

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL CHARLES KOVALESKI,

Defendant-Appellant.

UNPUBLISHED

December 21, 1999

No. 202522

Macomb Circuit Court

LC No. 95-000697 FC

Before: Smolenski, P.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

Defendant Michael Charles Kovaleski appeals as of right his plea-based convictions of conspiracy to deliver more than 50 but less than 225 grams of cocaine, MSA 750.157a; MSA 28.354(1) and MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and assault with a dangerous weapon, MCL 750.82; MSA 28.277. The trial court initially sentenced Kovaleski to concurrent terms of ~~7½~~ to 20 years' imprisonment for the conspiracy conviction and 2 to 4 years' imprisonment for the assault conviction, but subsequently modified the sentences to ~~5½~~ to 20 years' imprisonment for the conspiracy conviction and 2 to 4 years' imprisonment for the assault conviction, to be served consecutively. Kovaleski appeals as of right. We affirm Kovaleski's convictions, but remand for resentencing.

I. Basic Facts And Procedural History

On September 26, 1988, police officers executed a warrant to search Kovaleski's Emmet County home for records and documents relating to drug trafficking. A Macomb County magistrate authorized the search warrant after an investigation of narcotics trafficking in Macomb County provided a possible link to Kovaleski. When the police officers searched Kovaleski's home, they discovered a small amount of marijuana and cocaine in the master bedroom and in other rooms of the house, but located no drug records or documents. In 1991, as a result of the drugs found pursuant to the search warrant, the police arrested Kovaleski and, following a bench trial in Emmet Circuit Court, he was convicted of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), and possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d) ("Emmet County convictions"). Kovaleski thereafter pleaded guilty to habitual offender, second

offense, MCL 769.10; MSA 28.1082. The Emmet County Circuit Court sentenced Kovaleski to concurrent prison terms of three to six years for the cocaine conviction and one year for the marijuana conviction. Kovaleski was paroled in early 1994.

This Court subsequently reversed the Emmet County convictions in *People v Kovaleski*, unpublished opinion per curiam of the Court of Appeals, issued December 28, 1994 (Docket No. 143404), concluding that the affidavit supporting the search warrant did not contain sufficient facts to warrant a reasonable person to believe that Kovaleski was involved in cocaine trafficking. Accordingly, this Court concluded that the trial court erred in denying Kovaleski's motion to suppress evidence.

In mid-1994, the Macomb County prosecutor charged Kovaleski with conspiracy to deliver more than 650 grams of cocaine and conspiracy to deliver between 50 and 225 grams of cocaine. After Kovaleski attempted to escape the police to avoid arrest, the prosecutor charged him with assault with a dangerous weapon. Kovaleski ultimately pleaded guilty to conspiracy to deliver between 50 and 225 grams of cocaine and to assault with a dangerous weapon.

II. Double Jeopardy

A. Standard Of Review

Kovaleski argues that his current conviction for conspiracy to deliver between 50 and 225 grams of cocaine violates the double jeopardy provisions of the United States and Michigan constitutions. US Const, Am V; Const 1963, art 1, § 15. Although Kovaleski did not raise this issue below, we will consider it because it involves a significant constitutional question. *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995). We review a double jeopardy issue de novo as question of law *Id.*

B. The Rule Against Successive Prosecutions For The "Same Offense"

The double jeopardy provision of the United States Constitution, US Const, Am V, and its counterpart in the Michigan Constitution, Const 1963, art 1, § 15, protect individuals from multiple punishments and successive prosecutions for the same offense. *People v Harding*, 443 Mich 693, 699; 506 NW2d 482 (1993); *People v Sturgis*, 427 Mich 392, 398-399; 397 NW2d 783 (1986). In this case, Kovaleski's argument focuses on the protection against successive prosecutions for the "same offense." The purpose of both the federal and the state protections against successive prosecutions for the same offense is to preserve the finality of judgments in criminal prosecutions and to protect a defendant from overreaching by the prosecutor. *Sturgis, supra*. The term "same offense" applies to "overlapping conduct that violates more than one statute." *Id.* at 399. "In order to make a prima facie case of double jeopardy, the defendant must show that he was prosecuted twice for the same offense." *People v Wilson*, 454 Mich 421, 428; 563 NW2d 44 (1997).

C. The Michigan "Same Transaction" Test

In Michigan, the validity of multiple prosecutions is measured by the "same transaction" test. *People v White*, 212 Mich App 298, 305-306; 536 NW2d 876 (1995). Under the "same

transaction” test, a prosecutor may not split a criminal transaction into a series of prosecutions. *People v Gonzales*, 197 Mich App 385, 398; 496 NW2d 312 (1992). When the crimes at issue involve specific criminal intent as an element, the prosecutor is required to join at one trial all charges that grow out of a “continuous time sequence” and that demonstrate “a single intent and goal.” *Crampton v 54-A Dist Judge*, 397 Mich 489, 501-502; 245 NW2d 28 (1976); *People v Spicer*, 216 Mich App 270, 272; 548 NW2d 245 (1996). When applying this test, a “close, unified purpose relationship” between the crimes is necessary and the defendant must demonstrate a direct, factual connection, as opposed to “mere temporal happenstance.” *People v Jackson*, 153 Mich App 38, 46; 394 NW2d 480 (1986). Where one or more of the offenses does not involve criminal intent, the criterion is whether the offenses are part of the same criminal episode, and whether the offenses involve laws intended to prevent the same or similar harm or evil, not a substantially different, or very different kind of, harm or evil. *Crampton, supra* at 502; *People v Ainsworth*, 197 Mich App 321, 323; 495 NW2d 177 (1992).

Here, Kovaleski was charged in 1991 with possession of less than 25 grams of cocaine and possession of marijuana in Emmet County and charged in 1994 with conspiracy to deliver more than 650 grams of cocaine and conspiracy to deliver between 50 and 225 grams of cocaine in Macomb County. After examining the evidence to determine if all the charges grow out of a “continuous time sequence” that demonstrate “a single intent and goal,” we conclude that the 1991 Emmet County charged offenses and the 1994 Macomb County charged offenses do not involve a single transaction, nor do they demonstrate the necessary continuous time sequence. Rather, Kovaleski’s possession of a small amount of narcotics in his home and his conspiracy with another to deliver a large amount of cocaine does not display a singular purpose. Kovaleski’s goal in allegedly possessing small amounts of narcotics in his home was purportedly to have a supply for personal use while the conspiracy charges related to delivering cocaine for others to use. Those possession offenses began and were completed in 1988, well before he committed the 1994 crime, contradicting any notion of a “continuous time sequence” in this case.

Furthermore, the conspiracy to deliver a large amount of cocaine demonstrates the independent goal of conspiring with another to deliver cocaine. In order to establish a conspiracy, there must be “evidence of specific intent to combine with others to accomplish an illegal objective.” *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993). The formation of the agreement completes the crime of conspiracy. *People v Cotton*, 191 Mich App 377, 392-393; 478 NW2d 681 (1991). The offenses of possession of less than 25 grams of cocaine and possession of marijuana do not require a conspiracy to be complete. The crime of being in unlawful possession of a controlled substance only requires proof that the Kovaleski had actual or constructive possession of the substance. *People v Hellenthal*, 186 Mich App 484, 486; 465 NW2d 329 (1990). Therefore, we conclude that there was no meaningful factual connection between the small amount of drugs found in Kovaleski’s home in 1988 and the large amount of cocaine that Kovaleski conspired to deliver in 1994. Accordingly, no violation of double jeopardy occurred.

III. Sentence Credit

A. Standard Of Review

Kovaleski argues that he is entitled to sentence credit for time served on the reversed Emmet County convictions. We review this issue de novo as a question of law. *Lugo, supra*.

B. The Categories Of Sentence Credit

There are certain instances when a defendant is entitled to sentence credit. Pursuant to MCL 769.11a; MSA 28.1083(1), a defendant whose initial sentence is invalid is entitled to credit when a court imposes a new valid sentence. See *People v Hill (After Remand)*, 202 Mich App 520, 524; 509 NW2d 856 (1993). In addition, pursuant to MCL 769.11b; MSA 28.1083(2), a defendant who is unable to post bond must be awarded sentence credit for all time served in jail before sentencing “for the offense of which he is convicted.” See *People v Whiteside*, 437 Mich 188, 195-197; 468 NW2d 504 (1991).

C. “Unrelated” Offenses

It is well established, however, that a defendant is not entitled to sentence credit for time served in prison for a previous *unrelated* offense. See *People v Prieskorn*, 424 Mich 327, 340; 381 NW2d 646 (1985); *People v Ovalle*, 222 Mich App 463, 468; 564 NW2d 147 (1997). Here, Kovaleski’s incarceration as a result of the 1991 Emmet County convictions for possession of less than 25 grams of cocaine and possession of marijuana is unrelated to his current incarceration as a result of the 1994 Macomb County conviction for conspiracy to deliver between 50 and 225 grams of cocaine. Further, Kovaleski is not seeking sentence credit for a previous invalid sentence in this case, nor is he seeking credit for time served in this case as a result of an inability to post bond. Therefore, Kovaleski is not entitled to sentence credit for time served on the previous unrelated offenses.¹

IV. The Right To Be Present At Resentencing

A. Standard Of Review

Kovaleski argues that he is entitled to be resentenced because he was denied his right to be present at his resentencing. Whether a defendant’s right to due process was violated is a question of law, which we review de novo. *Lugo, supra*.

B. Resentencing

Initially, the Macomb County Circuit Court imposed concurrent sentences of 7 $\frac{1}{2}$ to 20 years and 2 to 4 years. The prosecutor then moved for reconsideration, arguing that MCL 333.7401(3); MSA 14.15(7401)(3) required consecutive sentencing. The Macomb County Circuit Court held a hearing to correct the judgment of sentence, but Kovaleski was not present at this hearing.

C. Waiver

A defendant has a right to be present at any stage of trial where substantial rights might be adversely affected, including sentencing. MCR 6.425(D)(2)(c); *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984); *People v Palmerton*, 200 Mich App 302, 303; 503 NW2d 663 (1993). MCR 6.425(D)(2)(c) states that, at sentencing, the court must give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider to impose sentence.

A defendant can waive his right to be present at sentencing. *Palmerton*, supra at 304. A valid waiver arises when the defendant specifically knows of the right to be present and intentionally abandons the protection of that right." *Id.* at 303. "A valid waiver cannot be established from a silent record." *Id.* In other words, when the record does not explain why a defendant failed to appear, we cannot conclude that there was a valid waiver. *Id.* at 303-304. Here, there is inadequate information in the record to conclude that Kovaleski knew of the sentencing date and intentionally waived his right to appear for sentencing. *Id.* at 304. Accordingly, we are unable to conclude that Kovaleski validly waived his right to be present. Therefore, we remand for resentencing.

We affirm Kovaleski's convictions, but remand for resentencing. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ William C. Whitbeck

/s/ Brian K. Zahra

¹ Kovaleski states in passing that he is entitled to sentence credit on a due process basis because the charges that led to his current incarceration were not brought with due diligence. Kovaleski, however, fails to support this claim with sufficient argument or facts supported by citation to the record. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority. *People v Kelly*, 231 Mich App 627, 640, 641; 588 NW2d 480 (1998).