

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARWOOD R. SMITH,

Defendant-Appellant.

UNPUBLISHED

August 4, 2000

No. 210613

Bay Circuit Court

LC No. 97-001182-FH

Before: Saad, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12; MSA 28.1084, to 4½ to 20 years' imprisonment, to be served consecutively to his two- to four-year sentence in another case. We affirm.

Defendant argues that the trial court violated his due process rights by refusing to suppress the evidence that the police obtained following defendant's arrest without a warrant where no exigent circumstances existed. We disagree. When ruling on a motion to suppress the evidence, this Court reviews the trial court's factual findings to determine if they are clearly erroneous and its conclusions of law de novo. *People v Zahn*, 234 Mich App 438, 445; 594 NW2d 120(1999).

The United States Constitution and the Michigan Constitution guarantee the right to be free from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *In re Forfeiture of \$176,598*, 443 Mich 261, 264-265; 505 NW2d 201 (1993). The expectation of privacy for a dwelling extends to hotel rooms. *People v Oliver*, 417 Mich 366, 377; 338 NW2d 167 (1983). A search without a warrant is unreasonable unless there is both probable cause and an applicable exception to the warrant requirement. *People v Mayes (After Remand)*, 202 Mich App 181, 184; 508 NW2d 161 (1993). For probable cause to exist, there must be "a fair probability that contraband or evidence of a crime will be found in a particular place." *People v Garvin*, 235 Mich App 90, 102; 597 NW2d 194 (1999), quoting *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983).

The existence of exigent circumstances is one exception to the warrant requirement. *People v Davis*, 442 Mich 1, 10; 497 NW2d 910 (1993). Under the exigent circumstances exception, the police may enter a dwelling without a warrant if the officers have probable cause to believe that a crime was recently committed on the premises, and probable cause to believe that the premises contain evidence or perpetrators of the suspected crime. *In re Forfeiture*, *supra* at 271. The police must establish that immediate action is necessary to (1) prevent the immediate destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect. *Id.* In cases where the police can show an objectively reasonable risk that destruction or removal of evidence is imminent, and that immediate action is necessary before they can obtain a warrant, the exigent circumstances exception applies. *People v Blasius*, 435 Mich 573, 594; 459 NW2d 906 (1990).

In *Blasius*, police officers observed an individual, Gieber, go to the defendant's residence and return with cocaine. *Id.* at 594-595. The Court determined that this act, in addition to the fact that the police had observed traffic of known narcotics dealers at the residence, would lead a reasonable person to believe that there was criminal activity occurring in the house. *Id.* at 595. Gieber told the officers that the cocaine was "going fast" and might be gone by the end of the day. *Id.* Our Supreme Court held that, when viewing all the factors in combination, exigent circumstances to enter the house existed. *Id.* at 597. Specifically, the Court noted that the imminent removal or destruction of evidence may itself constitute an exigent circumstance. *Id.* at 583.

In *People v Hadley*, 199 Mich App 96, 100-101; 501 NW2d 219 (1993), *aff'd sub nom* on other grounds *People v Morris*, 450 Mich 316; 537 NW2d 842 (1995), another controlled substances case, this Court determined that where the police entered the defendant's house with no search warrant, exigent circumstances justified the entry because it was necessary to prevent the loss or destruction of contraband.

In *People v Snider*, 239 Mich App 393; 397-398; 608 NW2d 502 (2000), a shooting victim identified the defendant as the man who shot him and indicated that the defendant lived in a hotel. A witness also stated that he saw a white van pull into the parking lot and saw a man who matched the defendant's description running away from the van after the victim was hollering that he had been shot. *Id.* at 397. The police saw a white van with the doors open, the engine running, and the body of a woman who had died from a gunshot wound inside. *Id.* at 398. The police then obtained a key for the defendant's hotel room and conducted a search of the room without a warrant. *Id.* This Court found that there were sufficient facts to show exigent circumstances justifying the search. *Id.* at 407. This Court stated that the police could not wait for a warrant because evidence may have been destroyed and it was necessary to protect the police and others, to prevent the defendant's escape, and to determine if the defendant was wounded. *Id.* at 410.

Here, defendant was staying at a motel; consequently, he was only there temporarily and could have checked out. A motel room itself does not create exigency, but each case must be judged on its own facts. *Oliver*, *supra* at 383-385. The question is whether a reasonable person would have perceived the need to immediately secure the motel room. *Id.* at 383; *People v Olajos*, 397 Mich 629, 634; 246 NW2d 828 (1976). In this situation, the police acted under the exigent circumstances exception. The facts demonstrated that the evidence may have been gone by the time the police had

obtained a warrant. Further, the police had probable cause to search the room because a controlled buy took place there less than an hour earlier. Because the police had probable cause and exigent circumstances existed, it was reasonable for the police officers to search the motel room, and the trial court properly refused to suppress the evidence.¹

Next, defendant argues that the trial court should have granted his motion for new trial because of prosecutorial misconduct. Specifically, he claims that the prosecutor violated his due process rights by allowing witness Gerardo Facundo to testify falsely to not expecting leniency in exchange for his testimony against defendant. We disagree. In cases of prosecutorial misconduct, the determination must be made whether the defendant was denied a fair trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). The clear error standard of review applies to a trial court's factual findings in deciding a motion for new trial. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998). The court's disposition of the motion is reviewed for an abuse of discretion. *Id.*

Where an accomplice or co-conspirator has been granted immunity or other leniency, it is incumbent upon the prosecutor and trial judge, if the fact is brought out in trial, to disclose the fact to the jury upon request of defense counsel. *People v Atkins*, 397 Mich 163, 173; 243 NW2d 292 (1976). It has been held to be a denial of due process where the witness testifies that he has not been promised consideration for testimony where the prosecutor knows the statement to be false. *Id.* at 173-174. A prosecutor has a constitutional duty to report to the defendant when a witness for the prosecution lies under oath and a duty to correct the false evidence. *Lester, supra* at 276. Nevertheless, the possibility of future leniency does not have to be disclosed:

[I]t is one thing to require disclosure of facts (immunity or leniency) which the jury should weigh in assessing a witness's credibility. It is quite another to require "disclosure" of future possibilities for the jury's speculation. Indeed, if a prosecutor were required to volunteer that, although there was no agreement, he intended to recommend some sort of consideration for a witness because the witness was testifying in this and other cases or had corrected his past misdeeds, could this not be viewed as vouching for a witness's credibility? The focus of required disclosure is not on factors which may motivate a prosecutor in dealing subsequently with a witness, but rather on facts which may motivate the witness in giving certain testimony. [*Atkins, supra* at 174.]

¹ In his appellate brief and at oral argument, defendant relied on the case of *Payton v New York*, 445 US 573; 100 S Ct 1371; 63 L Ed 2d 639 (1980), in arguing that the evidence should have been suppressed because no exigent circumstances existed. Defendant's reliance on *Payton* is misplaced because the exigent circumstances exception to the warrant requirement was not considered in *Payton*. The *Payton* Court specifically stated that, although it was arguable that the warrantless entry might have been justified by the exigent circumstances exception, the Court would not consider the exception because the lower courts had not relied on any such justification. *Id.* at 582-583.

Here, although there was evidence that the possibility of future leniency existed, the evidence did not demonstrate that Facundo testified in exchange for the prosecutor's promise of leniency. Accordingly, there was no prosecutorial misconduct, and defendant was not denied a fair trial.

Finally, defendant contends that the trial court violated his due process rights by admitting evidence that, after his arrest, he told the police he would purchase cocaine and he assaulted Facundo, the person to whom he sold the cocaine. Defendant claims that the prejudicial effect of the other acts evidence outweighed its probative value. Again, we disagree. The admissibility of other acts evidence is within the trial court's discretion, and the court will be reversed only when there is an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would conclude there was no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

There was no abuse of discretion in the present case. The evidence that defendant agreed to cooperate with the police and buy cocaine from a friend was not introduced to prove his character. Rather, the evidence was intended to demonstrate that the defendant had access to cocaine. This was relevant because defendant claimed he did not sell cocaine to Facundo. Furthermore, its probative value was not substantially outweighed by its prejudicial effect. Defendant explained that he was forced into the agreement with the police and had to cooperate or he would be jailed. Thus, the prejudicial impact of the evidence was minimal. The evidence was properly admitted. Moreover, the evidence regarding the assault on Facundo was admissible to show consciousness of guilt. In *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996), the Court held that evidence demonstrating consciousness of guilt was admissible, and the trial court did not abuse its discretion by admitting the evidence. Evidence of a threat against a witness is generally admissible as conduct that can demonstrate consciousness of guilt. *People v Kelly*, 231 Mich App 627, 640; 588 NW2d 480 (1998). Thus, the trial court did not abuse its discretion.

We affirm.

/s/ Henry William Saad

/s/ Joel P. Hoekstra

/s/ Jane E. Markey