STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MARTRICE ANTON MITCHELL,

Defendant-Appellee.

UNPUBLISHED
June 23, 2000

No. 221582
Eaton Circuit Court
LC No. 99-000036-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ROBERT PARNELL HIGGINS,

Defendant-Appellee.

No. 221586
Eaton Circuit Court
LC No. 99-000035-FH

Before: Bandstra, C.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

In these consolidated cases, plaintiff appeals by leave granted from orders quashing Count II of the felony informations against defendants, which charged them with conspiracy to possess with intent to deliver 225 grams or more but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), and MCL 750.157a; MSA 28.354(1). We affirm.

A district court must bind a defendant over for trial when the prosecutor presents competent evidence constituting probable cause to believe that (1) a felony was committed, and (2) the defendant committed that felony. MCL 766.13; MSA 28.931; MCR 6.110(E); *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998). This Court reviews de novo a circuit court's decision to grant or deny a motion to quash a felony information to determine if the district court abused its discretion in

ordering a bindover. *Id*. A district court's determination that probable cause exists will not be disturbed unless the determination is wholly unjustified by the record. *Id*. This Court has said the following about a district court's determination of probable cause:

> Probable cause requires a reasonable belief that the evidence presented during the preliminary examination is consistent with the defendant's guilt. Circumstantial evidence, coupled with those inferences arising therefrom, is sufficient to establish probable cause to believe that the defendant committed a felony. Although the district court should consider the weight of the evidence and the credibility of the witnesses in determining whether to bind the defendant over for trial, it may not usurp the role of the jury. Competent evidence that both supports and negates an inference that the defendant committed the crime charged raises a factual question that the district court must leave to the jury. [*Northey, supra* at 575 (citations omitted).]

Plaintiff argues that the circuit court erred in quashing the information because there was some evidence before the district court of an agreement to commit the target offense. We disagree. Both defendants were charged with conspiracy to possess with intent to deliver 225 grams or more but less than 650 grams of cocaine in violation of MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). Thus, to bind over either defendant on the conspiracy charge, plaintiff was required to introduce sufficient evidence to give probable cause to believe that (1) the defendant possessed the specific intent to deliver the statutory minimum as charged, (2) his coconspirator possessed the specific intent to deliver the statutory minimum as charged, and (3) the defendant and his coconspirator possessed the specific intent to combine to deliver the statutory minimum as charged to a third person. *People v Justice (After Remand)*, 454 Mich 334, 349; 562 NW2d 652 (1997). Only the third element is seriously contested by the parties as to either defendant.

To find the intent to combine, two or more individuals must have voluntarily agreed to effectuate the commission of a criminal offense and there must be proof demonstrating that the parties specifically intended to further, promote, advance, or pursue an unlawful objective. *Justice, supra* at 345, 347. Because of the clandestine nature of criminal conspiracies and the difficulty of identifying the objectives and the participants of an unlawful agreement, direct proof of the conspiracy is not essential; instead, proof may be derived from the circumstances, acts, and conduct of the parties, and inferences may be made because such evidence sheds light on the intentions of the alleged coconspirators. *Id.* at 347. Any inferences drawn, however, must be reasonable. *Id.* at 348. Nevertheless, it is impermissible to pile one inference on top of another inference based on identical evidence, particularly where the inference of the intent to sell is used to establish an inference of an agreement to sell in order to find a conspiracy. *People v Atley*, 392 Mich 298, 315; 220 NW2d 465 (1974).

After review of the record, we conclude that the evidence adduced at the preliminary examination does not sufficiently show an agreement between defendants to possess with intent to deliver the requisite quantity of cocaine. Plaintiff points to a number of factors: (1) Mitchell's nervousness when stopped by police; (2) the presence of cocaine near where Higgins lay in the back seat; (3) the amount of drugs found; (4) the conversation between Mitchell and Higgins as to whether to allow the trunk to be searched; (5) the amount of time necessary to pull Mitchell's car over after the

sheriff's deputy turned on his emergency lights; and (6) Mitchell's denial, and later admission, that the cocaine and gun found in the back seat were his. At best, these factors might be used to raise an inference of possession with intent to deliver, the target offense on the part of one or the other defendant. It is not evidence of an agreement between defendants to commit such a crime. *Atley*, *supra* at 315.

The only evidence on which plaintiff relies that does not go directly to show possession with intent to deliver cocaine is the conversation between defendants regarding whether the authorities should be given consent to search the trunk of the vehicle. This conversation took place after defendants were standing outside in cold weather, acknowledged by the police to be freezing temperatures, for a significant period of time. Moreover, defendant Mitchell's response to an officer's request to search the trunk specifically referenced the cold weather. Defendant Higgins then suggested to defendant Mitchell that he let the officer search the trunk, and defendant Mitchell gave consent for the search.

The exchange between Mitchell and Higgins does not raise a reasonable inference of an agreement to commit the predicate offense. *Justice*, *supra* at 348. Nor does this conversation amount to reasonable proof demonstrating awareness of the overall objective, an interest in it, or a commitment to such a conspiracy by either defendant. *Id.* at 347-348. We find no evidence of an agreement on this record and therefore conclude that the district court's decision to bind over defendants on the conspiracy charge was not justified by the record and constituted an abuse of discretion. *Northey*, *supra* at 574. Consequently, the circuit court did not err in quashing the conspiracy charges.

We affirm.

/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra