit the crime of which he was convicted. [*People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997) (citations omitted).]

We believe that an elementary requirement of a defendant's claim of entrapment based on reprehensible police conduct is that the reprehensible conduct be directed *at the defendant*. The trial court found that Detective Johnston may have used cocaine with Fannon and that he encouraged the transaction with Fannon for his own purposes. The trial court held that Detective Johnston's conduct was reprehensible and therefore vacated Fannon's conviction. However, there is no evidence in the record to indicate that Detective Johnston used drugs with defendant or improperly encouraged defendant to sell drugs. Indeed, defendant's motion for relief from judgment is predicated in part on his lack of prior knowledge of Detective Johnston's inappropriate conduct. Defendant's involvement in the transaction was precipitated not by Detective Johnston but by Fannon, who was not a police actor. Although some of Detective Johnston's actions toward Fannon may have been reprehensible, from defendant's perspective, Detective Johnston merely set in motion a series of events that provided defendant the opportunity to commit the crime of which he was convicted, which does not constitute entrapment. See *id.*

In its supplemental opinion, the trial court relied on *People v Matthews*, 143 Mich App 45; 371 NW2d 887 (1985), and *People v Gallon*, 121 Mich App 183; 328 NW2d 615 (1982). We conclude that *Matthews* and *Gallon* do not support the decision to grant defendant a new trial. Indeed, the *Matthews* panel explicitly noted that "a defendant lacks standing to raise the entrapment defense where an informant's activities were directed only at a codefendant and *were not within the knowledge of the defendant*." *Matthews*, *supra* at 54 (emphasis added).

In *Gallon*, the prosecution improperly elicited testimony from an officer regarding one defendant's exercise of his right to remain silent. This Court reversed the convictions of both that defendant and his codefendant, reasoning that the error would be equally prejudicial to the codefendant because the cases were so intertwined. *Gallon*, *supra* at 191. The trial court stated, "In the case at hand, it is also extremely unlikely that without the evidence against Fanon [sic] – which would have been barred by the entrapment defense – that Thompson would have been convicted." We disagree. A meritorious entrapment claim does not bar the admission of evidence against the defendant, but rather

presents facts that justify barring the defendant's prosecution. *People v Jones*, 203 Mich App 384, 386; 513 NW2d 175 (1994). There is no legal rule providing that evidence against a defendant who presents a successful entrapment claim is inadmissible against a codefendant who was not entrapped.[4]

Apart from a claim of entrapment, the only other method for defendant to obtain a new trial or other relief based on the new information about Detective Johnston would appear to be for defendant to move for a new trial based on newly discovered evidence. However, defendant would have to establish that (1) the evidence itself, not merely its materiality, is newly discovered, (2) the evidence is not merely cumulative, (3) the evidence is such as to render a different result probable on retrial, and (4) the defendant could not with reasonable diligence have produced it at trial. See *People v Lester*, 232 Mich App 262, 271; ___ NW2d ___ (1998).

At trial, Detective Sergeant Michael Bertha testified that defendant arrived at the rendezvous site with Earl Lathon. While Detective Johnston remained in the car, Bertha walked to defendant's vehicle and asked if he had "the stuff." Defendant told Lathon to open the trunk, and Lathon complied. Inside the trunk, Bertha saw a large baggy containing a white, chunky material that appeared to be cocaine; subsequent testing confirmed that the material was in fact cocaine. Bertha told Johnston to go ahead and give defendant the money, and defendant walked over to Johnston, who then arrested him. Thus, the critical evidence against defendant was provided not by Johnston, but by Bertha.[5] That Johnston was engaged in illicit, drug-related activities has no effect whatsoever on Bertha's testimony. On this record, we conclude that no trial court could, in the reasonable exercise of its discretion, grant defendant a new trial based on the newly discovered evidence of Detective Johnston's misconduct because this evidence would not make a different result probable in a new trial. See *id*.

We reverse the order granting defendant relief from judgment, setting aside his conviction and sentence, and granting him a new trial. Defendant's conviction is reinstated. We vacate the order granting defendant bond.[6] The Clerk of the Court is directed to forward a copy of this opinion to the Michigan Appellate Assigned Counsel System for investigation of appellate counsel.

/s/ William C. Whitbeck
/s/ Mark J. Cavanagh
/s/ Richard Allen Griffin

[1] *People v Thompson*, unpublished opinion per curiam of the Court of Appeals, issued August 24, 1989 (Docket Nos. 102760, 104623).

[2] While it is not relevant to our resolution of this case, we note that we cannot share the trial court's conviction that Fannon's conduct was more blameworthy than defendant's. The evidence indicates that Fannon contacted defendant to obtain the cocaine. Thus, the possibility exists that defendant may have been in a higher position in the drug distribution hierarchy than Fannon.

[3] In fact, the trial court specifically found that defendant "had superficial contact with Officer Johnston and was not entrapped by him."

[4] Moreover, in *Gallon*, the fact that one defendant asserted his privilege against self-incrimination was not relevant to the guilt or innocence of the second defendant. In the instant case, the evidence implicating Fannon is relevant to whether defendant committed the charged crime.

[5] Attorney Arthur Lee Morman, who is representing defendant in this appeal, made a contrary assertion to this Court in his appellate brief. The brief states, "Officer Johnston, the rogue police officer, provided the only substantive evidence against either Fannon or Thompson by his testimony." In addition, the brief maintains, "All of the evidence against Michael Anthony Thompson came from the mouth of Officer Johnston." However, in light of Detective Sergeant Bertha's testimony at trial, these statements are patently false and appear to be in violation of MRPC 3.1, 3.3, and 4.1.

Furthermore, in noting that the prosecutor did not appeal the grant of a new trial to Fannon and declined to reprosecute him, the brief claims that "[t]he only difference between Gary Wayne Fannon and your Defendant, is that your Defendant Michael Anthony Thompson is an African American and that Gary Wayne Fannon is a white person." We see no evidence that the prosecutor's decision to appeal the trial court's decision in this case was motivated by race rather than by objective differences between Detective Johnston's interactions with Fannon and defendant. We believe that intimating, without foundation, that the prosecutor based his actions on race rather than legitimate considerations is beyond the bounds of appropriate legal advocacy and may constitute a violation of MRPC 8.2.

We therefore direct the Clerk of this Court to send a copy of this opinion to the Michigan Appellate Assigned Counsel System for investigation and possible referral to the Attorney Grievance Commission.

[6] Defendant may, of course, file an appropriate motion for bond if he seeks leave to appeal to the Michigan Supreme Court.