# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEANGELO DOMON HENDERSON,

Defendant-Appellant.

UNPUBLISHED
October 19, 2001

No. 219387
Oakland Circuit Court
LC No. 97-157047-FC

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

PER CURIAM.

The jury convicted defendant of possession with intent to deliver 650 or more grams of cocaine, MCL 333.7401(2)(a)(i), and conspiracy to deliver 650 or more grams of cocaine, MCL 750.157a. The trial judge sentenced defendant to a term of life imprisonment for each conviction, with the sentences to be served consecutively. He appeals as of right and we affirm.

Defendant raises several issues on appeal challenging the affidavit and search warrant. We find that the trial court properly denied defendant's motion to suppress evidence seized by the police. *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000); *People v Stevens (After Remand)*, 460 Mich 626, 631; 597 NW2d 53 (1999). We reject defendant's claim that the affidavit failed to establish probable cause to issue the warrant to search the package. Viewed in a common-sense and realistic manner, the affidavit provided a substantial basis for concluding that there was a "fair probability that contraband or evidence of a crime" would be found in the package. *People v Clark*, 220 Mich App 240, 243; 559 NW2d 78 (1996); see also *United States v Kennedy*, 131 F3d 1371, 1377-1378 (CA 10, 1997); *People v Sloan*, 450 Mich 160, 168; 538 NW2d 380 (1995), overruled in part on other grounds by *People v Wager*, 460 Mich 118, 123; 594 NW2d 487 (1999); *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992); *People v Darwich*, 226 Mich App 635, 637; 575 NW2d 44 (1997).

Also, contrary to plaintiff's contention, the trial court did not abuse its discretion in admitting London Terry's preliminary examination testimony pursuant to MRE 804(b)(6). *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). The record indicates that Terry was unavailable due to "then existing physical or mental illness or infirmity." MRE 804(a)(4). Further, considering the totality of the circumstances, the statements in question had particularized guarantees of trustworthiness, were offered as evidence of a material fact, were more probative on the point for which the evidence was offered than any other evidence that could have been procured, and there is no indication that the general purposes of the rules or the

interests of justice were not served by the admission of the statements. *People v Smith*, 243 Mich App 657, 688; 625 NW2d 46 (2000); *People v Welch*, 226 Mich App 461, 467; 547 NW2d 682 (1997).

Defendant also argues that the trial court violated his Fifth Amendment privilege against self-incrimination by allowing testimony that defendant failed to contest the forfeiture of property that was taken from his person at the time of his arrest. However, because defendant did not object to the evidence on this ground before the trial court, this issue is not preserved. MRE 103(a)(1); *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Accordingly, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant's reliance on *United States v Scrivner*, 167 F3d 525 (CA 9, 1999), is misplaced. This decision was subsequently withdrawn, see 167 F3d 536 (1999), and the court's new decision *United States v Scrivner*, 189 F3d 825 (CA 9, 1999), does not support defendant's argument. Thus, defendant has failed to show that the admission of the evidence was "plain error." *Carines, supra*. Further, even if the evidence did amount to plain error, appellate relief is not warranted because we are satisfied that the outcome of the proceedings was not affected, and that defendant is not "an actually innocent defendant." *Id.*

Further, when the evidence is viewed in a light most favorable to the prosecution, there was sufficient evidence to enable a rationale trier of fact to find, beyond a reasonable doubt, that defendant conspired to possess with intent to deliver over 650 grams of cocaine. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000); *People v Justice (After Remand)*, 454 Mich 334, 345-349; 562 NW2d 652 (1997); see also *People v Mass*, 464 Mich 615, 629-634; 628 NW2d 540 (2001).

"[P]roof of an actual delivery of narcotics is not required to prove intent to deliver." *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). "Intent to deliver has been inferred from the quantity of narcotics in a defendant's possession, from the way in which those narcotics are packaged, and from other circumstances surrounding the arrest." *People v Wolfe*, 440 Mich 508, 524; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Moreover, "[p]ossession with intent to deliver can be established by circumstantial evidence and reasonable inferences arising from that evidence, just as it can be established by direct evidence . . . ." *Id*. at 526.

In *Justice, supra* at 349, our Supreme Court explained:

> To be convicted of conspiracy to possess with intent to deliver a controlled substance, the people must prove that (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.

To establish a conspiracy, the "prosecutor must show a combination or agreement, express or implied, between two or more persons, to commit an illegal act or to commit a legal act in an illegal manner." *People v Meredith*, 209 Mich App 403, 407-408; 531 NW2d 749

(1995); see MCL 750.157a. A conspiracy to commit an offense is a specific intent crime, requiring the intent to combine with others and the intent to accomplish the illegal objective. *People v Carter*, 415 Mich 558, 568; 330 NW2d 314 (1982) overruled in part on other grounds in *People v Robideau*, 419 Mich 458, 483-491; 355 NW2d 592 (1984). Although knowledge of the quantity of cocaine is not an essential element of the crime of possession with intent to deliver over 650 grams of cocaine, *People v Northrop*, 213 Mich App 494, 498; 541 NW2d 275 (1995), it is an element of the offense of conspiracy to possess with intent to deliver over 650 grams of cocaine. *Justice, supra* at 349. In other words, both defendant and his coconspirator must have intended to deliver 650 or more grams of cocaine. See *Mass*, *supra* at 633-634.

Here, the prosecutor presented records of telephone, cell phone, and pager calls between defendant and the co-conspirator Harris from December 11 through 14, 1997. The records show not only defendant kept in constant contact with Harris, but that they both made several calls to Airborne Express, beginning on December 12, 1997, and continuing through December 14, 1997. Testimony also established that defendant and Harris used certain pager codes for personal identification, to indicate that further information was forthcoming, and to show the number of kilograms of cocaine to be sent.

This evidence sufficiently established an inference of Harris' intent to deliver, an established relationship between defendant and Harris, and defendant's awareness of the quantity of cocaine sent. Further, two detectives testified that, in their experience, no one would ship such a large quantity of cocaine to someone unless they had an established relationship, and that the sender would "absolutely" let the receiver know the amount sent.

We also find that the prosecutor established an intent to deliver because the cocaine was wrapped under a layer of petroleum jelly, which is used to hide the smell of cocaine. Also, that defendant accepted the package and was arrested with it on his person is direct evidence of possession. And, finally, the fact that nothing was found in the hotel room was evidence that the room was used only as a place to receive the cocaine. Accordingly, the evidence was clearly sufficient to convict defendant of both possession with intent to deliver 650 or more grams of cocaine and conspiracy to possess with intent to deliver 650 or more grams of cocaine.

Defendant also contends that his two consecutive life sentences for possession with intent to deliver 650 or more grams of cocaine and conspiracy to possess with intent to deliver 650 or more grams of cocaine constitute cruel and unusual punishment. Because defendant did not challenge his sentences on this basis below, this issue is not preserved. *Asevedo, supra* at 398. Thus, we review this issue for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764. This Court has previously held that the mandatory life sentences for these offenses do not constitute cruel or unusual punishment. *People v Poole*, 218 Mich App 702, 715-716; 555 NW2d 485 (1996). Accordingly, defendant has failed to show plain error.

Finally, defendant has failed to demonstrate that the prosecutor breached an agreement with defendant, or that an evidentiary hearing on this issue is necessary. The agreement between defendant and the prosecutor is clear and unambiguous. The only promise made pursuant to that agreement is that "any statement . . . will not be used against [defendant] as direct evidence in any court proceeding." There is no evidence that the written agreement was breached in any manner and no justification for an evidentiary hearing. See *People v McIntire*, 232 Mich App 71, 82-83; 591 NW2d 231 (1998), rev'd on other grounds 461 Mich 147 (1999), citing *Kastigar*

*v United States*, 406 US 441, 444-446; 92 S Ct 1653; 32 L Ed 2d 212 (1972) and *United States v Tramunti*, 500 F2d 1334, 1342 (CA 2, 1974).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Henry William Saad
/s/ William C. Whitbeck