STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee	UNPUBLISHED September 26, 2000
v ROBERT H. HLAVATY, Defendant-Appellant	No. 209396 Oakland Circuit Court LC No. 94-135150-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee	
v NABEEL M. MASHNI, Defendant-Appellant.	No. 211879 Oakland Circuit Court LC No. 94-135149-FH

Before: Fitzgerald, P.J., and Holbrook, Jr. and McDonald, JJ.

PER CURIAM.

Following a joint jury trial, defendants Robert Hlavaty and Nabeel Mashni were both convicted of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and conspiracy to deliver less than fifty grams of cocaine, MCL 750.157a; MSA. 28.354(1) and MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Both defendants were sentenced to lifetime probation for each conviction. Defendants now appeal as of right. We affirm defendants' convictions and sentences for possession with intent to deliver less than fifty grams of cocaine, but vacate their convictions and sentences for conspiracy to deliver less than fifty grams of cocaine.

I

At trial, Farmington Hills Detective Robert Tiderington testified that he observed defendants in a vehicle at a restaurant parking lot. While remaining inside the vehicle, the two defendants met a third individual in a manner which, according to Detective Tiderington, was indicative of a suspected narcotics transaction. After the third individual left the vehicle, defendants drove off. Detective Tiderington followed the vehicle and requested that a marked vehicle stop defendants for investigative purposes. During the stop, two similarly packaged baggies containing different amounts of cocaine, with a combined weight of less than fifty grams, were seized from inside the vehicle. One baggie was found on the floorboard between the passenger side door and the seat, in an area where defendant Robert Hlavaty ("Hlavaty") had been observed leaning down. The other baggie was retrieved from a beverage cup after one of the police officers participating in the stop saw the driver, defendant Nobeel Mashni ("Mashni"), put the baggie in the cup and try to conceal it.

II

Hlavaty's sole claim on appeal is that the trial court abused its discretion by allowing a police officer, who had been qualified as an expert, to provide expert testimony outside the scope of his qualifications with respect to the ultimate issue of intent to deliver. Specifically, Hlavaty argues that Officer Mike Farley should not have been allowed to provide opinion concerning the average consumption of cocaine by a drug addict because this is not within the scope of expertise of an expert qualified as knowledgeable regarding drug investigations and trafficking, and that his testimony constituted improper drug profile testimony.

We find that Hlavaty failed to preserve his evidentiary claim with a timely objection at trial. MRE 103(a)(1). We further note that the specific testimony challenged by Hlavaty, regarding the average consumption of cocaine by an addict, was elicited on cross-examination by Mashni's attorney and that Hlavaty's own attorney then elicited further testimony from Officer Farley concerning this issue. Error must be that of the trial court and not that which an aggrieved party contributed by plan or design. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999). Thus, to the extent Hlavaty claims that the challenged testimony from Officer Farley was error, we find no basis for relief.

We note, however, that Officer Farley's testimony regarding average cocaine use, in response to the defense questions, was based on usage he had observed in his work as a police officer. Contrary to Hlavaty's claim, Officer Farley did not purport to render an opinion on average consumption of addicted individuals in a more general context.

More importantly, we note that a prosecutor may use expert testimony from police officers to aid a jury's understanding of evidence in controlled substance cases. *People v Murray*, 234 Mich App 46, 53; 593 NW2d 690 (1999). In the case at bar, as is acknowledged by Hlavaty, the specific area in which Officer Farley was qualified to provide expert testimony for the prosecution was drug trafficking and investigation. We are not persuaded that Officer Farley's opinion regarding the significance of the evidence with regard to the quantity of cocaine found in the vehicle, as well as items that were not found during the stop (e.g., drug paraphernalia associated with personal use), was outside the scope of his expertise or otherwise constituted plain evidentiary error, even though the opinion embraced the ultimate

issue of intent to deliver. *People v Stimage*, 202 Mich App 28, 29-30; 507 NW2d 778 (1993); *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991).

Turning to the trial court's denial of defendants' joint motion for new trial based on their claim that Officer Farley provided improper drug profile testimony, we note that the trial court denied the motion on the basis that it did not believe that drug profile evidence was presented to the jury. A new trial may be granted on any ground supporting appellate reversal of a conviction or because a trial court believes that the verdict resulted in a miscarriage of justice. MCR 6.431(B). A trial court's decision to grant a new trial is reviewed for an abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). Our review of the record convinces us that defendant Hlavaty has not demonstrated plain evidentiary error in connection with this unpreserved issue. MRE 103(d); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

We similarly find that defendant Mashni has failed to establish support for his claim that Officer Farley's expert testimony warrants reversal. Nor has Mashni shown that the admission of Detective Tiderington's expert testimony requires reversal. We deem any challenge by Mashni to Detective Tiderington's qualifications to provide expert testimony in the area of drug trafficking, based on his training and experience, abandoned because Mashni has not briefed this issue. The failure to brief the merits of an allegation of error constitutes an abandonment of the issue on appeal. *People v Kent*, 194 Mich App 206, 210; 486 NW2d 110 (1992).

Further, defendant Mashni's objection at trial to Detective Tiderington's qualifications to provide expert testimony in the area of drug trafficking is insufficient to preserve an objection to Detective Tiderington's testimony on another ground. MRE 103(a)(1); *Stimage*, *supra* at 30. Hence, Mashni must show plain error affecting substantial rights. MRE 103(d); *Carines*, *supra*, at 763.

Because Mashni does not identify the specific testimony of Detective Tiderington that he claims was improper, we need not consider this issue further. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). In any event, to the extent Mashni may be arguing that Detective Tiderington's testimony concerning the events that he perceived in the restaurant parking lot, and his characterization of those events as a narcotics transaction, constituted inadmissible drug profile evidence, no plain error is apparent. Cf. *Griffin*, *supra* at 44 (detective's expert testimony concerning his impression that what he observed was drug trafficking was not improper drug profile evidence).

III

Of the remaining issues raised by Mashni, we find only one that warrants appellate relief. We agree with Mashni's claim that insufficient evidence was presented to establish the conspiracy charge. In this regard, we note that the trial court considered the wrong offense when denying a directed verdict at trial. The conspiracy charged and presented to the jury was conspiracy to deliver less than fifty grams of cocaine, not conspiracy to possess with intent to deliver cocaine.

Our review of this issue is de novo. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). Due process commands a directed verdict of acquittal when evidence is insufficient to support a conviction beyond a reasonable doubt. *People v Lemmon*, 456 Mich 625,

633-634; 576 NW2d 129 (1998). "Considering all the evidence presented by the prosecution in the light most favorable to the prosecution, a directed verdict is inappropriate where a rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt." *Hammons*, *supra* at 556. The elements of conspiracy to deliver cocaine are:

> (1) the defendant possessed the specific intent to deliver the statutory minimum as charged, (2) his coconspirators possessed the specific intent to deliver the statutory minimum as charged, and (3) the defendant and his coconspirators 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).]

Thus, to convict defendants of the charged offense, the prosecutor was required to prove beyond a reasonable doubt that defendants conspired to deliver less than fifty grams of cocaine. Knowledge of the exact quantity was not required. *People v Mass*, 238 Mich App 333, 336-337; 605 NW2d 322 (1999), lv gtd ___ Mich ___ (June 13, 2000). However, the criminal agreement required for a conspiracy offense is defined by the scope of the coconspirators' commitment. *Justice (After Remand)*, *supra* at 347. There must be proof that the coconspirators specifically intended to further, promote, or pursue the unlawful objection. *Id.* Circumstantial evidence may determine the scope of the conspiracy, but any inferences drawn must be reasonable. *Id.* at 348. The evidence must show beyond a reasonable doubt that two or more individuals reached a mutual understanding to violate the law in question. *Id.* at 348.

Viewed most favorably to the prosecution, the evidence showed that defendants acted in concert to acquire the cocaine in question, which was packaged in two separate baggies and had a total weight of less than fifty grams. However, such evidence was insufficient to enable a rational trier of fact to reasonably infer an agreement to deliver all or part of that cocaine. While an intent to deliver is reasonably inferable from the evidence, an agreement to deliver is not. Cf. *People v Atley*, 392 Mich 298, 314; 220 NW2d 465 (1974) (agreement to sell marijuana not inferable from evidence on joint acquisition of the marijuana).

Accordingly, we vacate defendant Mashni's conviction and sentence for conspiracy to deliver less than fifty grams of cocaine. Although defendant Hlavaty does not raise this issue on appeal, we will give him the benefit of this issue in order to avoid inconsistent results. Hence, defendant Hlavaty's conspiracy conviction and sentence are likewise vacated. *People v Hayden*, 132 Mich App 273, 288-289 n 8; 348 NW2d 672 (1984).

IV

The other claims raised by defendant Mashni warrant little discussion. Because we have vacated his conviction for conspiracy, Mashni's challenge to his bindover on the conspiracy charge, based on the preliminary examination, is moot and we decline to address it.

The trial court's denial of Mashni's motion for a separate trial from Hlavaty was not an abuse of discretion. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994). Severance was not required because Mashni failed to show mutually exclusive or irreconcilable defenses. *Id.* at 349.

Further, neither defendant testified as proposed in their respective motions for severance and, with the benefit of hindsight, reversal would not be required in any event because Mashni was not prejudiced by the joint trial. *Id.* at 360; see also *People v Stricklin*, 162 Mich App 623, 630; 413 NW2d 457 (1987).

Mashni's challenge to the reasonableness of the search of the vehicle was previously addressed and decided against Mashni in a prior appeal in this Court. *People v Mashni/Hlavaty*, unpublished order of the Court of Appeals, issued December 4, 1996 (Docket Nos. 188859 & 189222). We agree with prosecution that the law of the case doctrine precludes reconsideration of this issue. *People v Phillips (After Second Remand)*, 227 Mich App 28, 33-34; 575 NW2d 784 (1997); *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996).

Mashni's claim regarding the 180-day rule of MCL 780.131 *et seq*.; MSA 28.969(1) *et seq*. is without merit because he was not an inmate in a state penal institution. *People v Patterson*, 170 Mich App 162, 166; 427 NW2d 601 (1988), remanded on other grounds 437 Mich 895 (1991). Further, remand is not necessary to consider Mashni's speedy trial claim because we are able to apply the balancing test for evaluating this issue based on the record presented. Contrast *People v Gambrell*, 157 Mich App 253, 259; 403 NW2d 535 (1987). Although the delay in the case was more than eighteen months, on balance, we agree with the trial court's determination that Mashni was not denied his right to a speedy trial. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997).

Finally, we uphold the trial court's pretrial ruling that the destruction of the narcotics evidence by the police does not require dismissal. The failure to preserve the evidence did not constitute a denial of due process because bad faith on the part of the police was not shown. *Arizona v Youngblood*, 488 US 51; 109 S Ct 333; 102 L Ed 2d 281 (1988). See also *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993); *People v Leigh*, 182 Mich App 96; 451 NW2d 512 (1989).

Affirmed in part and vacated in part. We remand for entry of an amended judgment of sentence for each defendant reflecting that the conspiracy conviction and sentence has been vacated.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald